# WTO CASE REVIEW 2010[#]

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# This *WTO Case Review* is the eleventh in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each *Review* explains and comments on Appellate Body reports adopted by the WTO Dispute Settlement Body (DSB) during the preceding calendar year (January 1 through December 31), excluding decisions on compliance with recommendations contained in previously adopted reports. Our preceding *Reviews* are:

- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83–190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113–228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75–155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299–387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107–345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99–249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317–439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143–289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457–642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1–101 (2001).

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The WTO reports we discuss are available on the website of the WTO, at www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm. The texts of the WTO agreements we discuss also are available on the WTO website, at www.wto.org/english/docs_e/legal_e/legal_e.htm, and are published in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT (3rd ed. 2008). We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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**Table of Contents** **Page**



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TRADE IN THE AMERICAS (West 2nd ed. 2005); REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE (Carolina Academic Press, 2009); and (with Greg Bowman, Nick Covelli, and Ihn Uhm), TRADE REMEDIES IN NORTH AMERICA (Kluwer Law Int'l 2010).

1. For another discussion of this case, see Elanor A. Mangin, Note, *Market Access in China – Publications and Audiovisual Materials: A Moral Victory with a Silver Lining*, 25 BERKELEY TECH. L. J. 279 (2010).

# I. INTRODUCTION

## A. The Work of the Appellate Body

In many respects, 2010 was for the Appellate Body the (relative) calm before the storm. During the calendar year, only one Appellate Body Report, *Australia – Apples*, discussed in this Review, was issued by the Dispute Settlement Body (DSB). The other Appellate Body Report discussed herein, *China – Publications and Audiovisual Products*, was issued by the Appellate Body in December 2009, but not approved by the DSB until January 2010.[2]

The year 2011 has already proved to be a different situation, not solely because of the number of cases, but also because of the extreme complexity of *EC – Aircraft*,[3] and the important report (March 2011) in *US – AD/CVD (China)*.[4] An appeal is pending in *Thailand – Cigarettes*[5] and appeals are highly likely in *US – Tyres*[6] and *EC – Fasteners*[7] to be filed later in 2011. Interestingly, in both of the latter matters, the Complainant (China) and the Respondents (United States, EU) agreed to extend the deadlines for the filing of appeals to May 24 and March 25, respectively.[8] The reason given was the complexity of the *EC – Aircraft* case and the perceived need by trade diplomats to avoid new appeals until the report in *EC – Aircraft* was issued (in May).[9] (According to sources, this is not unprecedented; several appeals were similarly delayed in 2005 and 2007.)[10]

During the five years prior to 2010, the number of Appellate Body reports approved by the DSB ranged from a low of four in 2009 to a high of nine

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2. In this case review, as in the past, Appellate Body reports are reviewed based on the date of their adoption by the DSB, typically in the month following their circulation.

3. Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316 (June 30, 2010); *see also* Notice of Appeal, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316 (July 21, 2010).

4. Appellate Body Report, *United States – Definitive Antidumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

5. Notice of Appeal, Thailand – *Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371 (Feb. 22, 2011).

6. Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R (Dec. 13, 2010).

7. Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (Dec. 3, 2010).

8. Daniel Pruzin, *Safeguards: U.S., China Agree to Suspend Appeals Proceedings in WTO Tire Safeguard Dispute*, 28 INT'L TRADE REP. (BNA) 190 (Feb. 3, 2011).

9. *Id.*

10. *See Heavy DSB Workload Forces U.S., China to Delay Action on Tire Panel*, WORLD TRADE ONLINE, Feb. 10, 2011, *available at* http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-02/11/2011/heavy-dsb-workload-forces-us-china-to-delay-action-on-tire-panel/menu-id-710.html (reporting on the delays in an EU-Brazil tire dispute in 2007 and EU-Australian sugar dispute in 2005).

in 2005.[11] Of the total for the five-year period (thirty-three), twenty-two were appeals of original cases, and eleven were matters falling under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).[12]

The composition of the Appellate Body did not change in 2010; it consisted of Litia R. Bautista (the Philippines), Peter van den Bossche (Belgium), Ricardo Ramirez Hernandez (Mexico), Jennifer Hillman (United States), Shotaro Oshima (Japan), David Unterhalter (South Africa), and Yuejiao Zhang (China).[13]

Overall, activity before the DSB remained robust. During calendar year 2010, seventeen requests for consultation were filed.[14] As of February 28, 2011, the aggregate number of requests for consultation lodged with the DSB had reached 422.[15] There is no recent discernible trend regarding the number of annual disputes based on the worldwide recession in 2008–2009; in the five years prior to 2010, the number of filings ranged from a low of ten (2005) to a high of twenty (2006).[16]

## B. Revisions to the Working Procedures

In August 2010, the Working Procedures for Appellate Review were amended for the sixth time since 1995.[17] The amendments are relatively minor. They alter the deadlines for written submissions during the appeal process and, for the first time, specify procedures for filing and services of written submissions in

11. *See* World Trade Law, WTO Panel and Appellate Body Reports, *available at* http://www.worldtradelaw.net/ (last visited Dec. 31, 2011).

12. *See id. See also* World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21.5, *available at* http://www.worldtradelaw.net/uragreements/dsu.pdf [hereinafter DSU] (providing in pertinent part that "[w]here this disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures . . . .").

13. *See Appellate Body Members*, WTO, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Dec. 31, 2011).

14. *Chronological List of Disputes Cases*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 31, 2011).

15. *See id.*; *see, e.g.*, *China Files Dispute Against the United States*, WTO, Feb. 28, 2011, http://www.wto.org/english/news_e/news11_e/ds422rfc_28feb11_e.htm (relating to U.S. anti-dumping measures on certain frozen warmwater shrimp from China).

16. For the other years, cases filed were 12 (2007), 18 (2008), and 12 (2009). *See Chronological List of Disputes Cases*, *supra* note 14.

17. *See* WTO, WORKING PROCEDURES FOR APPELLATE REVIEW, WT/AB/WP/6, Aug. 16, 2010, *available at* http://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm (last visited Dec. 31, 2011).

electronic form. The revised Working Procedures became effective with appeals initiated on or after September 15, 2010.[18]

The modifications also, to a limited degree, streamline the appellate process. The changes reflect a delicate balance between accelerating certain aspects of the procedures and preserving adequate time for Members to respond to other Parties' filings, presumably with the interests of developing country Members, many of which must retain outside counsel for DSU proceedings, in mind. In particular, the Appellate Body, after extended consultations with Members, decided to retain the separate Notice of Appeal in addition to the separate decision to appeal required under DSU, Article 16.4, but to require that both be filed simultaneously. The Appellate Body explained that "there is significant value, both to Members participating in the appeal and to the Appellate Body, in requiring a concise and precise statement of the errors of law and legal interpretation subject to appeal."[19] The scheduling changes that were implemented included moving up the range of dates for the oral hearing from 35–45 days to 30–40 days after commencement of the appeal.[20] This change and others, both adopted and rejected, presumably reflect the chronic difficulties the Appellate Body faces in completing its review within the maximum 90-day period specified under the DSU,[21] of which approximately two weeks must be devoted to translation of the English language report into French and Spanish.[22] Despite these pressures, the Appellate Body decided after consultation not to eliminate the seven-day period between the filing of the Notice of Appeal and the filing of the appellant's submission, a change that had been proposed in light of the fact that "the relatively long period between the date on which parties are made aware of the content of panel reports and the time during which an appeal can be filed affords potential appellants and other appellants adequate preparation time . . . ."[23]

The importance of the consultation process is also apparently reflected in the Appellate Body's decision not to introduce a new rule relating to consolidation of appellate procedures. Rather, the Appellate Body decided to continue to deal with consolidation issues on an ad hoc basis.[24]

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18. *Id.*

19. WTO, COMMUNICATION FROM THE APPELLATE BODY, WORKING PROCEDURES FOR APPELLATE REVIEW, Jul. 27, 2010, WT/AB/WP/W/11, Annex A, at 5 [hereinafter COMMUNICATION], *available at* http://www.wto.org/english/news_e/news10_e/ab_27jul10_e.htm.

20. *See id.* (citing Rule 27(1)).

21. DSU, *supra* note 12, art. 17:5.

22. Interview with Werner Zdouc, Appellate Body Secretariat Director, in Geneva, Switz. (May 2007).

23. COMMUNICATION, *supra* note 19, at 3.

24. *Id.* at 1.

## II: DISCUSSION OF THE 2010 CASE LAW FROM THE APPELLATE BODY

### A. *GATT*, *GATS*, and *PROTOCOL* Obligations

#### 1. Citation

*China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (complaint by United States), WT/DS/363/AB/R (adopted Jan. 19, 2010)

#### 2. The Irresistible Force Versus the Immovable Object[25]

The case, launched by the United States in April 2007, arose because China imposed restrictions on the sale and distribution of four categories of what broadly are considered cultural products, or more specifically, copyright-intensive products:[26]

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25. This discussion is drawn from Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 1–13, 125–165 WT/DS/363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010); Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 8.1–8.2 WT/DS/363/R (Aug. 12, 2009) (*adopted* as modified by the Appellate Body Jan. 19, 2010); Summary of Dispute, WTO, Dispute Settlement: DS 363, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (July 29, 2010), [hereinafter *Summary of Dispute*] *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm; Daniel Pruzin, *China Says It Will Comply with WTO Audiovisual Ruling*, 28 INT'L TRADE REP. (BNA) 86 (Jan. 20, 2011); Daniel Pruzin, *U.S., China Reach Agreement on Deadline for Compliance with WTO Audiovisual Ruling*, 27 INT'L TRADE REP. (BNA) 1117 (July 22, 2010); Amy Tsui & Kathleen E. McLaughlin, *Kirk Claims Victory for United States Over China in WTO Case on Film, Music*, 26 INT'L TRADE REP. (BNA) 1129 (Aug. 20, 2009); Daniel Pruzin, *U.S. Initiates Challenge Against Chinese Film Distribution, Download Restrictions*, 24 INT'L TRADE REP. (BNA) 1075 (July 26, 2007).

Australia, the EU, Japan, Korea, and Taiwan participated as third parties in the Panel proceedings, and at the Appellate stage. Taiwan attended the oral hearing, but provided no written submission. Among the third-party participants at the Appellate stage, only the EU, Japan, and Korea made oral statements. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 11–12; Panel Report, *Audiovisual Products*, *supra* note 25, ¶ 1.8. There is no coverage in the Appellate Body Report of what Taiwan thought about the case, though given its lively, open culture, it might well have been sympathetic with many of the American arguments.

26. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 131, nn.214–16.

- *Reading materials*, namely, books, journals, magazines, newspapers, periodicals, and electronic publications.
- *Sound recordings distributed electronically*, including music in hard-copy form (such as compact discs (CDs)) intended for electronic distribution via the internet, and digitalized music intended for such distribution.
- *Films* (i.e., movies) for theatrical release.
- *Audiovisual home entertainment (AVHE) products*, namely, digital video discs (DVDs), videocassettes, video compact discs, and physical sound recordings (i.e., in hard-copy form, such as recorded audio tapes).[27]

These products were an irresistible force seeking entry into China. Indeed, by "imported" products, such as "imported music," the United States meant an item in which the intellectual property (IP) right was held by a foreign-owned or foreign-invested enterprise. Through its restrictions on market access and national treatment, the Community Party was an immovable object.[28] The Chinese restrictions limited the rights of foreign companies to import and distribute these copyright-intensive products.

The Communist Party showed it did not want to budge when the Panel was established in November 2007, when the Director-General's intervention was necessary to appoint Panelists, when the Panel issued its preliminary ruling to the parties in April 2009, and when, after the final Panel ruling in August 2009, it gave notice of its appeal in September 2009.[29] To its credit, the party displayed some restraint by not appealing most of the Panel findings that went against it, namely, those concerning national treatment violations under Article III:4 of the *General Agreement on Tariffs and Trade* (*GATT*) and Article XVIII of the *General Agreement on Trade in Services* (*GATS*), and market access violations under Article XVI of *GATS*. Still, in the end, the force of the adverse Panel and Appellate Body rulings was sufficient to move the object. In January 2011, China informed the WTO it would comply with the rulings, following a July 2010 deal it made with the United States on a reasonable period of time (RPT) for compliance of fourteen months from the date of adoption of the Appellate Body Report, i.e., March 19, 2011.

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27. For a discussion of the treatment of audiovisual products in international trade law before the case, *see generally* Tania Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, 14 UCLA ENT. L. REV. 1 (2007).

28. The possibility exists some Party officials were more moveable than others, and in fighting the case quietly hoped that should China lose, they could cite the international legal obligation for China to comply with an adverse decision to hardliners. The lack of transparency in the Party makes it difficult to assess this possibility.

29. To be fair, in October 2009, the United States also gave notice it was appealing certain legal interpretations reached by the Panel. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 11; *Summary of Dispute*, *supra* note 25.

Conceptually, the case is not too difficult. The legal points are relatively straightforward. The United States inveighed against three categories of Chinese import barriers, that is, limitations on market access and national treatment:

1) *Trading rights restrictions*, measures that restrict importation and exportation of copyright-intensive products.
2) *Distribution services restrictions*, measures that prohibit or circumscribe foreign firms from distributing these products.
3) *Market access restrictions*, measures that deny market access to foreign suppliers of copyright-intensive services.

Factually, however, the case is confusing. That is because of the large number of Chinese market access and national treatment measures at stake.[30] It also is because China does not have four distinct measures to cover in a mutually exclusive manner each of the goods or services at issue—reading materials, sound recordings, films, and AVHE products. Rather, China subjects these goods and services to multiple measures.[31] Three of its measures—the *Foreign Investment Regulation*, *Catalogue*, and *Several Opinions*—apply to all goods and services categories:

- The State Council enacted the *Foreign Investment Regulation* in 2002.[32] The *Regulation* says foreign investment in China may take the form of a foreign-invested enterprise, a Chinese-foreign equity joint venture (JV), or a Chinese-foreign contractual JV. Article 3 of the *Regulation* creates the authority for a separate measure, the *Catalogue*. Article 4 sets up four categories of foreign-invested projects: (1) "encouraged"; (2) "permitted"; (3) "restricted"; or (4) "prohibited."
- The State Council approved the *Catalogue* in 2007.[33] The *Catalogue* lists the foreign-invested projects that are "encouraged," "restricted," and "prohibited," and foreign investment in any industry that is "permitted." Read with Articles 3 and 4 of the *Regulation*, any foreign-invested project that is "prohibited" will not be approved. Three provisions of the *Catalogue* are critical: (1) Article X:2 specifies "[m]aster distribution, and import operations of books, newspapers, and periodicals"; (2) Article X:3 highlights "import operations of audiovisual products and electronic

30. Even the Appellate Body might have been a bit bamboozled. For example, its list of measures challenged by the United States in footnote 10 of its Report does not match up identically with its list of measures in its Abbreviations at page vii, nor its chart at paragraph 131. Footnote 10 refers to an "*Importation Procedure*" not listed at the other two spots. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, vii, n.10, ¶ 131.

31. *See id.* ¶ 130.

32. *See id.* ¶ 142.

33. *See id.* ¶¶ 142–43.

publications"; and (3) Article X:7 refers to "[n]ews websites, network audiovisual program services, internet on-line service operation sites, and internet culture operations." Articles X:2–3, read in conjunction with Articles 3–4 of the *Regulation*, prohibit any foreign-invested enterprise from lawfully importing into China books, newspapers, periodicals, electronic publications, audiovisual products, sound recordings, and films for theatrical release. Article X:7, along with Articles 3–4, in referring to "internet culture operation," meant foreign-invested enterprises could not electronically distribute sound recordings.

- With the approval of the State Council, the Ministries of Culture and Commerce jointly issued the *Several Opinions* measure in 2005.[34] *Several Opinions* guides authorities on how to regulate foreign investment in various sectors. Article 4 of this measure orders government agencies to forbid a foreign-invested enterprise from importing or distributing certain products, including all the goods and services at issue in the *Audiovisual Products* Case.

The other controversial measures apply only to one category of copyright-intensive products.

Accordingly, to appreciate the case, the Chinese measures have to be aligned with different types of copyright-intensive product, and then—like three-dimensional chess—matched to findings under one of the three key legal instruments at stake. Those legal instruments are:

(1) *Protocol*, that is, the *Protocol on the Accession of the People's Republic of China* to the WTO and the associated *Report of the Working Party on the Accession of China* to the WTO, which is incorporated into the *Protocol*.[35]

Chinese restrictions on trading rights raised issues under the *Protocol* and *Working Party Report*.

The relevant provisions of the *Protocol* concerning which the United States alleged violations were paragraphs 5:1 and 5:2 in Part I, which state:[36]

> ¶ 5:1 Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises

34. *See id.* ¶ 144.
35. *See id.* ¶ 133.
36. Quoted in Appellate Body Report, *Audiovisual Products*, *supra* note 25, nn.222, 231 (minor formatting changes added).

> in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.
>
> ¶ 5:2 Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

Relatedly, the United States cited paragraph 1:2 in Part I of the *Protocol*, which states:[37]

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

Paragraph 1:2 incorporates commitments China made in paragraphs 83(d) and 84(a)–(b) of the *Working Party Report*. It did so for good reason: according to the *Protocol* itself, the *Protocol*, along with the commitments covered in the Report, are an "integral part of the *WTO Agreement*," that is, of the

37. Quoted in Appellate Body Report, *Audiovisual Products*, *supra* note 25, n.218 (minor formatting changes added). Relatedly, paragraph 342 of the *Working Party Report* states:"The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs . . . 83 [and] 84 . . . of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol." *Id.*

*Agreement Establishing the World Trade Organization* and its Annexes, which contain *GATT* and the Uruguay Round accords. These provisions state:[38]

> ¶ 83(d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting.
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> ¶ 84(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China's Schedule of Specific Commitments under the GATS.
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> ¶ 84(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT [technical barriers to trade] and SPS [sanitary and phytosanitary standards], but confirmed that requirements relating to minimum capital and prior experience would not apply.

38. Working Party Report, *Report of the Working Party on the Accession of China*, ¶¶ 83(d), 84(a)–(b), WT/ACC/CHN/49 (Oct. 1, 2001).

In brief, the United States argued that China violated the *Protocol* by permitting only specially authorized, state-related entities to import copyright-intensive products. The entities were firms designated by the Chinese government, wholly or partly state-owned enterprises (SOEs). China limited trading rights in the copyright-intensive products to wholly Chinese SOEs. Thus, China restricted the right of other Chinese enterprises, foreign enterprises, and foreign individuals to import those products.

An egregious example cited by the United States, which became an issue both at the Panel stage and on appeal, concerned two Chinese measures regulating the importation of films for theatrical release. The measures, Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, stated that only entities designated or approved by the State Administration of Radio, Film, and Television (SARFT) could import movies. SARFT designated only one such importer, a Chinese wholly SOE called the China Film Import and Export Corporation.[39]

(2) *GATT*, that is, the *General Agreement on Tariffs and Trade*, specifically, Article III:4.

Chinese restrictions that discriminate against imported creative goods raised issues under Article III:4. This provision is the famous and heavily litigated rule on non-discrimination, namely, national treatment for non-fiscal measures:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.[40]

In brief, the United States claimed China violated this duty for four reasons. China:

1. Restricts distribution channels for imported reading materials in that distribution of certain foreign materials must be only through wholly

39. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 175.

40. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. III:4 [hereinafter GATT].

Chinese SOEs, only via subscription, and only to subscribers the Communist Party approves. No such regime exists for like domestic products.

2. Limits to wholly Chinese-owned enterprises the distribution of certain imported reading materials that could be distributed other than via subscription. No such limitation applies to like domestic products, which other types of enterprises, including foreign-invested ones, can distribute.

3. Discriminates against imported hard-copy sound recordings intended for electronic distribution (such as the internet) within China by subjecting them to more burdensome content review requirements than like domestic products.

   In particular, China mandates that foreign-sourced music must undergo a content review by official censors before it can be distributed in China. The censorship process delays access by Chinese internet service providers (ISPs) and Chinese consumers to foreign-sourced music. In contrast, Chinese-sourced music is not required to undergo a content review. Rather, music for which a Chinese enterprise holds the rights must be registered with Chinese authorities, but does not have to undergo prior content review before being distributed digitally. Therefore, domestically produced music is available to Chinese ISPs and consumers faster than the foreign-sourced music, which led those ISPs and customers to prefer Chinese music. Likewise, China subjects music imported in physical form but intended for subsequent digital distribution in China to content review before such music may be distributed digitally over the internet. In contrast, Chinese-produced sound recordings are not subject to this scrutiny.

4. Discriminates against imported films for theatrical release by limiting their distribution to a duopoly, two Chinese SOEs.[41] In contrast, any licensed distributor operating in China (including a private one) may distribute a like domestic product. In other words, Chinese measures afford less favorable distribution opportunities for foreign vis-à-vis Chinese-produced films. The measures amount to a dual distribution scheme: imported movies can be distributed in China by only one of two SOEs, and only nationwide. Chinese films can be distributed by many more enterprises than the duopoly and can be disseminated on a local, provincial, or inter-provincial basis. Such measures, the United States

41. Neither the Panel Report nor the Appellate Body Report indicates the United States contended restrictions on trading rights operated as a restraint other than a duty, tax, or charge, and thus violated the rule against quantitative restrictions in *GATT* Article XI:1.

alleged, violate *GATT*–WTO rules on non-discrimination (as well as China's commitments in its *Protocol*).

(3) *GATS*, specifically, Articles XVI and XVII. Chinese restrictions on distribution of services raised issues under these provisions. Articles XVI and XVII provide for market access and national treatment, respectively:

> *Article XVI, Market Access*
>
> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> > (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
> >
> > (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
> >
> > (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
> >
> > (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

> (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
>
> (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.
>
> *Article XVII, National Treatment*
>
> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.[42]

In brief, the United States alleged China violated its *GATS* market access and national treatment obligations, in Articles XVI and XVII respectively, in three ways:

- Prohibiting foreign-invested enterprises in China, and foreign enterprises and individuals (including ones not invested in or registered in China) from distributing reading materials and electronically distributing sound recordings. That is, no foreign company could own or invest in a Chinese company that distributes reading materials or music over the internet. Consequently, Chinese measures forbid foreign-invested

42. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATS].

enterprises from engaging in the wholesale importation of reading materials, the exclusive sale (also called "master distribution") of books, periodicals, and newspapers, the exclusive wholesale sale of electronic publications, and the supply of sound recording distribution services.

As an example, regarding digitalized sound recordings, China adopted a regulation in May 2003, which it amended in July 2004, that precludes a foreign firm from obtaining a license to offer "internet cultural activities." The regulation defines such activities to include any wholesale or retail transactions of an "internet cultural product" via the internet or mobile phones. An "internet cultural product" includes a "network audiovisual product." In turn, such a product encompasses items designed for transmission via the internet and items in hard-copy form that have been transformed into a format that allows for internet transmission. Thus, argued the United States, the Chinese regulation forbids a foreign company from transacting in an audio or visual product across the internet, meaning that it cannot digitally distribute, inter alia, a sound recording. As an alternative to its argument about distribution restrictions on digitalized sound recordings, the United States contended that even if a foreign firm could disseminate them under China's 2003–2004 regulations, that regulation accorded less favorable treatment to foreign distributors.

- Limiting the commercial presence for AVHE product distribution to contractual joint ventures between Chinese and foreign firms with a majority Chinese ownership in the JV. Moreover, Chinese measures limit the operating terms for JVs engaged in the distribution of DVDs and videocassettes, but not the operating term of wholly Chinese-owned enterprises.

- Imposing on any foreign-invested enterprise in China that is allowed to distribute AVHE products or reading materials requirements more burdensome than those applicable to domestic distributors that have trading rights in copyright-intensive products. For instance, Chinese measures impose requirements about registering capital and operating terms.

Put succinctly, the legal concepts at stake are promises made to the WTO and its Members by China when it joined the WTO on December 11, 2001, concerning market access for foreign-printed matter, music, and movies, and its obligations to provide market access and non-discriminatory (specifically, national) treatment under *GATT* and *GATS*. The concepts concern two basic matters: trading rights and distribution rights.

3. Tabular Presentation of Facts and American Claims at the Panel Stage

Overall, the United States challenged seventeen Chinese measures, fifteen of which the WTO Panel found illegal, eleven of which were contested on appeal, and which the Appellate Body found illegal, too.[43] The Table below briefly summarizes the restrictions and adjudicatory findings.[44]

Column 1 sets out the shorthand name of the challenged measure as used by the Panel. Column 2 identifies the full title of each measure as set out in the United States Exhibit to the WTO proceedings. For several measures, China's translation of the full title is slightly different from that of the United States. Also, for several measures, Column 2 modifies and simplifies the American translation. The remaining Columns (3–6) separate the type of copyright-intensive product regulated by the relevant measure and at issue in the WTO proceedings. The cells in those Columns explain the Panel and Appellate Body findings, if any.

Manifestly, six of the measures emanate from the highest executive governing body in China, the State Council.[45] The eleven remaining measures come from any one (or in some cases, two or more of) the following ministries or agencies, all of which are under the State Council:

- Ministry of Commerce (formerly known as the Ministry of Foreign Trade and Economic Cooperation)
- Ministry of Culture
- General Administration of Customs
- General Administration of Press and Publication (GAPP)
- National Development and Reform Commission
- State Administration of Radio, Film, and Television (SARFT)

43. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 129–30, nn.212–13. Technically, the United States challenged nineteen Chinese legal instruments, but the Panel held two of them (the *Film Distribution Rule* and *Exhibition Rule*) were not "measures" under Article 3:3 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* and were not within the terms of reference of the Panel. *See id*. n.209, ¶ 129.

44. This Table is an elaboration of Appellate Body Report, *Audiovisual Products*, *supra* note 25, vii, ¶ 131.

45. *See id*. ¶ 129, n.210. In terms of the hierarchy of laws and regulations of the central government of China, the rank order is: 1) Laws enacted by the National People's Congress (NPC) or by the NPC Standing Committee; 2) Administrative regulations of the State Council; and 3) Departmental rules of ministries or agencies under the State Council. *Id.* ¶ 129. No measures challenged in the *Audiovisual Products* case came from the NPC or its Standing Committee.

Certainly, not all Chinese Communist Party officials think alike, and some are indeed energetically reform-minded.[46] That is, there is diversity of opinion (within boundaries) about free versus managed trade in, and censorship of, cultural products. Could it be said the restrictions are the result of a single orthodox entity? The facts suggest not. They come from not only the highest levels of the Communist Party, but also many of its organs of administration and thereby intimate a degree of consensus within the Party.

Further, no more than five of the restrictions entered into force before China acceded to the WTO on December 11, 2001. That fact is a lesson for future accessions: the United States and other interested WTO Members would do well to see an applicant enact as much WTO-compliant legislation as possible before accession. It may be naïve to wait passively with the expectation that the applicant, once a Member, will do the needful.

Blank cells in the Table indicate the Panel did not find any violation by China of its *Protocol*, *GATT*, or *GATS*, in relation to the measure at issue. Two arguable inferences may be drawn from the large number of such cells. First, substantial portions of China's challenged measures are compliant with rules of *GATT*, the *WTO Agreement*, and accession pledges. All it takes is a single provision of a measure to be inconsistent with those rules for a problem to arise. The fact that many features of its measures were in compliance is to the credit of China in its efforts to live up to its promises.

Second, the United States might have over-argued the case. That is, might it have challenged too many provisions of each measure? That would be unsurprising, given the quintessential American litigation culture to "fight everything." Might the United States have done better, and conserved precious adjudicatory resources at the WTO, to engage in smart-targeting, i.e., focusing on truly egregious provisions of measures?

One way to consider that matter is to assess the proportion of blank to completed cells in the Table. With seventeen contested Chinese measures across four categories of cultural products, there are sixty-eight potential violations. Of the sixty-eight, there are thirty-six blank cells, suggesting the United States did not prevail on about 53% of claims. However, that suggestion is not only simplistic, but also misleading. First, not all of the Chinese measures apply to all categories of copyright-intensive products. Second, of the seventeen challenged measures, the United States proved fifteen of them had one or more illegal features under the *Protocol*, *GATT*, or *GATS*. That suggests a failure rate of its claims of only about 12%. Nonetheless, the basic point is to consider whether contesting not fewer measures, but fewer provisions within each measure, might be prudent.

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46. *See generally* RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS (2010) (providing insights into Party officials); *see also The Permanent Party; The Communist Party*, ECONOMIST, Jun. 19, 2010, at 84 (book review); Chris Patten, *The Life and Soul of the Party; It May Be 'Costly, Corrupt and Often Dysfunctional' But China's Regime Has Also Overseen the Nation's Resurgence*, FIN. TIMES WEEKEND SUPP., May 29, 2010, at 13 (book review).

Such consideration requires an examination of the number of provisions within each measure the United States challenged for each category of copyright-intensive product. For example, for AVHE products, the United States made claims under the *Protocol* against three Articles of the *2001 Audiovisual Products Regulation* and prevailed on two of them.[47] Such an analysis also requires some subjective choices. For example, with respect to reading materials, the United States made claims that Articles 3 and 4 of the *Imported Publications Subscription Rule* violated *GATT* Article III:4 for newspapers, periodicals, and books. It was successful under both Articles for newspapers and periodicals, but not books. Depending on the counting methodology, the United States had a 50% "win" rate (if the focus is on claims) or a 66.6% "win" rate (if the focus is on goods).[48]

Indeed, in all significant respects, the Panel, which was constituted in November 2007, ruled in favor of the United States. It made no changes to its preliminary report between April and June 2009. The Panel struck down the major Chinese restrictions about which the Americans complained. In doing so, it handed China its second WTO loss, the first one being *Auto Parts* case in 2008.[49]

**Synopsis of Controversial Chinese Measures in *China – Audiovisual Products***

| **Chinese Measure: Shorthand Name** | **Chinese Measure: Formal Name** | **Reading Materials** | **Audiovisual and Home Entertainment Products** | **Films for Theatrical Release** | **Sound Recordings Distributed Electronically** |
|---|---|---|---|---|---|
| ***Foreign Investment Regulation*** | State Council, Order No. 346 (2002) – *Regulations Guiding the Orientation of Foreign Investment* | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVI market access obligations | Panel: Violations of *Protocol* Trading Rights commitments. | Panel: Violation of *GATS* Article XVII national treatment obligations |
| | | Appellate Body: Appeal of *GATT* Article XX(a) public morality "necessity" defense[50] | Appellate Body: Not appealed[51] | Appellate Body: Not appealed[52] | Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule[53] |

47. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶¶ 8.1.2(d)(i)–(iii).

48. *See id*. ¶¶ 8.2.4(a)(i)–(ii).

49. *See generally* Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Jan. 12, 2009). This case is analyzed in our *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83, 102 (2010). A common theme of both cases is China's violation of national treatment obligations.

50. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶¶ 8.1.2(a)(i)–(ii), 8.2, 8.2.3(a)(iii).

| | | | | | |
|---|---|---|---|---|---|
| ***Catalogue*** | National Development and Reform Commission and Ministry of Commerce, Order No. 57 (2007) – *Catalogue of Industries for Guiding Foreign Investment* | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of *GATT* Article XX(a) public morality "necessity" defense[54] | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVI market access obligations<br><br>Appellate Body: Not appealed[55] | Panel: Violations of *Protocol* Trading Rights commitments<br><br>Appellate Body: Not appealed[56] | Panel: Violation of *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule[57] |
| ***Several Opinions*** | Ministry of Culture, Ministry of Commerce, SARFT, GAPP, and National Development and Reform Commission, Notice No. 19 – *Several Opinions on the Introduction of Foreign Capital into the Cultural Sector* | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of *GATT* Article XX(a) public morality "necessity" defense[58] | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Not appealed[59] | Panel: Violations of *Protocol* Trading Rights commitments<br><br>Appellate Body: Not appealed[60] | Panel: Violation of *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule[61] |

51. *See id*. ¶¶ 8.1.2(a)(i)–(ii), 8.2, 8.2.3(c)(i).
52. *See id*. ¶¶ 8.1.2(a)(i)–(ii), 8.2.
53. *See id*. ¶ 8.2.3(b)(i).
54. *See id*. ¶¶ 8.1.2(a)(i)–(ii), 8.2, 8.2.3(a)(iii).
55. *See id*. ¶¶ 8.1.2(a)(i)–(ii), 8.2, 8.2.3(c)(i).
56. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶¶ 8.1.2(a)(i)–(ii), 8.2.
57. *See id*. ¶ 8.2.3(b)(i).
58. *See id*. ¶¶ 8.1.2(a)(v), 8.2, 8.2.3(a)(iii).
59. *See id*. ¶¶ 8.1.2(a)(v), 8.2, 8.2.3(c)(iii).
60. *See id*. ¶ 8.1.2(a)(v).
61. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶ 8.2.3(b)(i).

| | | | | | |
|---|---|---|---|---|---|
| ***Publications Regulation*** | State Council, Order No. 343 (2001) – *Regulations on the Management of Publications* | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of *GATT* Article XX(a) public morality "necessity" defense[62] | | | |
| ***Imported Publications Subscription Rule*** | GAPP, Order No. 27 (2004) – *Rules for the Management of Subscribers Placing Subscriptions for Imported Publications* | Panel: Violations of *GATT* Article III:4 and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Not appealed[63] | | | |
| ***Publications Sub-Distribution Rule*** | *GAPP* and Ministry of Foreign Trade and Economic Cooperation, Order No. 18 (2003) – *Rules for the Management of Foreign Invested Enterprises Sub-Distributing Books, Newspapers, and Periodicals* | Panel: Violations of *GATT* Article III:4 and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Not appealed[64] | | | |
| ***Publications Market Rule*** | GAPP (2004) – *Administrative Rules for the Publications Market* | Panel: Violations of *GATT* Article III:4 and *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Not appealed[65] | | | |

62. *See id*. ¶¶ 8.1.2(b)(ii), (viii), 8.2, 8.2.3(a)(i)–(ii).
63. *See id*. ¶¶ 8.2.3(a)(i), 8.2.4(a)(i).
64. *See id*. ¶¶ 8.2.3(a)(ii), 8.2.4(a)(iii).
65. *See id*.

| | | | | | |
|---|---|---|---|---|---|
| ***1997 Electronic Publications Regulation*** | GAPP, Order No. 11 (1997) – *Regulations on the Management of Electronic Publications* | Panel: Violation of GATS Article XVII national treatment obligation<br><br>Appellate Body: Not appealed[66] | | | |
| ***2001 Audiovisual Products Regulation*** | State Council, Order No. 341 (2001) – *Regulations on the Management of Audiovisual Products* | | Panel: Violation of *Protocol* trading rights commitments.<br><br>Appellate Body: Appeal concerning scope of *Protocol*, Appeal of *GATT* Article XX(a) public morality "necessity" defense[67] | | |
| ***Audiovisual Products Importation Rule*** | Ministry of Culture and General Administration of Customs, Order No. 23 (2002) – *Rules for the Management of the Import of Audiovisual Products* | | Panel: Violation of *Protocol* trading rights commitments.<br><br>Appellate Body: Appeal concerning scope of *Protocol*, Appeal of *GATT* Article XX(a) public morality "necessity" defense[68] | | |

66. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶ 8.2.3(a)(iv).
67. *See id*. ¶ 8.1.2(d)(i)–(ii).
68. *See id*. ¶ 8.1.2(d)(v)–(vi).

| | | | | | |
|---|---|---|---|---|---|
| ***Audiovisual Product Sub-Distribution Rule*** | Ministry of Culture and Ministry of Commerce, Order No. 28 (2004) – *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products* | | Panel: Violations of *Protocol* Trading Rights commitments and *GATS* Article XVI market access and Article XVII national treatment obligations<br><br>Appellate Body: Appeal of *GATT* Article XX(a) public morality "necessity" defense[69] | | |
| ***Circular on Internet Culture*** | Ministry of Culture, Order No. 27 (2003) – *Interim Rules on the Management of Internet Culture*, and Ministry of Culture (2003) – *Notice on Some Issues Relating to Implementation of the Interim Rules on the Management of Internet Culture* | | | | Panel: Violation of *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule[70] |
| ***Network Music Opinions*** | Ministry of Culture – *Several Opinions on the Development and Management of Network Music* (2006) | | | | Panel: Violation of *GATS* Article XVII national treatment obligations<br><br>Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule[71] |

69. *See id*. ¶¶ 8.1.2(d)(x), 8.2, 8.2.3(c)(i), (iii).
70. *See id*. ¶ 8.2.3(b)(i).
71. *See id*. ¶ 8.2.3(b)(i).

| | | | | | |
|---|---|---|---|---|---|
| ***Film Regulation*** | State Council, Order No. 342 (2001) – *Regulations on the Management of Films* | | | Panel: Violations of *Protocol* Trading Rights commitments<br><br>Appellate Body: Appeal concerning scope of *Protocol*[72] | |
| ***Film Enterprise Rule*** | SARFT and Ministry of Commerce, Order No. 43 (2004) – *Provisional Rules on Entry Criteria for Operating Film Enterprises* | | | Panel: Violations of *Protocol* Trading Rights commitments<br><br>Appellate Body: Appeal concerning scope of *Protocol*[73] | |
| ***Film Distribution and Exclusion Rule*** | SARFT, and Ministry of Culture, Order No. 1519 (2001) – *Implementing Rules for the Reform of the Film Distribution and Projection Mechanisms (Trial Implementation)* | | | | |
| ***Film Enterprise Rule*** | SARFT, Order No. 43 (2004) – *Provisional Rules on Entry Criteria for Operating Film Enterprises* | | | | |

### 4. Panel Holdings: Trading Rights[74]

American claims concerning trading rights, and Chinese defenses thereto, arose under China's 2001 WTO *Protocol of Accession*. A key trading right

72. *See* Panel Report, *Audiovisual Products*, *supra* note 25, ¶¶ 8.1.2(c)(ii)–(iii), 8.2.

73. *See id*. ¶¶ 8.1.2(c)(ii)–(iii), 8.2.

74. This discussion is drawn from Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 6–10, 125–165; Summary of Dispute, *supra* note 25; Tsui & McLaughlin, *supra* note 25; Pruzin, *U.S., China Reach Agreement*, *supra* note 25; Daniel Pruzin, *WTO Issues Final Ruling Favoring U.S. in Dispute Over China's Audiovisual Curbs*, 26 INT'L TRADE REPORTER (BNA) 853 (June 25, 2009).

commitment China made in paragraph 5:1 of the *Protocol* was to grant "all enterprises in China . . . the right to trade."[75] The "right to trade" means the right to import and export goods. China made this commitment subject to the condition that the "right to trade" is "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement*," which, of course, includes *GATT* and other annexed texts.[76]

The Panel said this commitment covers all of the copyright-intensive products at issue in the case.[77] Likewise, the commitments literally cover all enterprises in China, meaning they cover wholly Chinese-invested enterprises, whether they are private or state-owned, foreign-invested enterprises, some of which are wholly foreign owned, and JVs between Chinese and foreign firms, whether in contractual or equity form.[78] The introductory clause in paragraph 5:1 that stipulates China's commitment to grant trading rights to all enterprises is subject to its right to regulate (including restrict) trade—both what is traded and who trades it. But, such regulation must comport with *GATT* and the *WTO Agreement*.[79] Paragraphs 83(d) and 84(a) confirm these commitments.[80] China did not appeal any of these Panel findings.[81]

And, of course, paragraph 5:2 of the *Protocol* and paragraph 84(b) of the *Working Party Report* make clear China's commitment on trading rights includes an obligation to grant such rights in a non-discriminatory manner, i.e., to treat foreign enterprises (even ones registered outside China seeking to import or export) and individuals no less favorably than Chinese providers of like goods or services by not exercising any discretion as between them.[82] Consequently, Chinese Communist Party officials cannot make decisions about trading rights on the basis of their preferences.[83] China did not appeal these Panel interpretations, either.[84]

The Panel agreed with the United States that many provisions in several Chinese measures violated China's *Protocol* obligation to grant the right to trade to enterprises in China, foreign enterprises not registered in China, and foreign individuals. Certain provisions in the measures also were inconsistent with China's obligation to grant non-discriminatory treatment in the right to trade. Specifically, the Panel held:

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75. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 135; *see also id*. ¶ 167.

76. *See id*. ¶¶ 135–36.

77. *See id*. ¶ 135.

78. *Id*.

79. *See id*. ¶ 136.

80. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 137.

81. *See id*. ¶ 140.

82. *See id*. ¶¶ 138–39; *see also id*. ¶ 167. Note the Appellate Body refers to "non-discretionary manner."

83. *See id*. ¶ 139.

84. *See id*. ¶ 140.

- China either limits importation rights to wholly SOEs, or forbids foreign-invested enterprises from importing, with regard to foreign reading materials, AVHE products (including DVDs), sound recordings, and films for theatrical release. The inconsistent measures are the *Catalogue* (Articles X:2–3), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), *Publications Regulation* (Articles 41–42), *Audiovisual Sub-Distribution Rule* (Article 21), *Film Regulation* (Article 30), and *Film Enterprise Rule* (Article 16).[85]

- China does not provide national treatment of trading rights with respect to various copyright intensive products. The inconsistent measures are the *Publications Regulation* (Article 41), *2001 Audiovisual Products Regulation* (Articles 5 and 27), *Audiovisual Products Importation Rule* (Articles 7–8), *Film Regulation* (Article 30), and *Film Enterprise Rule* (Article 16).[86]

In defense of these violations of its *Protocol*, China directly invoked the public morality exception of *GATT* Article XX(a), which states:

> Subject to 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, 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[87]

China argued that violating its trading rights commitments is justified because the offending measures are part of China's censorship regime—its rules on reviewing content—to protect public morals in China. For example, to support the Communist Party's censorship regime, it is necessary to restrict the right to import foreign reading materials and AVHE products.

Yet, the Panel held that none of China's offending measures are "necessary to protect public morals," in the language of Article XX(a). The Panel specifically rejected the Chinese argument that restricting imports is "necessary" to achieve the goals of the Communist Party's censorship regime. China failed to show that its violations of its trading rights obligations are "necessary" in this sense.

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85. *See id*. ¶¶ 6 n.14, 154, 166, 168, 270–71.
86. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 6 n.15, 155.
87. GATT art. XX(a), *supra* note 40.

Significantly, China invoked Article XX(a) not as a defense to a *GATT* obligation, but to its duties under the *Protocol*. Because the Panel concluded China flunked the "necessity" test, it did not reach the legal question of whether recourse to a *GATT* Article XX exception is permissible in respect to a non-*GATT* obligation. That is, the Panel did not rule on whether Article XX can be a defense to a non-*GATT* obligation, such as one arising from an *Accession Protocol*. Rather, the Panel gave China the benefit of the doubt and assumed China could do so.

5. Panel Holdings: Distribution Rights[88]

The United States argued that China's prohibitions on the rights of foreign-invested companies to supply and distribute AVHE products, foreign reading materials (e.g., books, newspapers, and periodicals), sound recordings, and digitalized music transmitted via the internet, and its discriminatory operating requirements on foreign-invested distributors, are illegal under *GATT* Article III:4 and *GATS* Articles XVI and XVII. The Panel agreed with American arguments that numerous Chinese measures violate the national treatment rule of *GATS* Article XVII:[89]

- First, Chinese measures that prohibit foreign-invested enterprises from engaging in the wholesale importation of reading materials; the exclusive sale (i.e., master distribution) of books, periodicals, and newspapers; the exclusive wholesale sale of electronic publications (also called "master wholesale"); and the wholesale of electronic publications, are illegal under Article XVII.[90] The offending Chinese measures are the *Catalogue* (Article X:2), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), *Publications Regulation* (Article 42), *Imported Publications Subscription Rule* (Article 4), *1997 Electronic*

88. This discussion is drawn from Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 6–10, 125–65; Summary of Dispute, *supra* note 25; Tsui & McLaughlin, *supra* note 25; Pruzin, *U.S., China Reach Agreement*, *supra* note 25; Pruzin, *WTO Issues Final Ruling*, *supra* note 74.

89. China's measures restricting the importation and distribution of copyrighted products also violate the commitments China made in its *Protocol* on market access and trading rights. That is, the Panel agreed with the American argument that in the *Protocol*, China promised to open completely the right to distribute these products within three years of joining the WTO, i.e., by December 11, 2004.

90. The term "master distribution" refers to the sale of a publication by an exclusive seller to other wholesalers or retailers, or to professional endusers. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 8, n.19. "Master wholesale" is a synonym for "master distribution" but is used only in the context of electronic publications. *See id.* ¶ 8, n.20.

*Publications Regulation* (Article 62), *Publications Sub-Distribution Rule* (Article 2), and *Publications Market Rule* (Article 16).[91]

- Second, Chinese measures that impose different requirements about registering capital and operating terms on foreign-invested wholesalers vis-à-vis wholly Chinese invested wholesalers violate Article XVII. The offending measure is the *Publications Sub-Distribution Rule* (Article 7:4–5).[92]

- Third, concerning sound recording distribution services, China's prohibition on foreign-invested companies supplying such services is inconsistent with the *GATS* national treatment obligations of Article XVII. The offending measures are the *Catalogue* (Article X:7), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), *Circular on Internet Culture* (Article II), and *Network Music Opinions* (Article 8).

Additionally, certain Chinese measures run afoul of the market access rule of *GATS* Article XVI:2(f):

- Some measures restrict the commercial presence for distribution of AVHE products (such as DVDs and videocassettes) to contractual JVs with majority Chinese ownership—i.e., rules limiting the distribution of these products to JVs in which a Chinese partner holds a majority stake. The offending measures are the *Catalogue* (Article VI:3), *Foreign Investment Regulation* (Article 8), and *Audiovisual Sub-Distribution Rule* (Article 8:4).[93]

- Even where a Chinese measure affects the distribution of AVHE products but does not violate the market access rules of Article XVI, it violates the national treatment [non-discrimination] obligation of Article XVII. That is because such a measure limits the operating terms for JVs engaged in the distribution of DVDs and videocassettes, but not the operating terms of [competing] wholly Chinese-owned enterprises. The offending measures are *Several Opinions* (Article 1) and the *Audiovisual Sub-Distribution Rule* (Article 8.5).[94]

91. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, n.21, ¶ 151.
92. *See id*. n.22.
93. *See id*. n.23, ¶ 158.
94. *See id*. n.24, ¶ 158.

The Panel also accepted some American arguments arising under the *GATT* Article III:4 national treatment obligation. It held that China fails to provide national treatment for reading materials:

- For certain imported reading materials, namely, imported newspapers and periodicals, Chinese measures restrict distribution channels by requiring that distribution exclusively through subscription and by Chinese wholly SOEs. Such measures do not apply to like domestic reading materials, and thus violate Article III:4. The controversial measure is the *Imported Publications Subscriptions Rule* (Articles 3–4).[95]

- For certain other imported reading materials that can be distributed other than via subscription, namely, imported books, newspapers, and periodicals, Chinese measures restrict distribution to wholly Chinese-owned firms. Foreign-invested enterprises are barred from distributing these materials. These measures do not apply to like domestic reading materials, which other types of enterprises, including foreign-invested ones, could distribute. Consequently, the measures violate Article III:4. The controversial measures are the *Publications Sub-Distribution Rule* (Article 2) and *Publications Market Rule* (Article 16).[96]

Note, then, the only *GATT* national treatment violation found by the Panel concerns reading materials.[97]

The Panel rejected American arguments concerning two other categories of copyright-intensive products: sound recordings intended for electronic distribution and films for theatrical distribution:[98]

- For films for theatrical distribution, the United States alleged Chinese measures limited their distribution to a duopoly of two SOEs, whereas any licensed distributor operating in China (including a private one)

95. *See id*. n.27.

96. *See* Appellate Body Report, *Audiovisual Products*, n.26.

97. *See id.*, *supra* note 25, ¶ 152.

98. *See id*. ¶ 10. Only on a few ancillary Chinese restrictions did the Panel either reject an American argument or opt not to render a ruling. The Panel brushed back the American argument that China's censorship of music transmitted via the internet discriminates against imports of hard-copy CDs. And it spurned the American argument that the Chinese duopoly for film distribution violates rules on discrimination against foreign film imports. Note, however, that the Panel did not hold against these American arguments. Rather, it simply stated the United States had failed to adduce sufficient evidence to prove its claims. As for electing not to make a ruling, the Panel said that the onerous process for approval of a foreign distributor, and limits on imported electronic publications and subscribers of imported reading materials, were beyond the scope of its mandate. Hence, it left them untouched.

could distribute a like domestic product. The Panel ruled that the United States failed to prove China had, either as a de jure or de facto matter, set up a duopoly that prevents other firms from applying for and obtaining a license to distribute imported films.

- Concerning hard-copy sound recordings intended through electronic distribution (such as the internet), the United States alleged Chinese measures subjected imported recordings to more burdensome content review than like domestic products. The Panel ruled the United States failed to prove this claim.

But the Panel agreed with the American argument that China offers less favorable distribution opportunities for imported films designed for theatrical release, because it establishes a dual distribution scheme. That scheme favors domestic films. Likewise, the Panel accepted the American argument that China discriminates against foreign firms seeking to distribute digital sound recordings, or to import sound recordings in hard-copy form. Still another type of discrimination, highlighted by the United States and acknowledged by the Panel, is China's requirement that imported music (that is, music in which a foreign-owned or foreign-invested enterprise has certain legal rights) in either digital or physical form be subject to content review before distribution. China has no such requirement for Chinese-produced music.

Thus, while the United States did not challenge the screen quota of twenty films annually, it did take aim—successfully—at China Film, the monopoly importer into China of foreign movies. As a result of the American victory, foreign filmmakers will be free to engage distributors other than China Film. In consequence, the actual number of foreign movies screened in China may increase. At the least, by encouraging legitimate film imports into China, pirated versions of movies may be less appealing. Not surprisingly, the Panel urged China to allow American companies to form JVs with Chinese enterprises to distribute music over the internet.

### 6. Appellate Issues[99]

Many of the holdings of the Panel were not appealed. Indeed, to a considerable extent, China accepted a large number of adverse holdings concerning its measures affecting trading and distribution rights that offended its *Protocol*, *GATT* Article III:4, or *GATS* Articles XVI and XVII. But the

99. This discussion is drawn from Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 11, 151; Summary of Dispute, *supra* note 25; Pruzin, *U.S., China Reach Agreement on Deadline for Compliance with WTO Audiovisual Ruling*, *supra* note 25, at 1117.

Communist Party did not kowtow to all of the Panel findings.

Quite the contrary, the Party sought to blunt the Panel decision with a two-pronged attack. First, some of its controversial measures are not subject to its *Protocol* or obligations under the *GATT* and *GATS*. Second, other contested measures are justified under *GATT* Article XX(a) as a necessary part of the substantive content review (i.e., censorship) scheme maintained by the Party, a scheme that forbids importation of cultural goods that might have a negative impact on Chinese public morality. Likewise, the United States, while coming off quite well at the panel stage, was not entirely satisfied with all of the legal conclusions reached by the Panel. Accordingly, three key issues were presented on appeal.

a. Scope of Accession Promises Issue: Trading Rights, Films and Unfinished AVHE Products, and the *Protocol*[100]

The central question: Do China's trading rights commitments in the *Protocol* apply to its measures on films for theatrical release and unfinished AVHE products?

The Panel found that China's measures for films for theatrical release and unfinished AVHE products are subject to China's trading rights commitments in the *Protocol*. The Panel held that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, which mandate that only a film import enterprise designated or approved by SARFT could import films, are subject to paragraphs 1:2 and 5:1 of the *Protocol* and paragraphs 83(d) and 84(a)–(b) of the *Working Party Report*. It also held that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are subject to paragraph 1:2 of the *Protocol* and paragraph 84(b) of the Report.

Critically, the Panel held that all of these measures violate the *Protocol* and *Working Party Report*, which guarantee that all enterprises in China, including foreign-invested ones, foreign individuals, and foreign enterprises not registered in China have the right to import cinematographic films. Essentially, the measures bar foreign-invested enterprises from importing films for theatrical release.[101] Moreover, the availability of discretion to SARFT in designating and approving enterprises that could import films is inconsistent with China's *Protocol* commitment on non-discretionary treatment.

China appealed certain of these findings. Broadly, it did not appeal the Panel findings that its foreign investment regulations (namely, the *Foreign Investment Regulation*, *Catalogue*, and *Several Opinions*) are inconsistent with the *Protocol*. But, China argued to the Appellate Body that Article 30 of its *Film*

100. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 124(a), 161, 165, 168.

101. *See id*. ¶¶ 160, 166, 168.

*Regulation* and Article 16 of its *Film Enterprise Rule* are measures relating to the content of films for theatrical release and associated services—not to the physical good (films).[102] Therefore, urged China, the *Protocol* and the *Working Party Report* are inapplicable to these two provisions. China also raised the *GATT* Article XX(a) defense to justify its controversial measures.[103]

Further, China appealed a Panel finding concerning "unfinished" AVHE products, namely, master copies used to publish and manufacture copies for sale in China.[104] The Panel said the *2001 Audiovisual Products Regulation* (Article 5) and *Audiovisual Products Importation Rule* (Article 7) were inconsistent with China's *Protocol*, because these measures did not grant the right to trade in a non-discretionary manner. China argued that "unfinished" AVHE products relate to content and associated services, not to physical goods. Therefore, urged China on appeal, these products are not subject to its trading rights commitments.

Simply put, the structure of China's argument was based on a distinction between content and services on the one hand, and goods on the other.[105] China did not say all of its foreign investment measures are entirely in compliance with the *Protocol*. Rather, China said some of the measures—the ones concerning films and unfinished AVHE products—are not subject to the *Protocol* at all. That is because, said China, for these items, those measures do not regulate goods. Rather, they regulate the content of films and services associated with the importation of content. Yet the *Protocol* applies solely to trading rights commitments with respect to goods. As the Appellate Body characterized it:

> [I]n 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*.[106]

Accordingly, the Appellate Body considered whether in rendering its findings on unfinished AVHE products, the Panel erred by failing to make an objective assessment of the facts under Article 11 of the DSU.[107]

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102. *See id*. ¶ 162.
103. *See id*. ¶ 156.
104. *See id*. ¶ 157.
105. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 169.
106. *Id*. ¶ 169 (emphasis in original).
107. The Appellate Body considered certain other related allegations of error raised by China concerning subject matter and burden of proof that are not discussed herein. *See id*. ¶¶ 171–74.

b. Public Morality Issue: Trading Rights, Films and AVHE Products, and *GATT* Article XX(a)[108]

The central question: Are Chinese measures necessary to protect public morality in China within the meaning of *GATT* Article XX(a)?

The Panel held that China could invoke the *GATT* Article XX(a) public morals exception as a defense to its violations of its trading rights and national treatment commitments under the *Protocol*, by virtue of the introductory clause of paragraph 5:1 of the *Protocol*. The Panel further held that China could not justify its measures as "necessary" to protect public morality under Article XX(a). These findings concerned Chinese measures that:

- Forbid foreign-invested enterprises from importing copyright-intensive products, pursuant to the *Catalogue* (Articles X:2–3), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), *2001 Audiovisual Products Regulation* (Article 27), *Audiovisual Products Importation Rule* (Article 8), and *Audiovisual Sub-Distribution Rule* (Article 21).

- Require conformity with the *Publications Regulation*, which is an administrative regulation of GAPP.[109] In particular:

  (1) Articles 41–42(2) of the *Publications Requirement* state that only an approved publication import entity, one designated by GAPP, can import reading materials. In effect, they mandate satisfaction of the State Ownership Requirement, i.e., be a wholly SOE in order to be eligible for approval as a publications import entity,

  (2) Article 42 lists eight criteria, all of which must be met, to receive this approval. Two of the criteria are:

    a. Suitable Organization and Qualified Personnel Requirement—The entity must be a wholly SOE. And the officials of the SOE must be qualified personnel.[110]

108. *See id*. ¶¶ 124(b), 165, 205. Related to this issue was one concerning completion of the GATT Article XX(a) analysis. Given its overall conclusion that China could not justify its violative measures under Article XX(a), the Appellate Body declined China's request that it complete the analysis and find the measures necessary to protect public morals in China. *See id.* ¶ 124(c), n.614.

109. *See id.* ¶ 147.

110. This Requirement appears to contain two separate criteria, one concerning the SOE and the other concerning officials of the SOE, but it is treated as a single measure. *See, e.g.*, Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 245–46.

b. State Plan Requirement—The entity conforms to China's State Plan for imported publications, i.e., satisfy the State Plan of the Chinese government concerning the number, structure, and geographical coverage of publication import entities, pursuant to the *Publications Regulation* (Article 42).

Additionally, the Panel found a less restrictive alternative than the aforementioned measures exists, one that is reasonably available to China. In doing so, the Panel considered the restrictive effect that the measures have on entities seeking to import copyright-intensive products.

Notably, China did not appeal Panel holdings in respect of imported reading materials. Rather, it fell back on the *GATT* Article XX(a) public morality defense. The Panel assumed that this provision could be invoked to justify a violation of a commitment stemming from a legal text other than *GATT* and that importing a product with content disfavored by China's censors could negatively impact Chinese public morality, thereby giving China the proverbial "benefit of the doubt" on both counts.[111] But the Panel said China failed to prove its trade measures—the structures in Article 41 of the *Publications Regulation* and criteria in Article 42 of the *Publications Regulation* (especially the Suitable Organization and Qualified Personnel Requirement and State Plan Requirement)—were "necessary" within the meaning of Article XX(a).[112] The Panel also said China has a reasonably available less trade-restrictive alternative.

On appeal, China challenged the adverse Panel ruling under *GATT* Article XX(a). Interestingly, the United States challenged the Panel's holding that the State Plan Requirement of Article 42 of the *Publications Regulation*, in the absence of a reasonably available alternative, could be characterized as necessary to protect public morality.[113] Thus, in respect to all of the Panel findings, the Appellate Body considered whether the Panel erred as a matter of law or failed to make an objective assessment of the facts under Article 11 of the DSU.

111. *See id*. ¶¶ 148, 209–10. The Appellate Body, while acknowledging that reliance on an assumption arguendo is a legal technique sometimes used by an adjudicator to render a decision, looked askance at the Panel doing so. Assuming that the Article XX(a) defense was available to China, without ruling on that question, detracted from the purposes of WTO dispute settlement, namely, to resolve trade disputes so as to preserve the rights and duties of WTO Members, clarify the meanings of terms in covered agreements, and bolster security and predictability of international trade law. *See id.* ¶¶ 213–15.

112. *See id*. ¶ 149.

113. *See id*. ¶ 150.

c. Services Scheduling Issue: Distribution Rights, Sound Recordings, and *GATS*[114]

The central question: Do "Sound Recording Distribution Services" in the *GATS* Schedule of China cover electronic distribution of sound recordings, and thereby subject China's measures about these services to the *GATS* Article XVII national treatment obligation?

The Panel decided the entry "Sound Recording Distribution Services," under the heading of "Audiovisual Services," in Sector 2.D of China's Services Schedule, covers the distribution of sound recording in non-physical form, including through electronic means. Did the Panel err in this decision? This issue matters because of the consequences of the decision.

Based on its decision, the Panel held that China's measures prohibiting a foreign-invested enterprise from electronically distributing sound recordings (e.g., via the internet) violate *GATS* Article XVII. China had no such prohibition on like domestic services suppliers. The measures at stake were the *Circular on Internet Culture* (Article II), *Network Music Opinions* (Article 8), *Several Opinions* (Article 4), *Catalogue* (Article X:7), and *Foreign Investment Regulation* (Articles 3–4). In other words, China committed a *GATS* national treatment violation because its measures prohibit foreign-invested enterprises from distributing music electronically in China, whereas there is no similar preclusion for like domestic service suppliers.

But if the Panel were wrong—i.e., if China's *GATS* Schedule entry for "Sound Recording Distribution Services" does not cover electronic distribution of music—then *GATS* would be inapplicable to the challenged measures. In turn, the Appellate Body would have to overturn its holding against them. This approach was precisely China's argument on appeal.

The Appellate Body, which issued its Report in December 2009, upheld all of the key findings of the Panel. Accordingly, it recommended that China revise its trading and distributions measures so that they conform to the *Protocol*, *GATT*, and *GATS*.

7. Appellate Body Holdings: Trading Rights, Films and Unfinished AVHE Products, and the *Protocol*[115]

The first key issue the Appellate Body addressed was whether China's trading rights commitments in its *Protocol* apply to its measures on films for theatrical release and unfinished AVHE products.

114. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 124(d), 163–65, 338–40.

115. *See id*. ¶¶ 175–204; Summary of Dispute, *supra* note 25.

"Yes," said the Appellate Body, thereby upholding the findings of the Panel.[116] Regrettably, the Appellate Body did not say so in an efficient manner. The Appellate Body began its analysis by recalling that assessment by a panel of the meaning and content of municipal law of a WTO Member is subject to its review. In particular, the Appellate Body has jurisdiction to review the legal question of whether a measure, like Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, comport with *GATT* and *WTO Agreement* obligations. This proposition must be correct. Were it not, a Member could violate those obligations with near impunity, arguing the Appellate Body cannot infringe on its sovereignty by telling it whether its laws are consistent with those obligations, and thereby vitiating the Appellate process.[117] The Appellate Body cited a precedent, one involving China, namely, the *Auto Parts* case, in which it reviewed a Chinese decree.

China's argument that the controversial measures on films for theatrical release regulate content and services associated therewith, not goods, hinged partly on translation. The United States said the relevant term in Article 30 of the *Film Regulation* is "film." China said it was "*dian ying*," which translates as "motion picture," or the content of a film as an artistic work to be projected in theaters. That is, "*dian ying*" refers to the content of a film, not the material (or physical medium) on which a film is printed, or the film stock. Accordingly, said China, Article 30 regulates who may import the content of films, not who may import physical goods. The United States replied sensibly enough: whether the translation is "film" or "motion picture," the item at issue is a physical good, a physical carrier medium, which has content embedded on it. Without expressly ruling on the translation question, the Panel stated that even if the term refers to contents for commercial exploitation by projection in a theater, the measure at issue (Article 30) necessarily affects who can import hard-copy cinematographic films. Only an entity designated and approved by SARFT can do so, i.e., only such an entity can import content on a hard-copy film. Therefore, said the Panel, the measure is governed by China's trading rights commitments in its *Protocol*.

China contested on appeal that the Panel had got it wrong, that it should have ruled "*dian ying*," if defined as "film," cannot mean "hard copy cinematographic film." Unfortunately, at this point in its Report (about half-way through), the Appellate Body failed to seize the opportunity to end the nonsense. It would have done well to call China's argument frivolous, which it is, and one based on a hair-splitting if not untenable distinction. Instead, the Appellate Body expended seven paragraphs (183–90) on the matter. One of those paragraphs (184) is plainly unnecessary, as it is nothing more than a re-hash of the Panel finding the Appellate Body just recapped (in paragraphs 181–82). In the end, the

116. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 414.

117. At the same time, as the Appellate Body conceded, DSU Article 17:6 constrains it from reviewing findings about municipal law that are factual in nature, such as how municipal law is applied within a Member. *See id*. ¶¶ 177–78.

Appellate Body arrived at the conclusion obvious all along: on simple common sense grounds, the Americans were right: cinematographic film with content on it is an integrated product, and if the content of a film is carried by a physical delivery material, i.e., expressed through a physical good, then Article 30 inevitably regulates who may import that good.[118] In turn, Article 30 is subject to *Protocol* commitments on goods.

Likewise, the Appellate Body would have done well to be stern with the Chinese argument that a hard-copy cinematographic film is imported simultaneously, and physically, in conjunction with the right to provide a service, namely, the commercial licensing, distribution, and projection of the intangible content of the film. The United States immediately offered the winning reply: even if the commercial value of film importation lies in supplying film projection services, the film is still a good subject to China's *Protocol* trading rights commitments. The point is worth at most a paragraph. Regrettably, the Appellate Body consumed seven paragraphs (191–98). All it needed were the five sentences it put out in one of these paragraphs (195):

> We do not see the clear distinction drawn by China between "content" and "goods." Neither do we consider that content and goods, and the regulation thereof, are mutually exclusive. Content can be embodied in a physical carrier, and the content and carrier together can form a good. For example, in *Canada – Periodicals*, the Appellate Body found that "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product – the periodical itself."[119]

In these five sentences, the Appellate Body made its legal point and cited a precedent.

China also appealed the Panel holding that Article 5 of its *2001 Audiovisual Products Regulation* and Article 7 of its *Audiovisual Products Importation Rule* violate paragraph 1:2 of the *Protocol* and paragraph 84(b) of the *Report*. The violation, said the Panel, stemmed from the licensing requirements these measures imposed for importation of unfinished AVHE products. China tried to distinguish the regulation of importation of goods from the regulation of the service of licensing copyrights for the publication of copies of audiovisual content. Its measures implicated the latter, not the former. Here, the Appellate

118. *See id*. ¶ 188.

119. *Id*. ¶ 195 (citing Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997)). *See generally* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 402–14 (3d ed. 2008) [hereinafter INTERNATIONAL TRADE LAW].

Body spent four paragraphs (201–04) on rejecting the specious distinction. In sum, then, China failed to escape the commitments on trade in goods it made in its WTO accession by re-characterizing its controversial measures, as applied to films for theatrical release and unfinished AVHE products, as measures affecting services and thus outside the purview of its commitments.

8. Appellate Body Holdings: Trading Rights, Films and AVHE Products, and *GATT* Article XX(a)[120]

The Appellate Body reached six key findings about the invocation by China of *GATT* Article XX(a) to justify its regulation of copyright-intensive products:[121]

- China can invoke Article XX(a) to defend measures inconsistent with legal obligations arising not from *GATT*, but from another text, namely, the *Protocol*.

- The Panel was correct that the State Ownership Requirement in Articles 41 and 42(2) of China's *Publications Regulation* is not necessary to protect public morals in China.

- The Panel was correct that Chinese measures—in the *Catalogue* (Articles X:2–3), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), and *Audiovisual Sub-Distribution Rule* (Article 21)—excluding foreign-invested enterprises from importing copyright-intensive products are not necessary to protect public morals in China.

- The Panel was wrong to hold that the State Plan Requirement in Article 42 of the *Publications Regulation* is likely to contribute materially to protecting public morality in China and that, absent a reasonably available alternative, is necessary to that protection.

- In considering the restrictive effect of China's measures that violated its trading rights commitments, the Panel rightly evaluated the restrictive effect those measures have on entities wishing to engage in importing.

- The Panel was correct that at least one of the measures proposed by the United States—centralized censorship by the Chinese government—was reasonably available to China.

120. *See generally* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 205–337, 415; Summary of Dispute, *supra* note 25.

121. *See id*. nn.439, 441, ¶ 336.

The latter five findings favored the United States. As to the first finding, China succeeded in invoking *GATT* Article XX(a). (Arguably, from a long-term perspective, even the first finding favored the United States, along with other WTO Members. In the future, they may seek to use Article XX in defense of a non-*GATT* violation and will have the *Audiovisual Products* precedent to cite.) But China's argument under the public morality exception roundly failed, as the Appellate Body declined to reverse the finding of the Panel that its controversial measures are "necessary" within that Article to protect public morality.

### a. Invocation of *GATT* Article XX(a)?

What logic supports the first finding that China can invoke Article XX(a) to justify measures inconsistent with legal obligations arising not from *GATT*, but from another text? The Appellate Body agreed with China, relying on the introductory clause to paragraph 5:1 of the *Protocol*, which states: "Without prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement* . . . ." As China said, reference to the "*WTO Agreement*" includes not only the *Agreement Establishing the World Trade Organization*, but also all the accords in the Annexes to that *Agreement*, one of which is *GATT*. China did not assert that the introductory clause meant it could violate its trading rights commitments, but rather that it could exclude products from the scope of those commitments, or circumscribe trading rights in them, if such an exclusion or limitation is consistent with *GATT*.

In accepting China's argument, the Appellate Body rejected the American rebuttal to it: *GATT* Article XX(a) can be invoked as a defense only to a breach of a *GATT* obligation. The United States said that paragraph 5.1 of the *Protocol* is specific, self-contained, and complete. Annexes 2A and 2B of the *Protocol*, referenced in that paragraph, are the exclusive list of products China excepted from its obligation to grant trading rights. Were that not so, then China could exempt a vast array of other products from trading rights commitments, and thus render the *Protocol* Annexes superfluous. Moreover, the United States contended China could not use a *WTO Agreement*, such as *GATT*, to cut back on its *Protocol* commitments. Rather, the *Agreement* is supposed to supplement, not detract from, those promises. Examples of such supplementation include the *TBT* and *SPS Agreements*.

Unsurprisingly, the Appellate Body turned to the *Shorter Oxford English Dictionary* for a lexicographic analysis of what the key terms in paragraph 5:1 of the *Protocol* mean: "without prejudice to," "right," and "in a manner consistent with the *WTO Agreement*." The Appellate Body consumed ten paragraphs (220–30) on the matter. An efficacious adjudicator would have spent half as many without wounding America's pride or causing China to lose face by intimating that it gave short shrift to the arguments of either side. Consider paragraphs 220 and 221, with the footnotes to them included:

220. In the abstract, "rights" may encompass both entitlements or powers, and immunities or protected interests.[421] Within the first sentence of paragraph 5.1, the word "right" is used twice. In the introductory clause, China is identified as enjoying a "right" to regulate trade. Subsequently, China is identified as being subject to an obligation to grant the "right" to trade. The first time the word "right" is used, it seems to us to refer to an *authority*, or *power* that China enjoys, whereas the second time the word is used, it refers to a legal entitlement that China is under an obligation to *grant* to all enterprises in China.[422] The next component of the phrase "China's right to regulate trade" is the verb "regulate". As noted by the Panel, to "regulate" means to "[c]ontrol, govern, or direct by rule or regulations; subject to guidance or restrictions" [423]. As for the word "trade", it is used as a noun in the phrase "China's right to regulate trade,"[424] and seems to refer, generally, to commerce between nations.[425]

221. Thus, our analysis so far suggests that the phrase "China's right to regulate trade" is a reference to China's power to subject international commerce to regulation. As explained above, this power may not be impaired by China's obligation to grant the right to trade, *provided that* China regulates trade "in a manner consistent with the WTO Agreement".[122]

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

122. *Id*. ¶¶ 220–21 (emphasis in original).

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

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

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

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

It is difficult to escape the conclusion that these paragraphs and footnotes are a waste of time and insult the intelligence of even a minimally competent first-year law student.

Put more politely, they add little value to the Appellate Body Report, and hardly can be called "analysis." Nevermind the pedantic point the Appellate Body repeats the full citation to the *Shorter Oxford English Dictionary* in the footnotes, rather than defining in its first use of this source a short-hand reference and using the standard "*supra*" reference thereafter. That sometimes is a reader-friendly technique, and in any event, the error could be excused were it not for a larger problem: nothing in paragraphs 220 and 221 tells the reader anything beyond the

obvious plain meaning of the introductory clause in paragraph 5:1 of the *Protocol*—that China has the legal right to regulate trade consistently with its international trade law obligations. These paragraphs certainly crush the life out of the most exciting issue in the entire case: 1) the free trade infatuation of the Americans on cultural products ostensibly driven on principle, but backed very strongly by Hollywood and concerns about IP piracy, versus 2) the protectionist proclivity of the Chinese driven ostensibly by concerns about public policy, but grounded in the control-obsessed political censorship regime of the Communist Party.

The next two paragraphs advance the "analysis" only marginally. In them, the Appellate Body states that "in a manner consistent with the *WTO Agreement*" refers to the entire *WTO Agreement*, including the covered agreements in the Annexes to that *Agreement*. It further reveals that "consistency" means either not violating a *GATT* or *WTO Agreement*, or violating one but justifying the violation under an applicable exception. At this point, the end of paragraph 223—nearly 100 pages into the Report—the Appellate Body seems to be catching up with most readers: at issue is whether *GATT* Article XX(a) is included in the term "the *WTO Agreement*." Apparently, it is.

The Appellate Body, however, hesitates in paragraph 224 to rush to judgment and looks to paragraph 84(b) of the *Working Party Report*. It claims that paragraph 84(b) "provide[s] context for and inform[s] the scope of WTO-consistent governmental regulation" to which China committed in respect of granting trading rights, and that such regulations consistent with *GATT* and the *WTO Agreement* include import-licensing, TBT, and SPS measures.[123] This paragraph is useful in "shedding light" on the types of regulatory measures China may take under the covered agreements, supposedly because such measures may apply directly to goods, to importing or exporting goods, or other similar restrictions.[124] Thereupon, the reader proceeds to paragraph 226 of the Report, which begins with the words "We recall . . . ." Those words are a telltale, albeit not foolproof sign, to skip what follows in that paragraph, because it is a rehash of a point already made, which essentially is the case.

The Appellate Body finally approaches the point in paragraph 227. There, it identifies a direct relationship between a restriction on trade in goods and entities engaged in trade in goods, and cites, inter alia, its own precedents in the *China – Auto Parts* case (at paragraphs 195–196) and *Korea – Various Measures on Beef*, and the *GATT* Panel Report in the *Canada – Foreign Investment Review Act* (paragraph 6.1).[125] These precedents stand for the proposition that there is a violation of *GATT* Article III:4 when a discriminatory measure affects the rights

123. *Id*. ¶ 224.

124. *Id*. ¶ 225.

125. *See* Report of the Panel, *Canada – Administration of the Foreign Investment Review Act*, ¶ 6.1, L/5504 (July 25, 1983), GATT B.I.S.D. (30th Supp.) (1984). *See generally* INTERNATIONAL TRADE LAW, *supra* note 119, at 389–96.

of traders to trade in goods, even if the measure does not directly affect the goods themselves. But the Appellate Body could simply have relied on the bulk of the final sentence of paragraph 227 (". . . measures that restrict the rights of traders may violate *GATT* obligations with respect to trade in goods") with a footnote and deleted the rest of the paragraph.

The Appellate Body closes in on its key finding (after another extraneous paragraph, 228) in paragraphs 229–30. Quoted below in their entirety (with the footnote to paragraph 230 omitted), the important parts are **bold** to differentiate from the *italics* of the Appellate Body:

> 229. China's power to regulate trade in goods is disciplined by the obligations set out in Annex 1A of the *WTO Agreement*. In our view, the introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments. Rather, **whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with Chinas trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand**.
>
> 230. All of the above suggests to us that the introductory clause of paragraph 5.1 should be interpreted as follows. Any exercise of China's right to regulate trade will be protected under the introductory clause of paragraph 5.1 only if it is consistent with the *WTO Agreement*. This will be the case when China's measures regulating trade are of a type that the *WTO Agreement* recognizes that Members may take when they satisfy prescribed disciplines and meet specified conditions. Yet, these are not the only types of WTO-consistent measures that may be protected under the introductory clause of paragraph 5.1. **Whether a measure regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade may also depend on whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue. In considering whether such a link is discernable, it may be relevant whether the measure regulating *who* may engage in trade is clearly and intrinsically related to the objective of regulating**

> **the *goods* that are traded. In addition, such a link may often be discerned from the fact that the measure in question regulates the right to import and export particular *goods*. This is because the regulation of *who* may import and export specific goods will normally be objectively related to, and will often form part of, the regulation of trade in those goods. Whether the necessary objective link exists in a specific case needs to be established through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated. When such a link exists, then China may seek to show that, because its measure complies with the conditions of a GATT 1994 exception, the measure represents an exercise of China's power to regulate trade in a manner consistent with the *WTO Agreement* and, as such, may not be impaired by China's trading rights commitments**.[126]

In other words, suppose a measure of a WTO Member regulates who can trade in a good has a "clearly discernable, objective link" to regulation of trade in that good. Evidence of that link may be a "clear and intrinsic relationship" between the measure regulating the trader and the regulation of the good, or a right to import or export merchandise. Then, the measure regulating the trader is to be treated just like a measure affecting the good itself. The two—regulation of the trader and the good—are inextricably linked. In turn, a commitment by that Member to grant a trade concession on the good applies to the measure regulating the trader. And, critically, consistency with *GATT*, *WTO Agreement*, and defenses thereunder, are relevant.

Of course, from the perspective of China, its measures regulating traders are part of the broader Communist Party apparatus to regulate copyright-intensive products, particularly their content.[127] Its political agenda aside, the stated objective of the Party is to prevent dissemination of cultural products, whether foreign or domestic, which negatively impact Chinese public morality. That is, the controversial measures at issue in the case that affect traders are part of a regime to regulate trade in goods, or as the Appellate Body put it in accepting China's argument, they "have a clearly discernible, objective link to China's regulation of trade in the relevant products."[128] Thus, such measures come within the ambit of paragraph 5:1 of the *Protocol*. Because that paragraph refers to the

126. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 229–30 (emphasis added).

127. *Id*. ¶ 231.

128. *Id*. ¶ 233.

WTO Agreement, which in turn means any covered agreement, such as *GATT*, China can invoke Article XX(a) as a defense for its measures.

Query whether there is any need for the Appellate Body to distinguish between measures affecting traders and those affecting goods. The Appellate Body would have done well to explain why this distinction matters at all. It suggests that without a "clearly discernible, objective link" between traders and goods, the controversial measures would not have come within paragraph 5:1, and thus would not be subject to multilateral trade law disciplines.

Perhaps a hypothetical illustration by the Appellate Body might have helped. What might be a measure affecting a trader that has no "clear and intrinsic relationship" to the thing traded? An example might be a requirement that a trader be, or engage the services of, a licensed customs broker for purposes of importation. Another one might be compliance with environmental rules about pollution in imports, or labor standards about loading and unloading cargo. Such measures apply to all traders, regardless of the good in which they trade, and are designed to assure proper customs clearance, a clean environment, and good working conditions. Such measures might not fall within the ambit of a promise of market access for a certain good. They would not be subject to paragraph 5:1.

### b. Necessity Under *GATT* Article XX(a)?

Why did the Appellate Body uphold the Panel finding that China failed to prove any of its controversial measures are necessary to protect public morals under *GATT* Article XX(a)? Predictably, the Appellate Body did not proceed directly to address this issue, which is the crux of the entire case. Instead, it began with the American concern that the Panel ought not to have used a two-step test in considering "necessity" under Article XX(a).[129] The two steps are:

1) Does China have a prima facie case that its measures are "necessary" under Article XX(a)?; and

2) Does China have a reasonably available alternative that is consistent with multilateral trade disciplines?

129. Reference to the two-step test in this context is not a reference to the grand two-step test associated with an Article XX matter, i.e., first justify a violation under an itemized exception in Article XX, and second, satisfy the *chapeau* to that Article. The *Audiovisual Products* case never reached the *chapeau* step. In other words, the two-step test about which the United States speaks is associated with the first of the two grander steps.

The Panel looked to the Appellate Body Report in *Brazil – Retreaded Tyres* (paragraph 178) to buttress its two-step approach.[130]

Citing the Appellate Body Reports in *United States – Gambling* (paragraph 307) and *Korea – Various Measures on Beef* (paragraph 166), the United States said the two steps are supposed to be a single process.[131] Indeed, the single word "necessary" suggests one integrated, albeit multifaceted, analysis. The United States said the conclusion of the Panel that the State Plan Requirement was "necessary" to protect public morals, in the absence of a reasonably available alternative, was confusing.

Thereupon, the Appellate Body expended another ten paragraphs reminding the parties that a "necessity" analysis under *GATT* Article XX(b) (as in *Brazil – Retreaded Tyres*), *GATT* Article XX(d) (as in *Korea – Various Measures on Beef*), or *GATS* Article XIV(a) (as in *United States – Gambling*) involves "weighing and balancing" several factors concerning the controversial measure of the respondent Member and possible reasonably available alternatives to that measure to achieve the policy objective desired by the respondent.[132] Such factors include, as in the *Gambling* case, the:

1) Contribution of the measure to the realization of the goal it pursues, and
2) Restrictive effect of the measure on international commerce.[133]

In addition to these two factors, they may concern, as in the *Retreaded Tyres* case, the:

3) importance of the interests or values at stake.

Assuming this analysis leads to the "preliminary conclusion" (sometimes billed as an "intermediate finding") that the measure is "necessary," then reasonably available alternatives must be considered.

In the *Audiovisual Products* case, said the Appellate Body, the Panel's necessity analysis was not quite how the Americans characterized it. Rather, conceptually, the Panel proceeded through five steps:

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130. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007). This Report is analyzed in our *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75, 83 (2008).

131. *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 307, WT/DS285/AB/R (April 7, 2005); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 166, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001). These Reports are analyzed in our *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107, 118 (2006), and *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 472 (2002), respectively.

132. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 239–49.

133. *See id*. ¶ 240.

1) Consideration of the relationship between the stated policy objective of China, namely, protection of public morality in China by keeping out goods containing prohibited content, and the controversial measures:

   In considering this relationship, the Panel assumed that any content prohibited by China's measures could, if imported into China, negatively affect public morality in China. In other words, the Panel gave China the benefit of the doubt: prohibited content indeed offends the moral sensibilities of everyday Chinese. And, the Panel did not second guess: it did not query whether the true, underlying objective of the measures is to ensure no cultural products enter China that undermine the power or authority of the Communist Party.

2) Identification of the importance of the stated objective of China:

   Here, the Panel stated categorically that:

   > [T]he protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy.[134]

Likewise, the Panel identified the level of protection China sought, namely, a high level of protection of public morality.

3) Evaluation of each of China's controversial measures separately:

Whereas the Panel looked at China's controversial measures in aggregate in steps (1) and (2) above, in the third step, the Panel turned to an examination of each of the measures. In this examination, the Panel undertook a three-part analysis:

> 1: Contribution—Identify the contribution of the specific measure at issue to China's objective.
> 2: Restrictive Impact—Determine the restrictive impact of the specific measure on trade and on those wishing to engage in trade.
> 3: Weighing and Balancing—Weigh and balance three factors, namely, the extent of the contribution, the restrictive impact, and the fact China has a highly important interest in protecting public morality at a high level.

4) Obtaining a conclusion on each controversial measure:

   As a result of the three-part analysis in step (3), for each measure, the Panel reached a conclusion about "necessity" under *GATT* Article XX(a).

134. *Id*. ¶ 243 (quoting Panel Report, *Audiovisual Products*, *supra* note 25, ¶ 7:817).

The Panel said, preliminarily, that the suitable organization and qualified personnel requirement, and the State Plan Requirement, are "necessary," but only "in the absence of reasonably available alternatives" to protect Chinese public morality.[135] All other measures—the *Publications Regulation* (the designation requirement of Article 41), *2001 Audiovisual Products Regulation* (the designation requirement of Article 27), *Audiovisual Products Importation Rule* (the designation requirement of Article 8), *Publications Regulation* (the state-ownership requirement of Article 42)—do not pass the necessity test.[136] Likewise, the measures excluding foreign-invested enterprises from engaging in importation of copyright-intensive products in the *Catalogue* (Articles X:2–3), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), and *Audiovisual Sub-Distribution Rule* (Article 21) all fail the necessity test.[137]

5) Consideration of reasonably available alternatives:

With respect to the two measures the Panel deemed "necessary," namely, the Suitable Organization and Qualified Personnel Requirement and State Plan Requirement, the Panel considered whether China had reasonably available to it an alternative that was less trade restrictive than its controversial measures. The United States said yes, and pointed it out: the Chinese government could take sole responsibility to conduct content review. The Panel considered this alternative, weighing and balancing it against the contribution it would make to the objective of protecting Chinese public morality and the importance of China's interest in doing so rigorously. The Panel concluded that China failed to show the American alternative is not reasonably available to it. Hence, the Panel found even these two Requirements are not necessary under Article XX(a).

The Appellate Body endorsed the Panel's work, while observing the necessity test is sufficiently flexible that the five-conceptual-step approach of the Panel perhaps is not the only acceptable one.[138]

What, then, did the Appellate Body make of the American appeal that the Panel was wrong to conclude the State Plan Requirement is necessary to protect public morality, in the absence of a reasonably available alternative?[139] Essentially, it sloughed off the argument, saying that the Panel did not reach a

135. *See id*. ¶ 245.

136. *Id*. ¶ 245, n.467.

137. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 245 n.467, ¶¶ 270–71.

138. *Id*. ¶ 249.

139. *Id*. ¶¶ 150, 248.

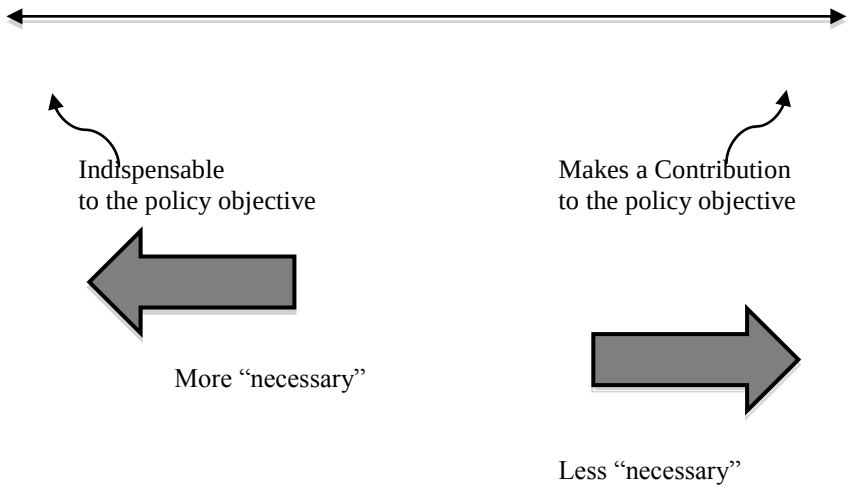
definitive conclusion. Rather, said the Appellate Body, the Panel provided an "intermediate finding" that the State Plan Requirement is necessary, had there been no reasonably available alternative. But, because the United States provided an alternative, the Panel's final conclusion was that the State Plan Requirement is unnecessary. In effect, the Appellate Body told the United States that it had, in fact, won the point at the Panel stage, and there was no need to litigate the matter further.

c. Contribution of China's State Ownership Requirement to Protecting Public Morals in China?

The Appellate Body devoted considerable attention to the first part of the three-part analysis in Step (3) (above) of the work of the Panel. China and the United States squared off over whether the Panel was right to hold that the State Ownership Requirement (set forth in Articles 41–42(2) of the *Publications Regulation*) is necessary, and in particular, whether that measure contributes to the protection of public morality in China.

The Appellate Body began with a recital of its holding in *Korea – Various Measures on Beef*, namely, "necessity" is not a binomial concept, but rather a continuum of possibilities. There are degrees of "necessity." The Diagram below characterizes the range and its poles:

**"Necessity" Test Under *GATT* Article XX(a) – Range of Degrees of Necessity Based on WTO Appellate Body Jurisprudence**




To be "necessary," a measure should be at or closer to the left than the right end of the range. In turn, to decide where the measure lies on the continuum, there is a need to weigh and balance factors such as the:

1) contribution of the measure to secure compliance with the law at issue,

2) importance of the common interests or values protected by the law, and

3) impact of the measure on imports or exports.[140]

Succinctly put, the greater contribution a measure makes to the objective (factor (1)), the more likely the measure is "necessary."

The Appellate Body also reiterated its subsequent holding in *Brazil – Retreaded Tyres*, that analysis of the contribution of a measure to a stated objective should be through evidence or data concerning the past or present. In the case at bar, it added that other types of proof that do not involve immediately observable evidence may be offered.[141] That is particularly appropriate if in the short term it is difficult to prove the contribution made by one specific measure as distinct from another, and thereby avoid the risk of misattribution. So, then, was it truly necessary to exclude all entities except wholly SOEs from eligibility to import publications?[142]

China said "yes," for two reasons.[143] First, the Chinese government could not compel private enterprises or public-private JVs to bear the substantial cost of performing content review. Content review is a public policy function. The government could impose the burden of content review only on a firm in which the government holds all the equity, i.e., 100% SOE. The government could not expect a privately owned enterprise to pay to perform a public interest function. This cost consists of 1) human resources (i.e., employees who act as censors), 2) equipment, facilities, and premises (i.e., the physical resources used by the censors, such as computer hardware, as well as the requisite software), and 3) losses from compensating customers of publications that fail to pass content review. China urged that the government is not in a position to impose that burden on non-SOEs.

Second, only a wholly SOE can satisfy the requirement in Article 42(2) of the *Publications Regulation* concerning suitable organizations and qualified personnel. That is, only an SOE has the capacity to perform content review in a way to meet the high level of public morality protection China desires. In brief, content review is a public trust that must stay with a public entity.

Both Chinese reasons are grounded in an orthodox Communist mentality, endemic to which is a rigid dichotomy between public and private spaces. From a non-Chinese perspective, a blurred line between the public and private is familiar.

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140. *Id*. ¶ 252.

141. *Id*. ¶¶ 252–53. The similarity between this identification-and-attribution analysis, and that analysis in the context of causal factors to prove injury in antidumping (AD), countervailing duty (CVD), and safeguard cases, is evident.

142. *Id.* ¶ 255.

143. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 257.

Market economies tend to have admixtures of public-private partnerships taking one form or another.

Accordingly, as to the first argument that the Chinese government is not in a position to impose a cost on a non-SOE, the United States successfully rebutted it on empirical grounds—or rather, the lack thereof. China adduced little evidence on the cost of content review. While it identified the three aforementioned categories of costs, China provided no figures for these costs. This rebuttal, while successful, was understated.

What the United States could have said, but did not, is that the first argument (put undiplomatically) is pure poppycock. WTO Member governments far less mighty than China's frequently impose or debate the imposition of costs on private firms through legal and regulatory measures. In each Member, there is a dynamic between government and the business community, with significant legal and economic academic commentary to boot on which of the two parties is in the best position to bear a particular burden. That dynamic extends to functions traditionally thought of as "public," such as prison, and ones conventionally viewed as "private," such as support for the arts and humanities. How that dynamic plays out in a particular country depends on its unique political, economic, cultural, and religious landscape.

The United States could have intoned that for China to claim it is incapable of putting a cost on private firms to perform a public function either is a stunning tacit admission that the Communist Party is not so mighty after all, or simply disingenuous. After all, a quintessential move in legal argumentation is to point out that the contention of the other side suggests the other side is either a fool or a knave. This move, of course, carries the risk of degenerating into an undignified ad hominem attack. China appears lucky that the United States took the proverbial high road and thereby avoided the temptation of embarrassing Beijing anymore than it embarrassed itself.

As to the second argument, the United States rebutted non-SOEs can perform public interest functions if they are given sufficient incentives and face credible dissuasive sanctions.[144] (An obvious, but imperfect, illustration would be private security forces used in a variety of domestic and international settings.) Privately owned enterprises, or ones with mixed public-private ownership, can attract qualified personnel and obtain the organizational know-how needed to conduct a proper content review. There is no reason to believe a privately owned enterprise will be less scrupulous in its censorship than an SOE.

The Appellate Body was entirely satisfied that (contrary to Chinese contentions) the Panel had not misrepresented its two arguments, and thus did not violate its DSU Article 11 mission to avoid errors of law and make an objective assessment of the matter.[145] In brief, China "did not establish a *connection* between" exclusive ownership by the government of the equity of an import entity

144. *See id*. ¶ 258.
145. *Id*. ¶¶ 262–69.

on the one hand, and the contribution of that entity to protecting public morals in China on the other hand. Consequently, this aspect of the *GATT* Article XX(a) defense failed the "necessity" test.[146]

### d. Contribution of China's Exclusions of Foreign-Invested Enterprises to Protecting Public Morals in China?

China and the United States argued over whether the Panel was right to hold that Chinese measures excluding foreign-invested enterprises from being approved or designated import entities for books, newspapers, periodicals, electronic publications, and AVHE products (including sound recordings and films for theatrical release) are necessary under *GATT* Article XX(a). (These measures were the *Catalogue* (Articles X:2–3), *Foreign Investment Regulation* (Articles 3–4), *Several Opinions* (Article 4), *2001 Audiovisual Products Regulation* (Article 27), *Audiovisual Products Importation Rule* (Article 8), and *Audiovisual Sub-Distribution Rule* (Article 21).) Again the issue was whether the measures contributed to the protection of public morality in China. China contended that a foreign-invested enterprise may not have the requisite understanding or knowledge of Chinese moral standards and cannot communicate efficiently with Chinese governmental authorities.[147] Only qualified personnel working for non-foreign-invested enterprises adequately protect Chinese morality.

Once again, underlying the argument put forth by China was a fixation on maintaining control. How could censorship be entrusted to a firm not answerable directly to authorities in Beijing? Also lurking underneath are philosophies often encountered in a Communist Party and in some intellectual circles in Asia: moral relativism, and the distinction between Asian and Western values.

Moral relativism is the proposition that there is no such thing as absolute truth, but rather a plethora of truths all of which are more or less equal in their degree of truth, and the choice of which depends on the circumstances. This proposition is indispensable to Communist Party control. If absolute truth exists, then there are certain red lines that even the Party cannot cross—such as, for example, trespasses against the inherent dignity of man.

As for Asian values, the proposition here is that there are no universal values, nothing catholic, as it were. Democracy in America may be fine for the American context, but the political and civil liberties championed by the Founding Fathers have no necessary relevance to Asia. Thus, for example, Mr. Zhou Yongkang, the head of China's internal security services and a member of the Politburo Standing Committee, which is the senior-most body of the Chinese Communist Party, wrote an article criticizing "erroneous western political and

146. *Id*. ¶ 268 (emphasis added).

147. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 272–73.

legal ideas."[148] Likewise, Wen Jiabao, China's Premier, stated without explanation, that any comparison between China and the autocracies of the Middle East and North Africa was "not correct" and highlighted threats to China's economic topics, namely, controlling inflation, reducing the gap between rich and poor, and fighting official corruption.[149]

Among the many problems with propositions are two. First, there are overwhelmingly strong arguments against both propositions from time-tested philosophical and theological perspectives. One such perspective is the Natural Law Theory, which is based on what any person, regardless of his or her philosophy or faith, can discern through the use of reason and reflection. Second, both arguments are on the wrong side of history, as President William Clinton pointedly told then-Chinese Premier Jiang Zemin at the White House in October 1997.[150] That is, both arguments are incompatible with an understanding of the progressive development of humankind and human rights.

Of course, close as they were to the surface of the *Audiovisual Products* case, neither Natural Law Theory nor grand historical patterns were directly at issue. Thus, the United States rebutted the Chinese argument on more practical—yet effective—grounds. First, because a foreign-invested enterprise might not have the needed understanding or knowledge of Chinese morality does not lead inexorably to the conclusion that all such enterprises should be excluded. Some such enterprises might have the requisite qualifications. After all, non-Chinese people can learn about Chinese moral standards, and vice versa, if and to the extent they differ across cultures. (There is, after all, a whole industry known as "cultural consulting.") Second, there is no reason to believe a foreign-invested enterprise cannot hire qualified personnel to help China protect its moral standards. The Appellate Body agreed and applied the same logic as it did to the State ownership requirement matter, putting it thusly:

> In analyzing China's defence of the State-ownership requirement, the Panel was not convinced that enterprises with private investment would be unable to attract qualified personnel or unable to obtain the expertise needed to conduct content review properly. In our view, such reasoning—with which we agree—applies equally to the arguments made by China in defence of its provisions excluding foreign-invested enterprises from engaging in importation. The mere fact that an entity

148. Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, FIN. TIMES, March 4, 2011, at 3.

149. Jamil Anderlini, *Beijing Rejects Any North African Analogy*, FIN. TIMES, March 15, 2011, at 6.

150. *See Trick or Treat*, ECONOMIST, Oct. 30, 1997, *available at* http://www.economist.com/node/104320; interview transcript *President Jiang Zemin*, ONLINE NEWSHOUR (Oct. 30, 1997), http://www.pbs.org/newshour/bb/asia/july-dec97/china_10-30.html.

> involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities. In fact, those carrying out these functions could be the same individuals, with the same qualifications and capabilities, irrespective of the ownership of the equity of the import entity.[151]

Consequently, China failed to prove that excluding foreign-invested enterprises from importation of reading materials or AVHE goods contributed to the protection of public morality in China. That measure simply is not "necessary" under *GATT* Article XX(a), and the Panel did its job in interpreting and applying this law correctly and in making an objective assessment of the matter under DSU Article 11.[152]

### e. Contribution of China's State Plan Requirement to Protecting Public Morals in China?

Another donnybrook in the *Audiovisual Products* Appellate case was whether the Panel was right to hold that China's State Plan Requirement (set forth in Article 42 of its *Publications Regulation*) is "necessary" under *GATT* Article XX(a) to protect Chinese public morality. This measure mandates conformity with China's State plan for the total number, structure, and distribution of publication import entities. As an intermediate conclusion, the Panel held this measure can make a material contribution to protecting public morality. The United States disagreed and appealed, even though it proposed a reasonably available alternative to the Requirement, with which the Panel agreed and on that basis found that China failed to justify the Requirement under Article XX(a).[153]

In its weighing and balancing, the Panel considered the contribution of the State Plan Requirement to the protection of Chinese public morality along with three other factors: 1) a lack of clarity as to the extent to which the Requirement "limits overall imports" of relevant copyright-intensive products, 2) the likelihood that the Requirement actually minimizes unnecessary delays in importation transactions, and 3) the fact the Requirement "does not *a priori* exclude any particular type of enterprise in China from establishing an import entity."[154]

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151. Appellate Body Report, *supra* note 25, *Audiovisual Products*, ¶ 277.
152. *See id*. ¶¶ 275–78.
153. *See id*. ¶ 280.
154. *See id*. ¶ 279.

Thus, once again, the key issue concerned application of the Article XX(a) necessity test. China never provided the Panel or Appellate Body with the State Plan, saying such Plans are not available in writing.[155] But, citing in part what it acknowledged to be "circumstantial evidence," China said the Plan prescribes development consistent with selecting only a limited number of import entities, each of which had extensive geographic coverage.[156] Mandating that a small number of companies operate widely through branches ensures these companies have premises in a large number of customs areas, so that no entry gate into China is overlooked. Moreover, restricting import entities to a small number ensures that content review is efficient and smooth. In other words, China urged, and the Panel agreed, that limiting the number of import entities for copyright-intensive products materially contributes to the protection of public morals for two reasons. First, GAPP could interact with these entities to ensure the consistency of their content review. Second, GAPP could take more time to conduct annual inspections for compliance with the content requirements.[157]

For its argument, the United States relied heavily on the lack of transparency surrounding the State Plan.[158] How could the Panel reach a preliminary conclusion that the Plan can help protect Chinese public morality when it never was presented with the Plan? Making such a finding, with scarcely an evidentiary record, contravenes DSU Article 11. Of course, the truth, but one not articulated expressly by the United States, was that the State Plan Requirement, like the other controversial measures, is all about control by the Communist Party:

> China further asserted that limiting the number of importation entities "enables the administrative authorities to have *efficient control over whether those entities comply with the rules and procedures on inappropriate content*."[159]

The Plan itself is not transparent, and certainly not a matter for public debate or comment by domestic or foreign entities. But, to China's credit, the above-quoted admission is remarkably candid.

The Appellate Body agreed with the United States. The Panel erred in its preliminary finding the State Plan Requirement, specifically limiting the number of import entities approved to import copyright-intensive products, "can make a material contribution to the protection of public morals," or "is apt to" do so, in the absence of a reasonably available alternative and, therefore, is "necessary" to

155. *See id*. ¶¶ 282, 287.
156. *Id.* ¶ 287.
157. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 287, 291.
158. *See id*. ¶¶ 285–86.
159. *Id*. ¶ 282 (emphasis added).

that protection.[160] Why? First, the Panel failed to cite quantitative or qualitative evidence to support its intermediate finding.[161]

Second, China argued inconsistently.[162] In one part of its brief, it said the State Plan does not set a quantitative threshold on the number of enterprises that could be approved to import copyright-intensive product. In a different part of the same brief, it said the Plan does contribute to limiting the number of approved entities. The Panel was wrong to assume the Requirement did, in fact, impose a limitation on the number of import entities. In turn, it was wrong to agree with China that a limitation enhances the ability of GAPP to conduct annual inspections for compliance with content review requirements by giving GAPP more time per inspection.[163]

Third, as intimated, the Panel was sloppy in the way it phrased its finding. The Panel used three different phraseologies, which the Appellate Body highlighted:

> The Panel stated at the outset of its analysis that it would "consider whether [the State Plan Requirement] *makes a contribution* to the realization of . . . the protection of public morals in China." This language suggests that the Panel intended to assess the *actual* contribution of the State plan requirement to the protection of public morals in China. The Panel then stated that it could "see that limiting the number of import entities *can make a material contribution*." Finally, in its conclusion, the Panel stated that "the requirement of conformity with the State plan is *apt to make a material contribution* to the protection of public morals."[164]

Unfortunately, none of these phraseologies got to the key point: does the State Plan make an "*actual* contribution" to the protection of public morals in China?[165]

### f. Restrictive Effect of the Chinese Measures?

Weighing and balancing a measure put forth as "necessary" to protect public morals in an importing country requires not only an examination of the

160. *See id*. ¶ 297. The Appellate Body found it unnecessary to rule on whether the Panel contravened *DSU* Article 11 by reaching a finding with no evidentiary basis. *See id*. ¶¶ 298–99.

161. *See id*. ¶¶ 292, 294.

162. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 293.

163. *See id*. ¶¶ 295–96.

164. *Id*. ¶ 290 (emphasis in original).

165. *Id*. (emphasis in original).

actual contribution that measure makes to such protection, but also consideration of the restrictive effect the measure has on trade. Simply put, the less restrictive the effects of an illegal measure, the more likely that measure is to be characterized as "necessary" and, therefore, justified by an applicable exception.[166] Thus, if a measure is highly restrictive, then that measure should be carefully designed so that its other features, when taken into account in the weighing and balancing process, will outweigh its restrictive effects.[167] The Panel looked both at the restrictive effect of Chinese measures on imports of copyright-intensive goods and on entities wishing to engage in such importing.[168] In other words, the Panel checked the trade-restrictive effects on trade in goods (what is traded) and on traders (who trades or has the right to trade).

As to the first effect, the Panel was not impressed with Chinese statistics that the number of titles of newspapers and publications increased in China between 2002 and 2006.[169] Obviously, the increase was not proof that Chinese measures had no effect on restricting imports. Imports might have increased yet more, but for the measures. On appeal, China objected to consideration of the restrictive effects of its measures on enterprises.[170] That consideration should be only in respect to imports. Taking into account the effect on enterprises presented China with an unsustainable burden of proof.

That contention had to be wrong, said the Appellate Body.[171] Of the four key measures at issue, the Panel rendered a split verdict. The Panel found 1) the State Ownership Requirement, and 2) measures excluding foreign-invested enterprises from importing copyright-intensive products are the most restrictive of China's measures. That is because they were a priori exclusions of certain enterprises from importing the products at issue. But, said the Panel, the 3) State Plan Requirement, and 4) Suitable Organization and Personnel Requirement have a less restrictive effect. That is because they are not a priori prohibitions on the right of certain enterprises to import. So in the absence of a reasonably available alternative, the third and fourth measures are "necessary" to protect public morality in China. In brief, the Appellate Body pointed out, China's burden is not unsustainable, as it had met it at the Panel stage on two of the four measures.

On appeal, China also objected to the evaluation of the restrictive effects of its measures in the context of both deciding whether the measures were illegal and whether they were justified.[172] Doing so (as the Panel did) led to circular reasoning and an absurd situation. The Panel used the restrictive effects of the measures in its reasoning that the measures violate paragraph 5:1 of the *Protocol* and in its reasoning that the measures are unnecessary under *GATT* Article XX(a).

166. *See id.* ¶ 310.
167. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 310.
168. *See id.* ¶ 300.
169. *See id.*
170. *See id.* ¶¶ 301, 308.
171. *See id.* ¶ 310.
172. *See id.* ¶¶ 301, 308.

It is fine, said China, to consider the restrictive effect of a measure to ascertain whether a measure is consistent with a multilateral trade obligation. Or, it is fine to consider the restrictive effect of a measure in determining whether the measure is justified under an exception to that obligation. But it is not copacetic to do both, i.e., to consider the restrictive effects in both contexts. If the restrictive effects of the measures on enterprises as well as imports are the reason for the violation and for denial of the defense to the violation, then how can China ever satisfy Article XX(a)?

The Appellate Body rejected China's contentions.[173] First, *GATT* Article XX(a) does not restrict an adjudicator to taking into account only the restrictive effect of a measure on imports of relevant products.[174] The treaty language does not refer specifically to "imports" or "importers," or to "products" or "traders." The *chapeau* of Article XX also eschews such terminology and speaks of restrictions on international "trade."

Second, the *Korea – Various Measures on Beef* precedent shows that examining the restrictive effect on who can engage in importing relevant products, as well as the effect on the products themselves, sometimes is required under the applicable covered agreement.[175] In that case, the accord was *GATT*, specifically Article III:4. This provision not only mandates treatment no less favorable for imports vis-à-vis like domestic products in respect of laws, regulations, and requirements, but also with respect to any measure affecting the internal sale, offer for sale, purchase, transportation, distribution, or use of imported and like domestic goods. Reference to such measures implicates anyone who sells, offers for sale, purchases, transports, distributes, or uses an imported or like domestic product. Therefore, in mounting an Article XX defense that has a "necessity" test to an Article III:4 challenge, an adjudicator rightly considers traders as well as goods. Otherwise, there could be an equality of competitive opportunities for imported and like domestic products, but not for importers versus domestic producers, and this second inequality would undermine the first equality. In brief, if the covered agreement at issue calls for or suggests it is appropriate to look at who as well as what is traded, then so be it. In the case at bar, the covered agreement, as it were, is paragraph 5:1 of the *Protocol*, which grants a right to trade to all enterprises with respect to goods. That grant is explicit—it applies to who is trading, not just what is traded. Therefore, when engaging in a weighing and balancing of factors under the *GATT* Article XX(a) "necessity" defense to a violation of paragraph 5:1, it is only proper to consider traders.

Third, as to considering the restrictive effects of a measure (whether on goods traded or on traders) in two contexts (a possible violation and a possible exception to a violation), the Appellate Body disagreed with the Chinese argument. Nothing in *GATT* or any of the other *WTO Agreements* precludes

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173. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 311.
174. *See id*. ¶ 303.
175. *See id*. ¶¶ 304–07.

analysis of restrictive effects in both contexts. Indeed, careful scrutiny of the two contexts reveals the analysis is different in each of them:[176]

- First, in considering whether a measure violates an obligation under *GATT* or the other *WTO Agreements*, as in connection with paragraph 5:1 of China's *Protocol*, the question is whether there is any restrictive effect at all caused by the controversial measure.

- Second, in considering whether a measure that is inconsistent with an obligation under *GATT* or the other *WTO Agreements* is justified under an applicable exception, there are two questions, which differ from each other and from the analysis in the first context: To what extent does the inconsistent measure restrict imports? And, how should the restrictive effect be weighted and balanced against the contribution it achieves to a legitimate policy objective it purportedly serves and the societal importance of that objective?

In brief, the reasoning is not circular, but sequential. It does not result in an absurd conclusion, but rather embodies logical, distinct inquiries.

### g. Reasonably Available Alternatives?

Does the Chinese Communist Party have at its disposal, as the United States proposed, a reasonably available alternative means to realize its objective of protecting public morality that was less trade restrictive than its actual measures? The question arose in the context of the State Plan Requirement and Suitable Organization and Qualified Personnel Requirement, both of which the Panel found as a preliminary matter are "necessary" on the assumption no reasonable

176. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 308. The Appellate Body also cast aside the Chinese argument that the *Audiovisual Products* Panel committed the same mistake as the Panel in *United States – Gasoline*. *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996). This case is treated in INTERNATIONAL TRADE LAW, *supra* note 119, at 1391–99.

In the *Gasoline* case, the Appellate Body faulted the Panel for examining whether less favorable treatment of imported gasoline (the *GATT* Article III:4 violation) was related to the conservation of exhaustible natural resources (under *GATT* XX(g)). The correct inquiry was to examine whether the controversial American measure was related to conservation. In the *Audiovisual Products* case, the Panel examined the relationship not between China's national treatment violation and Article XX(a), but between its unlawful measure and that Article—as the Panel was supposed to do. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 309.

alternative existed. The answer, said the United States, with which the Panel agreed, was "yes."

The alternative is for the government of China to assume sole responsibility for conducting content review.[177] That way, there would be no restriction on who could import copyright-intensive products into China, and the importing entities would be free from conducting content review. Instead, they would submit their proposed imports to the Chinese government, which would check their content for immoral tidbits, before taking a final decision on allowing the merchandise to clear customs.

Surely, if the Chinese government itself and alone reviewed the content of prospective imports of cultural products for immoral content, then the effect on trade would be significantly less restrictive than mandating conformity with a central plan for imported publications as to number, structure, and distribution, and with rules about and organizational structure and personnel. Indeed, there would be no impact on trade, that is, on traders, in that any entity—foreign or Chinese, public or private—could import copyright-intensive products. Surely, too, the government could contribute to the protection of Chinese morality through its content review at least as well as any SOE.

The Chinese appellate argument may mark a first in the annals of the history of Communism: a Communist Party in power publicly declares that censorship would impose an undue burden on the government:

> 313. China appeals this finding and submits that the proposed alternative—that the Chinese Government be given sole responsibility for conducting content review—is not "reasonably available," *because it is merely theoretical in nature and would impose an undue and excessive burden on China*. China alleges that the Panel erred in law and failed to properly address arguments it presented for purposes of demonstrating that the proposed alternative is not "reasonably available."
>
> 314. The United States contends that China failed to submit evidence in support of its position that adopting the United States' proposal would impose an undue burden on China. Instead, the evidence before the Panel established that *the Chinese Government does have the capacity to carry out content review, because Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products*.
>
> 322. China's main arguments on appeal allege that the Panel erred in law and failed to properly address arguments presented

177. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 315–16.

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

323. The United States responds that, because China failed to submit evidence substantiating its position that adopting the United States' proposal would impose an undue burden on China, the Panel rightly found that China had failed to establish that content review under the sole responsibility of the Chinese Government is not reasonably available to it. Instead, the evidence before the Panel suggested that the Chinese Government does have the capacity to carry out content review, because *Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products*. In addition, the United States asserts, China has not responded to the Panel's observation that *China*

> *could charge fees to defray additional expense involved in its performance of content review* and that, in fact, Article 44 of the *Publications Regulation* already provides for that option. *The United States adds that, because the Chinese Government owns 100 per cent of the equity in the importation entities, the Government is in effect already financing content review of imported publications*.[178]

The United States could have called the Chinese argument laughable, which it was. For instance, "tremendous restructuring" is exactly what the Communist Party proclaims it has been doing since Deng Xiaoping catalyzed reforms in the 1970s. "Time constraints" are hardly an issue for government bureaucrats, let alone those in China. Indeed, on a different dispute (under-valuation of the Chinese currency, the yuan, relative to the dollar), China has proudly proclaimed, inter alia, it is an ancient civilization and will not succumb to foreign pressure to act quickly. Regarding "training and assigning a large number" of staff is precisely the kind of job-creation program the Communist Party might seek to bolster employment—why not hire and train more censors?

It might be ventured that one aspect of the above-quoted Chinese argument insulted the intelligence of the Appellate Body and the United States. China asserted that it would face substantial technical difficulties to set up a new electronic sampling system and upgrade its current electronic transmission system. The Communist Party seems to be reasonably successful with its Great Firewall, as the internet encyclopedia, *Wikipedia*, explains:

> Internet censorship in the People's Republic of China is conducted under a wide variety of laws and administrative regulations. There are no specific laws or regulations which the censorship follows. In accordance with these laws, more than sixty Internet regulations have been made by the People's Republic of China (PRC) government, and censorship systems are vigorously implemented by provincial branches of state-owned ISPs [Internet Service Providers], business companies, and organizations.
>
> The censorship is not applied in Hong Kong and Macau, as they are special entities recognized by international treaty vested with independent judicial power and not subject to most laws of the

178. *See id*. ¶¶ 312–13, 322–23 (emphasis added). China also argued that the Panel should not have evaluated the restrictive effect of the proposed alternative on traders, but only on goods. That was the same argument China made in respect of its controversial measures, and the Appellate Body rejected it for the same reasons. *See id*. ¶¶ 320–21.

> PRC, including those requiring the restriction of free flow of information.
>
> The escalation of the government's effort to neutralize critical online opinion comes after a series of large anti-Japanese, anti-pollution, anti-corruption protests, and ethnic riots, many of which were organized or publicized using instant messaging services, chat rooms, and text messages. The size of the Internet police is rumored at more than 50,000. Critical comments appearing on Internet forums, blogs, and major portals such as Sohu and Sina usually are erased within minutes.
>
> The apparatus of the PRC's Internet repression is considered more extensive and more advanced than in any other country in the world. The governmental authorities not only block website content but also monitor the Internet access of individuals. Amnesty International notes that China "has the largest recorded number of imprisoned journalists and cyber-dissidents in the world." The offences of which they are accused include communicating with groups abroad, opposing the persecution of the Falun Gong, signing online petitions, and calling for reform and an end to corruption.[179]

As international trade lawyers well know, WTO adjudicatory hearings are not open to the public unless the parties agree, and then only on closed circuit screening for individuals who can afford the time, expense, and trouble to be in Geneva, Switzerland. The Chinese argument helps explain why some WTO Members fear transparency: behind the closed door of a hearing room at the Appellate Division, they can make arguments that, if made in "open court," might provoke chuckles, gasps, or heckles. (To be sure, some such arguments seep out, as did this one, through Panel or Appellate Body Reports. But only a few trade law specialists actually read these Reports.)

Instead, the United States was polite—at least from the available written materials, namely, the Appellate Body Report. As quoted above, the United States was content to highlight that China exaggerated what was at stake: Some change associated with implementing the alternative would not rise to the level of an undue burden. And, the United States was content to state, albeit implicitly, the Chinese argument was hypocritical: Because content review under the existing

179. *Internet Censorship in the People's Republic of China*, WIKIPEDIA, http://en.wikipedia.org/wiki/Internet_censorship_in_the_People's_Republic_of_China (last visited March 4, 2011); *see also* Anupam Chander, *Googling Freedom*; 99 CAL. L. REV. 1, 13-14 (2011); Shirong Chen, *China Tightens Internet Censorship Controls* (May 4, 2011), BBC NEWS-ASIA PACIFIC, http://www.bbc.co.uk/news/world-asia-pacific-13281200.

controversial measures is via SOEs, a change to government review would not be a change in ownership at all. Not surprisingly, the Appellate Body agreed with the United States and the underlying Panel findings.

Citing again its precedent in *Korea – Various Measures on Beef*, as well as its decisions in *EC – Asbestos* and *US – Gambling*,[180] the Appellate Body reiterated the test for whether an alternative measure is "reasonably available" to a respondent importing country invoking a *GATT* Article XX or *GATS* Article XIV defense. The answer is that a proposed alternative measure is not "reasonably available" if:

1) Undue Burden—The alternative is "merely theoretical in nature," as would be the case if the importing country is incapable of implementing it or if it "imposes an undue burden . . . , such as 'prohibitive costs of substantial technical difficulties,'" or

2) Inadequate Protection—The alternative does not achieve the level of protection desired by the importing country with respect to a legitimate policy objective of the respondent.[181]

The Appellate Body further explained, as per *US – Gambling*, that the respondent need not show it has absolutely no alternatives at its disposal to achieve its objectives. That, too, would be too high a burden of proof. Likewise, the respondent need not prove that no cheaper alternative exists, i.e., that its controversial measure is the cheapest one available, because implementing an alternative may impose some cost.[182] That, too, would be too high a burden of proof. Rather, the respondent need only react to an alternative proposed by the complainant and show that the alternative is not a genuine one owing to either or both of the aforementioned two reasons.

In the case at bar, the Appellate Body agreed with the Panel that while China might have to allocate some additional human and financial resources to censorship authorities, especially to review the content of reading materials, that fact was offset by three others.[183] First, the Chinese government already makes final content review decisions on electronic publications, AVHE products, and films for theatrical release. Second, China failed to adduce evidence that the cost of implementing the American proposal (having non-incorporated government offices do content review) would be substantially higher than its current regime (of having incorporated SOEs do the review). Third, a single, central location for

180. *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (April 5, 2001). This Report is analyzed in our *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. at 505.

181. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 318 (quoting as to the first item *U.S. – Gambling*, ¶ 308).

182. *See id*. ¶¶ 319, 327.

183. *See id*. ¶¶ 325–29, 331–32.

content review, as the United States proposed, would replace the current system of review in numerous locations, thus facilitating the goals of the Chinese government concerning organizational nature and personnel caliber.

### 9. Appellate Body Holdings: Distribution Rights, Sound Recordings, and *GATS*[184]

The third and final major issue in the Appellate Body decision: What is the scope of China's *GATS* Schedule entry on "Sound Recordings and Distribution Services" and what are the implications of that scope? The analysis consisted of three specific questions:

- Did China construct Section 2:D of its *GATS* Schedule in such a manner that the entry "Sound Recording Distribution Services" encompasses the distribution of sound recordings in non-physical, including electronic, form?

- If so, then does the *GATS* Article XVII national treatment obligation extend to China's measures that prohibit foreign-invested entities from engaging in the electronic distribution of sound recordings?

- And, if so, did China violate this obligation?

To these three logically sequenced questions, the Appellate Body responded "yes," thereby accepting the views of the United States and upholding the decisions of the Panel.[185]

China told the Appellate Body that the Panel was wrong: China's *GATS* Schedule entry for "Sound Recording Distribution Services" does not cover electronic distribution of music. Hence, China urged, *GATS* is inapplicable to those services and the challenged measures that regulate them. The basis for China's argument was the ordinary meaning of the *GATS* Schedule entry "Sound Recording Distribution Services," taken in the context of the object and purpose of the relevant treaty (*GATS*) and based on supplementary means of interpretation.[186] In other words, China mounted an argument grounded on Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*").[187] These key provisions state:

184. *See id*. ¶¶ 338–413; Summary of Dispute, *supra* note 25.

185. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 416.

186. *See id*. ¶¶ 341, 349.

187. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 INT'L LEGAL MATERIALS 679 (1969) [hereinafter Vienna Convention].

*Article 31: General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32: Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

> (a) leaves the meaning ambiguous or obscure; or

> (b) leads to a result which is manifestly absurd or unreasonable.[188]

China contended that application of the principles of Articles 31 and 32 yield an "inconclusive" result. Given "such a high level of ambiguity," China should have applied the principle of in dubio mitius (literally, "in the doubts, the mild," or "in the doubts, the more favorable") and not adopted the interpretation least favorable to China.[189] This principle is one counseling restrictive interpretation: When the meaning of a term is in doubt, an interpretation that is favorable to a party assuming an obligation should be rendered.[190] In the criminal law, it is essentially an assumption of innocence.[191]

But the Appellate Body essentially re-did the work of the Panel under the *Vienna Convention*, which yielded the same result.

> a. Article 31(1) of the *Vienna Convention*: What is the Ordinary Meaning of "Sound Recording Distribution Services"?[192]

To resolve this question, the Appellate Body, like the Panel before it, looked to lexicographic sources. Those sources indicated China's promise encompassed sound embedded on non-physical as well as physical media. First, the *Shorter Oxford English Dictionary* definition of "recording," which includes "recorded material," refers to "material that is recorded," not the "recording material."[193] Consequently, the word "recording" is not limited to sound put on a physical storage device. It also covers content that is recorded, regardless of the technology used for storing or distributing the sound. Second, the *Shorter Oxford English Dictionary* definition of "distribution" refers to the "dispersal of commodities."[194] On this basis, the Panel concluded that "distribution" can be understood as "the dispersal of things of value" whether tangible or intangible products.

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188. *Id*. art. 31–32.

189. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 341.

190. *See* Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Antidumping Decisions*, 34 LAW & POL'Y INT'L BUS. 152, n.183 (2002). For a more detailed discussion of the principle, see Christophe J. Larouer, *In the Name of Sovereignty?The Battle over In Dubio Mitius Inside and Outside the Courts*, CORNELL L. SCH. INTER-UNIV. GRADUATE STUDENT CONF. PAPERS, Paper 22 (2009), *available at* htttp://scholarship.law.cornell.edu/lps_clacp/22.

191. *See In Dubio Mitius*, WORLDLINGO, http://www.worldlingo.com/ma/dewiki/en/In_dubio_mitius (last visited Dec. 31, 2011).

192. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 344, 346, 348–57, 398–99.

193. *See id*. ¶ 350.

194. *See id*. ¶ 351.

China complained that the Panel failed to take account of its definitions of "recording" and "distribution" from lexicographic sources it submitted, such as *The American Heritage Dictionary of the English Language*.[195] Not so, said the Appellate Body, and moreover, no Panel is required to quote each dictionary definition submitted by parties to a case of every contested term.[196] All the Panel had to do, which it did, was explore whether "Sound Recording Distribution Services" extended to distribution in electronic form or could mean only distribution in physical form.[197] The Panel rightly decided the dictionaries do not support the restrictive definition China advocated.

b. Article 31(1) of the *Vienna Convention*: What is the Context of "Sound Recording Distribution Services"?[198]

The Appellate Body cautioned against equating a dictionary definition with "ordinary meaning."[199] Citing its precedents in *US – Gambling*, *US – Softwood Lumber IV*,[200] *Canada – Aircraft*,[201] and *EC – Asbestos*, a dictionary definition of a term is not, by itself, necessarily capable of resolving a complex question about meaning. That is, citing its precedent in *US – Offset Act (Byrd Amendment)*,[202] dictionaries are "important guides to, but not dispositive of, the meaning of words appearing in treaties."[203] Rather, a holistic exercise is needed, one that cannot be mechanically divided rigidly, which involves looking at the context of disputed terms, and the object and purpose of the treaty.

What are the elements of the context of the phrase "Sound Recording Distribution Services"? The immediate context is provided by:

1) The heading of Sector 2:D of China's *GATS* Schedule, namely, "Audiovisual Services," and

195. *See id*. ¶ 352.

196. *See id*. ¶ 354.

197. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 354.

198. *See id*. ¶¶ 344, 346, 358–88, 398–99.

199. *See id*. ¶ 348.

200. *See* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 59, WT/DS257/AB/R (Feb. 17, 2004). This Report is analyzed in our *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 178.

201. *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶ 153, WT/DS70/AB/R (Aug. 20, 2009). This case is treated in INTERNATIONAL TRADE LAW, *supra* note 119, at 1075–80.

202. *See* Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 248, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 27, 2003). This Report is analyzed in our *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 332 (2004).

203. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 348.

2) China's commitment on distribution services in Sector 4, called "Distribution Services," of the Schedule.

Additional context is provided by:

1) *GATS*, and

2) *GATS* Schedules of certain other WTO Members.

Even within the examination of contextual elements, a holistic exercise is necessary. No one contextual element is dispositive. Typically, some elements support a particular interpretation, others may be consistent with that interpretation, and still others may offer no guidance.[204] Conceivably, some contextual elements may point to a different interpretation.

China argued that each contextual element is inconclusive as to whether "Sound Recording Distribution Services" extends to electronic distribution of sound recordings. Reviewing the work of the Panel, the Appellate Body disagreed. It found, as did the Panel, these contexts suggest "Sound Recording Distribution Services" covers the electronic distribution of sound recordings. Some contextual elements evince this suggestion, while others were not inconsistent with it.

First, with respect to Sector 2:D, "Audiovisual Services," China's commitments on market access and national treatment in the sub-sector "Sound Recording Distribution Services" do not specify whether they are limited to the distribution of physical goods.[205] But China set out a market access limitation on the distribution of audiovisual "products" that refers to both tangible and intangible items. China could have expressly stated that its market access limitation covers only the distribution of CDs, DVDs, tapes, and videocassettes—that is, physical media. But it did not do so, which thereby suggests that China meant the limitation to cover intangible media as well.

Second, in China's *GATS* Schedule, Sector 2:D, "Audiovisual Services," consists of the sub-sector "Sound Recording Distribution Services" and two other sub-sectors:

- "Videos, including entertainment software and (CPC 83202), distribution services," and
- "Cinema Theater Services"

204. *See id.* ¶ 388.
205. *See id.* ¶ 364.

The "Cinema Theater Services" sub-sector is not relevant to contextual analysis, because it concerns the construction and renovation of movie theaters. But the "Videos" sub-sector does provide relevant context.

The "Videos" sub-sector covers tangible and intangible products, i.e., physical products or products that can be transmitted electronically. In this sub-sector, as well as in the "Sound Recording Distribution Services" sub-sector, China made full market access and national treatment commitments in Modes I (cross-border supply), II (consumption abroad), and III (commercial presence). China scheduled an exception only for certain market access limitations on Mode III as to the type of legal entity or JV through which a foreign service supplier could distribute audiovisual products other than movies (namely, they must form a contractual JV with a Chinese partner and must agree that China has a right to examine the content of audio and video products).[206]

The inference drawn by the Appellate Body and Panel from China's decision here is that if China made the same commitments in both sub-sectors and one of them ("Videos") clearly covers tangible and intangible products, then the other sub-sector likely covers both types of products, too.[207] Moreover, China did not expressly include or exclude any particular form of delivery from its exception.[208] That is, China did not say its exception to its market access and national treatment on Mode III encompasses only tangible distribution. Unfortunately, the Appellate Body did not spell out this inference as clearly as it should have. It did brush aside as nonsense—unfortunately, without calling it that—the Chinese argument that the plural word "Videos" refers to tangible content, because only physical copies of content recorded on tape can be counted. Obviously, videos stored on electronic files can be counted just as easily as those embedded on a physical media.[209]

Third, China expressly excludes "motion pictures" from its "Audiovisual Services" sector commitments under Mode III.[210] That exclusion implies that movies otherwise are in that sector and subject to those commitments. Instead, China undertook an additional commitment—that it would allow the annual importation of twenty motion pictures for theatrical release on a revenue-sharing basis.[211] These Chinese scheduling decisions indicate that "Audiovisual Services" covers tangible and intangible products. That is because they relate to "motion pictures," and it was undisputed that "motion pictures" covers non-physical content that can be embedded in physical products. In turn, the "Sound Recording

206. *See id*. ¶ 363. The four Modes of service supply are explained in INTERNATIONAL TRADE LAW, *supra* note 119, at 1546–48.

207. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 363, 368–69.

208. *See id*. ¶ 375.

209. *See id*. ¶ 367.

210. *See id*. ¶ 365.

211. *See id*. ¶ 363.

Distribution Services" sub-sector must include intangible items if the larger "Audiovisual Services" sector does.

The context also includes Sector 4, namely, "Distribution Services." This context supports the interpretation that the entry "Sound Recording Distribution Services" sub-sector extends to distribution of sound through electronic means and more generally that the "Audiovisual Services" sector extends to the distribution of audiovisual products in non-physical form. Why? Here again, the Appellate Body prose is turgid and weakens the force of its logic.[212]

The answer seems to be as follows: Sector 4, "Distribution Services," covers all physical products (other than ones China explicitly excluded in that sectoral column of its Schedule). Suppose the "Sound Recording Distribution Services" sub-sector and the "Audiovisual Services" sector covered exclusively audiovisual products in physical form. Then there would be no need to insert entries for "Sound Recordings" (as well as the sub-sector entries on "Videos") under the "Audiovisual Services" sector. Such entries already would be covered—as referring only to tangible expressions—by Sector 4, "Distribution Services." The fact China made separate entries for "Sound Recordings" under the "Audiovisual Services" sector suggests that China 1) understood "Sound Recordings" to include tangible and intangible items, and 2) did not think the "Distribution Services" sector covered "Sound Recordings," because "Distribution Services" covers only goods.

A fourth contextual element for the "Sound Recording Distribution Services" language is *GATS* Article XXVIII(b). This provision, said the Panel and Appellate Body, supports the interpretation that "Sound Recording Distribution Services" encompasses electronic distribution of sound recordings. Article XXVIII(b) states:

> For the purpose of this Agreement:
>
> . . . .
>
> (b) "[S]upply of a service" includes the production, *distribution*, marketing, sale and delivery of a *service*; . . . [213]

This definition is relevant because the term "supply of services" is used in the *GATS* Article XVII(1) national treatment obligation. This definition does not limit "distribution" or "service" to physical matters.[214] To the contrary, "distribution" refers to something that is intangible: services. To be sure, Article XXVIII(b) does not exclude the possibility that a WTO Member might prevent the extension of these terms to products stored in intangible form by drafting its Services Schedule entries appropriately. But China did not do so.

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212. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 372.

213. *See* GATS, *supra* note 42, art. XXVIII(b) (emphasis added).

214. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶¶ 378–79.

Still another contextual element to which the Appellate Body, like the Panel, looked to interpret the scope of "Sound Recording Distribution Services" was the *GATS* Services Schedules of other WTO Members. Even though each such Schedule has its own logic, specific to the Member to which the Schedule relates, looking at a variety of Schedules conveys a sense of the common intentions of the Members.[215] None of the other Schedules suggested that sound recordings were limited to distribution in physical form.

Other contextual elements, said the Panel and Appellate Body, are consistent with the suggestion, do not address the matter, or do not contradict the suggestion. No single contextual element supported China's argument. In contrast, while no single contextual element was dispositive, looking at them overall suggested that they support the view that "Sound Recording Distribution Services" in China's *GATS* Schedule includes the distribution of content in non-physical form.

### c. Article 31(1) of the *Vienna Convention*: What is the Object and Purpose of *GATS*?[216]

Following the work of the Panel, the Appellate Body checked the object and purpose of *GATS* to see if it sheds light on whether "Sound Recording Distribution Services" in China's *GATS* Schedule includes the electronic distribution of music. The *Preamble* of *GATS* lays out the object and purpose of the treaty, and they are consistent with the conclusion that the key language encompasses the non-physical delivery of sound content through technologies like the internet. In particular, the object and purpose of the "progressive liberalization" (as used in the *Preamble*) of services trade counsels for interpreting terms used in a Services Schedule at the time the interpretation is rendered.

China argued the opposite, that progressive liberalization means commitments should be defined based on meanings when those commitments are made, i.e., when China acceded to the WTO. But for four reasons across four paragraphs, the Appellate Body rejected that argument:

> 394. The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS. The scheduling of specific commitments by service sectors and modes of supply represents another manifestation of progressive

215. *See id*. ¶¶ 382–83.
216. *See id*. ¶¶ 344, 346, 389–99.

liberalization. In making specific commitments, Members are not required to liberalize fully the chosen sector, but may limit the coverage to particular subsectors and modes of supply and maintain limitations, conditions, or qualifications on market access and national treatment, provided that they are inscribed in their Schedules. *We do not consider, however, that the principle of progressive liberalization lends support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound*.

395. *Neither are we persuaded that, if the Panel had based its analysis on the meanings of the terms "sound recording" and "distribution" at the time of China's accession to the WTO—that is, 2001—it would have reached a different conclusion on the interpretation of the entry "Sound recording distribution services" in China's GATS Schedule*. The term "sound recording" can be used to refer to "recorded content," irrespective of how it is distributed. We have already considered above that the GATS, which entered into force in 1995, contemplates in Article XXVIII(b) the distribution of services—that is, of intangibles. This lends support to interpreting the meaning of "distribution" as applying to both tangible and intangible products, *and would equally have done so in 2001*, and at the time the Panel interpreted the entry "Sound recording distribution services" in China's GATS Schedule.

396. More generally, we consider that *the terms used in China's GATS Schedule ("sound recording" and "distribution") are sufficiently generic that what they apply to may change over time*. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.

397. We further note that *interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty*. Such interpretation would *undermine the predictability, security, and clarity of GATS specific*

> *commitments*, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.[217]

The rationale of the Appellate Body here accords perfectly with common sense. Liberalization of services trade would be far less "progressive" if the meanings of terms in a Services Schedule ossify as the date those terms are written than if the terms are alive and breathing.

### d. Article 32 of the *Vienna Convention*: Supplementary Means of Interpretation?[218]

Finally, the Appellate Body recapped and essentially repeated the Panel's work on whether supplementary means of interpretation confirmed the tentative conclusion that "Sound Recording Distribution Services" in China's *GATS* Schedule covers the electronic distribution of music. The supplementary tools are the Services Sectoral Classification List and the 1993 Explanatory Note on Scheduling of Initial Commitments in Trade in Services ("1993 Scheduling Guidelines"). These documents are preparatory work for the *GATS*. They support the tentative conclusion or confirm it. Additional supplementary means of interpretation are certain circumstances surrounding the conclusion of China's *Protocol* and *GATS* Schedule. These circumstances do not support China's argument that "Sound Recording Distribution Services" cannot extend to the electronic distribution of sound recordings; i.e., they were consistent with the preliminary conclusion.

China thought the Panel was supposed to establish that the supplementary means of interpretation are conclusive evidence as to whether China's commitments on "Sound Recording Distribution Services" is limited to physical distribution of sound recordings. That is not true, said the Appellate Body.[219] The Panel correctly applied Article 32 of the *Vienna Convention*, namely, to confirm its tentative conclusion under Article 31. Moreover, China's approach to both Articles was narcissistic (though of course the Appellate Body did not put the point so indelicately):

> We further note that the purpose of treaty interpretation under Articles 31 and 32 of the *Vienna Convention* is to **ascertain the "common intention" of the parties, not China's intention alone**. We recall that, in this respect, in *US – Gambling*, the

217. *Id*. ¶¶ 394–97 (emphasis added).
218. *See id*. ¶¶ 345, 400–11.
219. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 404.

> Appellate Body found that "the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members." The circumstances of the conclusion of the treaty may thus be relevant to this "common intention."[220]

What the Appellate Body said next—concerning China's claim that application of the principles of Articles 31 and 32 yield an "inconclusive" result, so the Panel should have applied the principle of in dubio mitius—was resolute: there was no doubt.[221] That is, application of Articles 31 and 32 of the *Vienna Convention* do not yield a high level of ambiguity as to whether the language "Sound Recordings Distribution Services" includes electronically distributed content. It does. Therefore, even assuming the in dubio mitius principle is relevant to WTO dispute settlement, the principle is inapplicable to the case at bar.

10. Commentary

a. Morality and Appellate Body Writing

The *China Audiovisual* case is more than a battle between the top two economies in the world. It is about culture, cultural industries, and the regulation thereof. The case pits Hollywood against the Communist Party, with American cultural products being an irresistible force, and the Party being an immovable object. And it is a case that illustrates a point that ancient and medieval scholars appreciated, but that has been lost with the near tyranny of economic analyses of trade, namely, that trade is very much about morality.

China contended that the products at issue—cultural goods—have an impact on social and individual morality. The United States successfully challenged that claim, but not by showing China was wrong in its contention. It is, or should be, self-evident that cultural goods not only have an impact on social and individual morality, but also spring from that morality. The arrow of causation goes in both directions: cultural products shape and are shaped by morality. Rather, the United States won the case on the law, as it were. China simply could not prove that its restrictions were "necessary" to protect its culture.

Perhaps China lost, then, because it over-reacted: Its measures were draconian, more than needed to protect its culture. That proposition begs a key question: Why might China have over-reacted? Was it possibly because China is an authoritarian, single-party state, and its party is virtually obsessed with staying in power amidst mounting social tensions and dislocations?

220. *Id*. ¶ 405 (footnote omitted, italics emphasis in original, bold emphasis added).
221. *See id*. ¶ 411.

The Communist Party measures could have been conceived and adopted by plenty of non-Communist authoritarian regimes—and, as an empirical survey might reveal, indeed have been. In other words, perhaps China lost not because its argument about the link between culture and morality is intellectually flawed. Rather, perhaps it lost because it was not really defending that link as much as it was defending a political status quo in which the Communist Party controls what Chinese people read, watch, and listen to in their spare time.

Here, then, is no ordinary case. It boasts a fascinating admixture of culture, morality, and power in the context of multilateral trade disciplines. Yet, with its dreadful style, the Appellate Body took the life out of this case, one full of provocative substantive issues, facts, and law. A competent legal writing instructor in an American law school might be hard pressed to assign a grade above "C" to the Appellate Body for the quality of its writing in the *China – Audiovisual Products* case. Unfortunately, as in other cases, the Appellate Body fails to ease the burden on the reader.

That is a shame. Discussions of morality and trade, in particular, are all too rare in official documents. This intersection makes for some of the most poignant controversies arising from globalization. Accordingly, the Appellate Body treatment of *GATT* Article XX(a) makes for the most interesting reading in the Report. Yet the discussion is insufferably long-winded, consuming far more paragraphs (132) than necessary and containing maddening redundancies and deadly dull passages.

To take one of many examples, there was no need to quote paragraph 5:1 of the *Protocol* in paragraph 215 of the Appellate Body Report, as it already is quoted in footnote 222 of paragraph 135. As another example, the content of paragraph 217 (about China's argument) is almost entirely redundant with that of paragraphs 206 and 211, and a minor adjustment in those earlier paragraphs would have eliminated the need for paragraph 217. As for paragraph 218, it is maddening because it states the obvious.

Whether different passages of its report are drafted by different persons, and then e-mailed into a single account and thereafter merged into a separate file that undergoes a light-handed edit, is unclear. That is, however, the unmistakable impression, i.e., that there is a kind of drafting by committee, with different persons responsible for different sections of a report and one harried person who runs rather quickly through a merged document.

By no means does fault for the sins of style lie entirely with the Appellate Body. Considerable culpability rests with the DSU system and schedule. The Appellate Body cannot be all things to the international trade law community. If great prose is to be expected of it, then it has to be liberated from some constraints, one of which is time-consuming translation of its reports into French and Spanish. Among the many arguments for eliminating the need for such translation is this: in terms of contribution to the case law of international trade and the legitimacy and authority of the Appellate Body, one short, poignant, well-written English report is worth more than the sum total of an interminable, enervating, and uninspiring polyglot report.

As to the substance of its Report, some fault lies with the Appellate Body. Why? The great English essayist George Orwell (1903–1950) provided an answer in 1946:

> When one sees *highly educated men* looking on indifferently at *oppression and persecution*, one wonders which to despise more, their *cynicism* or their *short-sightedness*.[222]

The *Audiovisual Products* case was not just another trade dispute. The Appellate Body tried to make it one by emphasizing the technical over the thematic, by writing a report as it would have had the issue been zeroing in a dumping margin calculation or estimating pre-privatization subsidies in a countervailing duty investigation. Its report is antiseptic, free from any paragraph, sentence, or even footnote calling into doubt whether China's controls on copyright-intensive products are about morality or power. Not a single Appellate Body member, all of whom are highly educated, took the opportunity to file a concurring, much less dissenting, opinion.

Its report, then, is shortsighted, if not cynical. The Appellate Body faced a dubious invocation of the *GATT* morality exception to restrict free trade with the possible, if not likely, collateral effects being oppression and persecution. Yes, its report understandably stays out of China's politics and avoids impugning the motives of China's lawyers. But its report arguably damages its moral authority. As the supreme adjudicator of international trade law, by keeping silent, the Appellate Body spoke loudly: It will keep morality out of trade. In this endeavor, ultimately it will fail, as the two are inseparable.

### b. Ethics and Chinese Argumentation

In its *GATT* Article XX(a) discussion, the Appellate Body did not focus on the word "morality" in that provision. Rather, it left China to self-judge what is "immoral" for Chinese people. Surely it is far easier for the adjudicators in Geneva to write a legalistic opinion on "necessity" than to offer even a bit of dicta on "morality." They are, after all, lawyers, supposedly schooled in dictionaries but untrained in moral philosophy or moral theology.

Yet, lawyers do practice according to a canon of ethics, embodied in documents such as the United States *Model Rules of Professional Conduct*.[223] These rules, inter alia, constrain lawyers from making arguments to a court that

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222. *See* George Orwell, *The Prevention of Literature*, POLEMIC, Jan. 1946, ATLANTIC MONTHLY, Mar. 1947, *reprinted in* GEORGE ORWELL, ESSAYS 931, 943 (1968) (Everyman's Library ed. 2002) (emphasis added).

223. *See* MODEL RULES OF PROF'L CONDUCT, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

are not based on good faith, and from misleading or lying to a court. Concerning advocacy, Model Rule 3:1, titled "Meritorious Claims and Contentions," states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Also concerning advocacy, Model Rule 3:3, titled "Candor Toward the Tribunal," states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

Finally, concerning transactions with persons other than clients, Model Rule 4:1, titled "Truthfulness in Statements to Others," says:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent

> act by a client, unless disclosure is prohibited by Rule 1.6 [concerning confidentiality of information].

To be sure, many of the attorneys acting for China are not American, and the Appellate Body is not an American court. Nevertheless, it behooves the ethically inclined lawyer interested in the integrity of DSU argumentation to probe the ethics of China's arguments.

One matter, already mentioned, is whether China has a colorable claim to protecting public "morality." Pornography? Absolutely, i.e., all or nearly all WTO Members would agree that banning pornographic materials is justified under *GATT* Article XX(a). Suppression of Liu Xiaobo and Charter 08? Absolutely not; few Members (if they are candid) would agree public "morality" needs protection from the content of that Charter or its author, who (after all) won the 2010 Nobel Peace Prize. In other words, China's motives seem to have been mixed, because both kinds of content run afoul of Communist Party censors.

Another matter concerns the cost of censorship. In response to the American proposal that China has available to it a reasonable, less trade restrictive alternative—centralized content control—the key Chinese argument was that it could not afford this alternative. Implementing it would be an undue and excessive burden in terms of financial and administrative costs and China lacked the requisite capacity. As indicated above, this argument was laughable and insulting to the intelligence of the United States. Worse yet, query whether it was made in good faith.

This query is prompted by the fact the Beijing municipal government monitors all cell phone traffic:

> The Beijing municipal government announced plans this week [in March 2011] to roll out a global positioning system for all mobile phones. Although the authorities say it is for smart traffic management, the platform is expected to help security forces close gaps in their surveillance of people considered a risk.

A network expert at a state-backed telecom research institution said the planned system would also help people predict "hot spots." "Once it works properly, it can create alerts about an imminent concentration of people in certain areas," said the researcher, who asked not to be named.[224]

It would seem this high-technology monitoring system relies on content review. How else can officials know whether a group of people might gather in the street and begin a protest? It also would seem that this system, if in the hands of a local government, could be put in the hands of a central government.

224. Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, FIN. TIMES, Mar. 4, 2011, at 3.

Admittedly, the system was implemented after the arguments in the *Audiovisual Products* case were over. But it suggests that the capacity to perform centralized content review does exist, and it is unlikely to have been developed overnight. It also suggests that at least some Chinese officials are willing to state that there is one innocuous purpose for a technology (such as minimizing traffic congestion), when in fact the technology is dual-use (preventing public demonstrations as well as monitoring traffic).

Even more strongly, the query as to whether Chinese arguments about the reasonable availability of alternative measures were made in good faith is prompted by the reality of what the Communist Party spends on internal security. Consider the *Financial Times* report on the matter:

> *China's spending on internal security overtook national defense* for the first time last year [2010], underlining Beijing's growing concern about public unrest.
>
> . . . .
>
> [S]pending on public security grew 15.6 per cent to Rmb [*Renminbi*, meaning "People's money"] 549 bn [billion] ($84 bn) last year, compared with defense spending that grew 7.8 per cent to Rmb 533.4 bn. Public security spending was RMB 34.6 bn., or 6.7 per cent, over budget.
>
> Security spending, budgeted at Rmb 624 bn [or $94.9 billion, at the March 15, 2011 exchange rate of 6.578 Rmb per dollar], is this year [2011] scheduled to outpace defense, at Rmb 602 bn., and will be more than the combined budgets for healthcare, diplomacy and financial oversight.
>
> This reprioritization underscores Beijing's nervousness at escalating public unrest. Violent riots in Xinjiang and Tibet in recent years have prompted more spending on public security forces, including paramilitary forces known as the people's armed police.
>
> The increased spending comes as calls for a Middle East inspired "Jasmine revolution" have gone largely unanswered in China.
>
> . . . .
>
> [T]he calls for protests in China have sent security forces into overdrive. Dissidents have been rounded up or placed under heightened surveillance, and several foreign journalists were beaten by security officers as they visited potential protest sites last Sunday [Feb. 27, 2010].
>
> . . . .

> *China's internal security apparatus has grown more powerful in recent years*, with the rise of Zhou Yongkan, security chief, a member of the politburo standing committee.
>
> In one reminder of the scale of the internal security apparatus, official media reported that 739,000 security guards were dispatched to ensure order and direct traffic as China's annual congresses began in Beijing over the weekend.
>
> . . . .
>
> China's security budget includes funding for courts, jails, police, paramilitary, and even *internet monitoring*. Analysts say spending on both public security and national defense is *higher* than reported.[225]

To be sure, the case was adopted by the DSB in January 2010. The security budgets discussed in the *Financial Times* article cover 2010 and 2011. There is, then, a timing problem: it cannot be said with certainty that, on the one hand, China knew its National People's Congress (NPC) was going to approve a massive hike in the security budget and, on the other hand, put forth its WTO arguments. There also is an agency problem. In any government, few officials have a complete, bird's eye picture of official operations. That is, whether security and trade officials in China conversed with one another to ensure that trade officials did not mislead the WTO is an open question. Even if they did, it is difficult, if not impossible, to ascertain whether the security officials were entirely

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225. Leslie Hook, *Nervous Beijing Raises Security Spending*, FIN. TIMES, Mar. 7, 2011, at 5 (emphasis added). Hours before the first planned Jasmine revolution protest, Mr. Zhou Yongkang, referenced above, told his colleagues in the security services to "[s]trive to defuse conflicts and disputes while they are embryonic." Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, FIN. TIMES, Mar. 4, 2011, at 3; *see also* Kathrin Hille & Patti Waldmeir, *China's Twin Strategy Keeps Lid on Protests*, FIN. TIMES, Feb. 28, 2011, at 4; Geoff Dyer, *Nervous China Puts Security Apparatus into Overdrive*, FIN. TIMES, Feb. 24, 2011, at 2, *available at* http://www.ft.com/cms/s/0/d4fcf4e6-3f6d-11e0-a1ba-00144feabdc0.html#axzz1VJQdcsNq (discussing the crackdown on the Jasmine Revolution and other such incidents).

At the same time, there are signs of possible shifts by, or at least differing opinions within, the Chinese government. As Bill Emmott, former editor of *The Economist* wrote, "China has just voted [on Feb. 26 at the United Nations Security Council on Resolution 1970] to refer [Libyan] Colonel Gaddafi to the ICC [International Criminal Court] for having acted against his opponents in pretty much the same way as it did in 1989 with the Tiananmen Square revolt." David Pilling, *Lying Low is No Longer an Option for Beijing*, FIN. TIMES, Mar. 3, 2011, at 9; *see also* Hu Ping, *Paradoxical UN Vote to Sanction the Gadhafi Regime*, EPOCH TIMES, March 3, 2011, at A3, *available at* http://www.theepochtimes.com/n2/opinion/chinas-paradoxical-un-vote-to-sanction-the-gadhafi-regime-52329.html (discussing this vote).

candid with them. In any government, for a variety of reasons (often related to power jockeying), some officials keep secrets from other officials.

Nevertheless, the point is clear enough: China made an argument about the unaffordability of the alternative proposed by the United States roughly contemporaneously when it was boosting its internal security budget, which includes internet censorship, to a level higher than its military forces. That level is astounding, even on a per capita basis.[226] In 2010, China spent US$62.84 to monitor each Chinese person.[227] In 2011, it spent $70.99 to keep its citizens in line.[228] And China made this argument while sitting atop the largest pool of foreign exchange reserves in the world—$2.6 trillion, dwarfing the number two country, Japan, which holds about $1.1 trillion.[229]

In turn, the point about honesty in argumentation before the WTO should be clear enough. The WTO dispute settlement system relies on the integrity of the lawyers who participate in it. In discussing the ethical dimensions of Chinese legal argumentation at the WTO in the case at bar, four points should be made clear.

First, the high levels of professionalism expected of advocates for China should apply on a most favored nation (MFN) basis. That is, China should not be singled out for criticism. Similarly, to criticize is not to render a final judgment. The *WTO Case Review* does not embody findings of a legal ethics board. Second, applying this ethical MFN principle, previous *WTO Case Reviews* have questioned the nearly endless American appeals of zeroing defeats, the essential pointlessness of most of those appeals, and the consequent wasting of precious Appellate Body resources. Likewise, it is anticipated that future *WTO Case Reviews* will probe the ethical aspects of WTO disputes, as appropriate.

Third, ethically questionable behavior can be contagious. If, for example, China observes the United States making frivolous arguments in a zeroing case, then it might well draw the inference that it is free to skirt the line of professional legal ethics. Wrong-headed as that inference is (on the simple, common sense ground that two wrongs do not make a right), the risk that it might be drawn indicates that each Member has a responsibility to the WTO dispute

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226. China's population as of July 2011 was estimated at 1,336,718,015. *See The World Factbook*, CIA, at East and Southeast Asia: China, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html (last updated Dec. 20, 2011).

227. This result is obtained by dividing the 2010 security budget of $84 billion into the CIA estimate of the Chinese population of July 2011. As China's population would have grown between 2010 and 2011, using the July 2011 estimate actually understates the true 2010 per capita result.

228. This result is obtained by dividing the 2011 security budget of $94.9 billion into the CIA estimate of the Chinese population of July 2011.

229. For a list of countries by foreign-exchange reserves, go to WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_countries_by_foreign_exchange_reserves or SCRIBD http://www.scribd.com/doc/50867370/List-of-countries-by-foreign-exchange-reserves (both last visited Dec. 31, 2011).

settlement system to be on its best professional behavior when making oral and written representations to panels or the Appellate Body. Fourth, as uncomfortable as it may be to probe the nexus between trade and ethics, it is the fundamental role of scholars "to speak the truth to power."[230] This point, made by Professor Edward Said (1935–2003), is amplified by his statement that "[n]othing disfigures the intellectual's public performance as much as trimming, careful silence, patriotic bluster, and retrospective and self-dramatizing apostasy."[231]

c. Intellectual Property Piracy

Underlying the American legal arguments in the *China – Audiovisual Products* case is a profound commercial concern: Chinese restrictions inhibit market access for and distribution of legitimate American entertainment products, creating a void into which IP pirates rush and fill the Chinese market with their fake substitutes. In February 2011, the United States Trade Representative (USTR) published its "Notorious Markets List," which identifies where the most egregious violations of IP rights occur.[232] At the top of the list were several internet websites and physical markets in China:[233]

- The Chinese websites

    1) Baidu, which is the most visited website in China and which had deep links to IP infringing materials, some of which are on third-party host sites.
    2) Taobao, which is for business-to-business but through which infringing goods may be obtained.
    3) TV Ants, a peer-to-peer service that specializes in live sports telecast piracy, i.e., it takes protected broadcasts and makes them available freely on the internet.

- The Chinese physical markets

    1) Silk Market, in Beijing.
    2) PC Malls, in Beijing, Shanghai, and elsewhere in China.
    3) Luowu Market, in Shenzhen.

230. EDWARD W. SAID, REPRESENTATIONS OF THE INTELLECTUAL xvi (1994).

231. *Id.* at xii–xiii.

232. Amy Tsui, *USTR Releases List of "Notorious Markets" with 17 Internet, 17 Physical Sites Described*, 28 INT'L TRADE REP. (BNA) 356 (Mar. 3, 2011). This list used to be part of the annual Section 301 Report, but now is published separately in an effort by the Obama Administration to prioritize international IP enforcement.

233. *See id.* (In addition to Chinese websites and physical markets, Russian ones figured prominently on the list.)

4) China Small Commodities Market, in Yiwu.
5) Ladies Market, in Mongkok, Hong Kong.

Indeed, the tremendous financial loss borne by the American IP industry because of Chinese piracy is what impelled the USTR to litigate the case at the WTO.[234]

The United States has good reason for concern. In 2008, according to one source, the total global economic and social costs of counterfeiting and piracy were $775 billion, taking the form of lost tax revenue.[235] The International Chamber of Commerce estimates these costs will double, to $1.7 trillion annually, by 2015. That is because counterfeiting and piracy are getting easier, with increased global access to the internet and mobile technologies. As is widely known, a sizeable portion of counterfeiting and piracy goes on in China.

Therefore, the Chinese policy concerns—that its cultural industries are infants that needed protection, and that unique Chinese cultural and historical traditions need preservation—miss the mark. In truth, the Communist Party has manufactured a two-tiered reality.

The legal reality is that the Party strictly censors the content of books, films, and music for content, and limits via screen quotas the number of foreign entertainment offerings broadcast on television or displayed in theaters. Its seven-year-old policy at issue in the case is to keep the number of foreign movies to a maximum of twenty per year. Party censorship attempted to ensure no anti-Party-line content was aired, particularly in respect of the "3Ts" (Tiananmen, Tibet, and Taiwan).

The practical reality is that while the Party tightly controls lawful distribution of foreign cultural products, the piracy market flourishes. It has large numbers of inexpensive pirated books, CDs, DVDs, and other entertainment choices, all of which were readily available to Chinese consumers. Are the two realities linked? They could be, by corrupt Party officials involved in piracy, or pirates with close ties to the Party. But, of course, in WTO proceedings, the United States did not draw that link. Perhaps it did not need to. Any informed observer can connect the dots.

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234. *See* Len Bracken, *Report Finds IPR, Other Violations in China; Baucus, Grassley Call on China to Improve*, 27 INT'L TRADE REP. (BNA) 1929 (Dec. 16, 2010) (reporting on a December 2009 ITC Report, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, which states, inter alia, that 79% of all seizures of IP infringing goods by the United States Customs and Border Protection are from China, and Hong Kong accounts for an additional 10%, and that weak IP enforcement in China depresses American foreign direct investment (FDI) there, which in 2009 was just 1.4% of total FDI).

235. Rick Mitchell, *ICC Says Counterfeiting, Piracy to Cost Global Economy $1.7 Trillion a Year by 2015*, 28 INT'L TRADE REP. (BNA) 261 (Feb. 17, 2011).

d. How Much Free Speech?

Setting aside the matter of whether there are distinct "Asian" and "Western" values, it may be observed that underlying the *Audiovisual Products* case is a fundamental difference in the relative emphasis each side places on a universal value: freedom of speech. The United States cherishes freedom of speech, including over the internet. It castigates China for blocking websites and discussions. It highlights the "dictator's dilemma" the Communist Party faces as it clings to power in part through internet censorship via the Great Firewall of China, yet at the same time hitches its future economic growth to new technologies.[236] The Communist Party falls back on tired, old retorts: Chinese citizens enjoy freedom of speech "in accordance with the law," other countries should not use internet freedom as a pretext for meddling in its internal affairs, and the United States, in particular, is guilty of "information imperialism."[237]

But not all these retorts are tired and old. Even in the dubious hands of the Communist Party, the point about public morality has some persuasive force. China explained that its trade regulatory regime is part of a broader system to review the content of relevant products and ensure prohibited content does not gain entry. That is why content review must happen at the border and why only approved or designated entities can be authorized to import the products.[238]

Indeed, import entities approved by GAPP notify GAPP of reading materials they expect to import and undertake day-to-day content review of books, newspapers, and periodicals.[239] Their content review is double checked at the time of customs clearance. (A similar procedure is used for electronic publications.) Likewise, the Ministry of Culture regulates importation and distribution of AVHE products and subjects them to content review.[240] Items are brought into China under temporary importation procedures, subject to a report about their content that is submitted to the Ministry. Only if the Ministry agrees that the product passes content review does it grant final importation, at which point the importing entry presents the requisite documentation to the Chinese customs authority. For the importation and distribution of films for theatrical release, SARFT is the controlling government body.[241] It has samples of films brought in, again through temporary importation procedures, and reviews them for content. Only if SARFT censors pass the film does SARFT grant approval for importation, thereby enabling the importing entity to get and present to the customs authority the necessary documents.

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236. *See China Warns U.S. Over Clinton's Web Freedom Call*, BBC NEWS (Feb. 17, 2011, 6:22 AM), http://www.bbc.co.uk/news/world-asia-pacific-12492302.

237. *Id*.

238. *See* Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 141.

239. *See id*. ¶ 145.

240. *See id*. ¶ 153.

241. *See id*. ¶ 159.

The public morality logic also is why China enforces its prohibitions on disseminating certain types of content through civil and criminal sanctions.[242] True enough, such entities screen out truths about the "3Ts." That is, the Communist Party uses its definition of law to address what it perceives as national security threats.[243] But it is not unique in doing so, and it also screens out material that many (if not most) Americans would find obscene. Is it, then, essential that the Chinese public be subjected to everything on offer from the United States? Must China worship at the altar of America's First Amendment and American Supreme Court jurisprudence thereunder?

e. Interference with Internal Affairs?

A favorite argument of China in a wide variety of venues, not the least of which is the United Nations Security Council, is that neither international organizations nor individual foreign countries should interfere with its internal affairs. Concerned about sovereignty in a theoretical sense and about how it deals with the "3T" issues in a practical sense, the Communist Party fears any international decision that might operate as a precedent, of more or less weight, which could be used against it.

The Appellate Body, seemingly aware of that concern, was careful to include the following paragraph in its decision against China's *GATT* Article XX(a) defense:

> Finally, it may be useful to indicate what we are *not* saying in reaching the above conclusion. We are *not* holding that China is under an obligation to ensure that the Chinese Government assumes sole responsibility for conducting content review. Rather, we are agreeing with the Panel that the United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China's desired level of protection of public morals. China, in turn, has not demonstrated that this alternative is not reasonably available. This does not mean that having the Chinese Government assume sole responsibility for conducting content review is the *only* alternative available to China, nor that China *must* adopt such a scheme. It does mean that China has not successfully justified under Article XX(a) of the GATT 1994

242. *See id*. ¶ 141.

243. *See* Jacques deLisle, *Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats*, 4 J. NAT'L SECURITY L. & POL'Y 397–436 (2010).

> the provisions and requirements found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report. It follows, therefore, that China is under an obligation to bring those measures into conformity with its obligations under the covered agreements, including its trading rights commitments. Like all WTO Members, China retains the prerogative to select its preferred method of implementing the rulings and recommendations of the DSB for measures found to be inconsistent with its obligations under the covered agreements.[244]

This passage is significant, not only for China, but also for all WTO Members. In the United States, for example, WTO critics—including in Congress—on occasion have mischaracterized the power of the Appellate Body by vastly overstating it. That tribunal cannot compel a change in the law of any WTO Member, unless the Member itself, under its own constitutional structure, allows for that result. In the United States, Section 102(a) of the 1994 *Uruguay Round Agreements Act* assures this result does not occur.[245] In the above passage, the Appellate Body manifestly takes pains to assure the parties to the case and by extension its critics: For it to hold that an alternative measure is reasonably available is not tantamount to it ordering implementation of that alternative.

### f. Scared to the Point of Silliness?

"Silly" is not a word normally hurled at the Chinese Communist Party. After all, Party officials have adroitly engineered an economic transition that has produced impressive growth. Moreover, many senior party officials seem to be well educated and well traveled, and if not exactly cosmopolitan in their outlook, at least have been exposed to alternative perspectives about China and the world. Accordingly, criticisms of the Party focus on the costs of that growth, most notably in terms of social inequality (which is high) and human rights (especially religious freedom), on whether it will be followed—sooner or later—with genuine democratic development. But the censorship regime China defended in the *Audiovisual Products* case masks a deep insecurity of Party officials about any matter it perceives as a threat to its monopoly on political power.

One such matter, and one of the "3Ts," is Tibet. Here is where censorship suggests the censors are scared to the point of silliness. The censorship regime China defended in the case actually includes—supposedly to protect public morality—the control of the reincarnation of His Holiness the 14th Dalai Lama

244. Appellate Body Report, *Audiovisual Products*, *supra* note 25, ¶ 335 (emphasis in original).

245. *See* 19 U.S.C. § 3512(a).

(1935–present), leader of Tibetan Buddhism and winner of the 1989 Nobel Peace Prize. In 2007, the Chinese government promulgated a regulation called *Management Rules for Reincarnation of Living Buddhas*.[246] This regulation prohibits any person living outside of China from influencing the reincarnation process for the Dalai Lama. Such a person, of course, would include the Dalai Lama, who was forced during the 1959 Tibet uprising to flee to exile in Dharamsala, India. As the *Financial Times* explains:

> The rules stipulate that reincarnations must be approved by a government authority above the municipal level, conjuring up images of old monks' spirits hovering in limbo while they await approval from the interminable Chinese bureaucracy before they can be reborn.[247]

In other words, the officially atheist Communist Party has a measure to control an unmistakably religious matter. The Party alone takes the final decision on who is reincarnated as the next Dalai Lama.

To be sure, the *Buddha Reincarnation Management Rules* were not among the measures at issue in the *Audiovisual Products* case. China apparently had not made a market access or national treatment commitment on any of the Modes of supply of religious services. Yet these *Management Rules* evince the extent of concern the Party has about controlling what the Chinese public reads, sees, and hears. That is, they provide insight into the mentality behind the measures that were at stake in the case. They also connect to a deeper point about freedom of conscience and its relation to free trade.[248]

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246. Jamil Anderlini, *Dalai Lama Divines a Path for His Succession*, FIN. TIMES, Mar. 11, 2011, at 3.

247. *Id.*; *see also* James Lamont & Jamil Anderlini, *Dalai Lama Relinquishes Political Role and Urges Move to Tibet Elections*, FIN. TIMES, Mar. 11, 2011, at 1 (reporting the Dalai Lama decided to step down as the political leader of the Tibetan government in exile but would remain the spiritual head, which "potentially confound[s] the Chinese government's efforts to control the succession process after his death," because it will make it more difficult for the government to argue the temporal power of the Dalai Lama passes to his reincarnated successor whom the government chooses; in other words, because the decision divorces religious and political authority, it is harder for the government to control the politics of Tibet through a reincarnated religious leader of the government's liking).

248. Notably, the sovereign state with the largest number of diplomatic relations is the Holy See (Vatican), which has them with 188 countries. The second highest number of diplomatic relations is enjoyed by the United States – 177. *See* John Thavis, *Vatican Emerges from WikiLeaks as a Key Player on Global Scene*, CATHOLIC NEWS SERV., Dec. 23, 2010, *available at* http://www.catholicnews.com/data/stories/cns/1005234.htm. Yet the Holy See does not officially recognize China (as well as Afghanistan and Saudi Arabia) in part because of a disagreement with China over the selection of Bishops and Cardinals. *See The Party Versus the Pope*, ECONOMIST, Dec. 11, 2010, at 53. As George Weigel's monumental biography of Pope John Paul II, *Witness to Hope* (1999), shows, having

## B. Other WTO Agreements, Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and Dispute Settlement Understanding (DSU)

### 1. Citation

Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (Nov. 29, 2010), *adopted* Dec. 17, 2010 (complaint by New Zealand, with Chile, Chinese Taipei, the European Union, Japan, Pakistan, and the United States as third participants).

### 2. Facts and Introduction

Appellate Body decisions interpreting and applying the SPS Agreement are relatively small in number; they include, prior to *Australia – Apples*, only *EC –Hormones*,[249] *Japan – Apples*,[250] *Canada/US – Continued Suspension*,[251] *Japan – Agricultural Products*,[252] and *Australia – Salmon*.[253] Thus, for many Members, clarification of many of the issues arising under the SPS Agreement, and multiple standard of review/degree of deference questions under the SPS Agreement (Articles 5.1, 5.5 and 5.6) and the DSU, is welcome even if it falls short of resolving some issues—such as what constitutes "undue delay" in completing a risk assessment. The earlier cases indicate that the SPS Agreement is one of the most complicated of the WTO international agreements to apply, largely due to the highly technical nature of demonstrating that SPS measures are based on

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encountered this issue throughout the former Soviet Bloc during the Cold War era, the Holy See is no stranger to Communist authorities claiming the right to make decisions about ordination of Catholic clergy. On this topic, and others, the Catholic Church and Tibetan Buddhist officials share much in common.

249. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998).

250. Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R (Nov. 26, 2003) (*adopted* Dec. 10, 2003); *see also WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. at 422.

251. Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (*adopted* Nov. 10, 2008); Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008) (*adopted* Nov. 10, 2008); *see also WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113, 194 (2009).

252. Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999) (*adopted* Mar. 19, 1999).

253. Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998) (*adopted* Nov. 6, 1998).

"scientific principles."[254] Here, as in previous cases, the adequacy of the risk assessment that is the basis of SPS measures and the applicable standard of review are the focal points of the discussion, and the Appellate Body relies extensively on and further refines and expands its explanations in *Canada/US – Continued Suspension* and *EC-Hormones*, with particular attention to the former.

New Zealand has been an apple exporter for more than 100 years, to seventy countries, including many in Europe, Asia, and the Middle East, with aggregate annual exports in the range of 250,000 to 300,000 tons.[255] However, New Zealand's access to the Australian apple market has been under dispute on various occasions for ninety years. Australia first banned the importation of New Zealand apples in 1919, as a result of the presence of fire blight in New Zealand.[256] New Zealand subsequently sought access to Australia's market in 1986, 1989, and 1995.[257] The current phase that is the subject of this action began in 1999, when New Zealand submitted yet another request for access to the Australian market. Accordingly, at that time the Australian Quarantine and Inspection Service (AQIS) instituted a risk assessment associated with several pests, fire blight, European Canker, and apple leaf curling midge (ALCM).[258] (European Canker is not addressed by the Appellate Body.)

AQIS issued a draft risk assessment for comment in 2000, 2004, and 2005; in the ensuing period, there were two Australian Senate inquiries and some government restructuring.[259] In 2006, AQIS issued its *Final Import Risk Analysis Report for Apples from New Zealand* (the IRA), including recommendations for the sixteen risk-management measures that are the subject matter of this case.[260] Accordingly, Australia's Director of Animal and Plant Quarantine determined in March 2007 that imports of apples from New Zealand would be permitted, subject to the application of various phytosanitary measures set out in the IRA.[261]

Australia and New Zealand were not able to agree on operating procedures for imports. New Zealand requested consultations; when the consultations failed to resolve the dispute, New Zealand requested formation of a panel, which was established in January 2008.[262]

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254. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

255. *Fruits*, NEW ZEALAND MINISTRY OF AGRIC. & FORESTS (Jan. 17, 2011), http://www.maf.govt.nz/agriculture/horticulture/fruits.aspx.

256. Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶ 129, WT/DS367/AB/R (Nov. 29, 2010) (*adopted* Dec. 17, 2010).

257. *Id.*

258. *Id.* ¶ 2.

259. *Id.* ¶ 129.

260. *Id.*

261. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 130.

262. *Id.* ¶ 1.

The risk-assessment procedure consisted of a) pest categorization; b) probability assessment for entry, establishment and spread; c) assessment of consequences; and d) combining an assessment of the probability of entry, establishment and spread with assessment of consequences.[263] A detailed description of the affected plant diseases and pests is not necessary here. It is sufficient to note that fire blight, a bacterium which exists in New Zealand but not in Australia, attacks the flowers, young leaves, stems, and fruit of apple trees and can be severe enough to cause plant death. It spreads within host plants and can affect the fruit as well.[264] ALCM is a small fly with a lifespan of a few days, although the life cycle may occur several times a year. The larvae develop by feeding on opening leaves of apple trees, preventing the leaves from developing normally.[265] Pupa development usually takes place on the ground in the tree itself.[266]

The method used in the IRA to assess both fire blight and ALCM was quantitative, based on the assumption of twelve months of imports of apples from New Zealand without the application of phytosanitary measures.[267] Annual apple imports for purposes of the IRA were estimated to be in a range of 50 million–400 million, with 150 million most likely, based on probability intervals.[268] Probability of entry for such pathogens as fire blight was based on estimating, in turn, probability of importation of an infected apple, the likelihood that handlers and users in Australia would be close enough for transfer of the pests, and an estimate of the likelihood of the transfer of a pest to a host plant in Australia, all based on the assumption that transfer would take place only through discarded infected applies (waste).[269] The IRA based the probability calculations on eight importation steps and ten scenarios, each a discrete point in the journey of apples from New Zealand to Australia (steps) and various combinations of the steps (scenarios).[270] The probabilities of each of the scenarios were aggregated to show an overall probability of importation of an infested or infected apple.[271]

Similarly, with arthropods such as ALCM, the IRA treated the pests as mobile, with a mating pair needed to establish a population; thus, the study focused on the number of infested apples that could be found in a particular place at a given time.[272] The probability of entry, establishment, and spread was estimated based on a five-step process that involved the probabilities of

263. Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶¶ 2.1, 2.2, WT/DS367/R (Aug. 9, 2010).

264. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 134.

265. *Id.* ¶ 135.

266. *Id.*

267. *Id.* ¶ 136.

268. *Id.*

269. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 137.

270. *Id.* ¶ 138.

271. *Id.*

272. *Id.* ¶ 143.

importation and distribution of infested apples to utility points and estimating the number of infested applies in a given place at a given time. The fourth step combined the results of step three with the pest's ability to establish and spread, while the fifth step mathematically combined partial probabilities.[273] Both direct and indirect consequences were also assessed at local, district, regional, and national levels, in a range from "unlikely to be discernable" to "highly significant."[274] These qualitative terms were converted into impact scores, from "A" (least significant consequences) to "G" (most significant consequences). Finally, an evaluation was conducted to arrive at an overall conclusion as to economic and biological consequences, expressed as "negligible," "very low," "low," "moderate," "high," or "extreme."[275] This combination of quantitative and qualitative assessments through the use of a matrix[276] is characterized by Australia as a "semi-quantitative approach."[277]

**Risk Estimation Matrix Used by the IRA**

| Likelihood of entry, establishment and spread | Negligible | Very low | Low | Moderate | High | Extreme |
|---|---|---|---|---|---|---|
| *High* | Negligible risk | Very low risk | Low risk | Moderate risk | High risk | Extreme risk |
| *Moderate* | Negligible risk | Very low risk | Low risk | Moderate risk | High risk | Extreme risk |
| *Low* | Negligible risk | Negligible risk | Very low risk | Low risk | Moderate risk | High risk |
| *Very low* | Negligible risk | Negligible risk | Negligible risk | Very low risk | Low risk | Moderate risk |
| *Extremely low* | Negligible risk | Negligible risk | Negligible risk | Negligible risk | Very low risk | Low risk |
| *Negligible* | Negligible risk | Negligible risk | Negligible risk | Negligible risk | Negligible risk | Very low risk |

**Consequences of entry, establishment and spread**

The results of this analysis determined the pest risk-management measures employed to mitigate the risks "so as to achieve Australia's appropriate level of protection."[278] No risk-management measures were needed where the risk estimate was "negligible" or "very low" since it did not exceed the appropriate level of protection. However, if the risk estimate fell into any of the four higher

273. *Id.*
274. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 144.
275. *Id.*
276. *Id.* ¶ 147.
277. *Id.* ¶ 145.
278. *Id.* ¶ 148.

risk categories (above), "it exceeded Australia's appropriate level of protection, and thus risk management measures would be required."[279]

With fire blight, the IRA concluded that the probability of entry, establishment, and spread was "very low" and that the estimate of consequences was "high." Using the risk-estimation matrix, the unrestricted risk of fire blight was "low."[280] However, because a "low" finding exceeded Australia's appropriate level of protection, the IRA moved to risk management/mitigation.[281] The IRA determined that a combination of sourcing from orchards free of fire blight and disinfection would reduce the risk to a "very low" level and thus be within the appropriate level of protection.[282] With ALCM, a similar analysis in the IRA using data from two separate periods produced a similar result, "low."[283] Once again, risk management was warranted, and the IRA concluded that because ALCM infestation is highly visible and can be eradicated with fumigation, 3,000 fruit from every lot should be inspected with suitable treatment or rejection where ALCM was found. This approach, according to the ALCM, would reduce the overall level of risk to "very low" and thus within Australia's overall level of protection.[284]

Overall, Australia imposed a total of sixteen measures to mitigate the risks from fire blight, ALCM, and European Canker. These were challenged on various grounds by New Zealand.

3. Major Issues on Appeal

The issues raised are a mixture of procedural and technical ones. The most significant are as follows:

1) Whether the Panel erred in determining that the sixteen measures applied by Australia to apples imported from New Zealand, individually and in the aggregate, were "SPS measures" under Annex A(1) of the SPS Agreement;[285]

2) Whether the Panel, in finding that that Australia acted inconsistently with Articles 5.1, 5.2, and 2.2 of the SPS with regard to measures relating to fire blight and ALCM and to general measures, misinterpreted and misapplied those provisions; in particular, did the Panel a) apply an improper standard of review, require an excessively high standard of

279. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 148.
280. *Id.* ¶ 154.
281. *Id.* ¶ 155.
282. *Id.*
283. *Id.* ¶¶ 156–63.
284. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 164.
285. *Id.* ¶ 124.

transparency and documentation and fail to assess adequately the materiality of the faults found by the Panel with the risk assessment;

3) Did the Panel fail to conduct an objective assessment under Article 11, DSU, by its treatment of expert testimony favorable to Australia, misunderstanding Australia's risk assessment methodology and finding that the fire blight and ALCM are inconsistent with Article 5.6 of the SPS Agreement, particularly by concluding that the alternative measures proposed by New Zealand would achieve Australia's appropriate level of protection, failing to require New Zealand to establish the inconsistency of Australia's measures with Article 5.6 and failure to consider potential biological and economic consequences for Australia under Annex A(5) of the SPS Agreement; and

4) Whether the Panel erred in finding that New Zealand's claims under SPS Agreement Article 8 and Annex C(1)(a) were outside the terms of reference, and, if so, whether the Appellate Body could complete the legal analysis.

4. Holdings and Rationale

a. "SPS Measure" Under Annex A(1) of the SPS Agreement

The Panel found, as argued by New Zealand, that "[t]he 16 measures at issue in the current dispute, both as a whole and individually, constitute SPS measures within the meaning of Annex A(1) and are covered by the SPS Agreement."[286] The essence of Australia's challenge is that the Panel failed to assess adequately whether each of the sixteen measures *individually* meet the Annex A(1) requirements.[287] Rather, the Panel should have considered that there were "principal" risk-management measures and "ancillary" ones; the latter should have been ignored.[288] The United States, with admirable understatement, noted that the issue "seems to be of minimal importance for purposes of this dispute."[289]

Annex A(1) of the SPS Agreement defines the measures regulated by it:

1. *Sanitary or phytosanitary measure*—Any measure applied:

286. Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.172.
287. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 166.
288. *Id.* ¶ 167.
289. *Id.* ¶ 120 (quoting the United States's third participant's submission, ¶ 6).

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants, or products thereof, or from the entry, establishment, or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment, or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements, and procedures, including, *inter alia*, end-product criteria; processes and production methods; testing, inspection, certification, and approval procedures; quarantine treatments, including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

However, as the Appellate Body notes, "neither the SPS Agreement nor the DSU contains a definition of the term 'measure.'"[290] However, no matter; the Appellate Body has previously held, citing DSU Article 3.3, that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings," although such acts or omissions "in the usual case" must be actions of the state.[291] The "applied to protect" requirement in Annex A(1) "establishes the required link between the measure and the protected interest."[292] Consequently, the "purpose of a measure is to be

290. *Id.* ¶ 171.

291. *Id.* (citing Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 81, WT/DS244/AB/R (Dec. 15, 2003) (*adopted* Jan. 9, 2004).

292. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 172.

ascertained on the basis of objective considerations."[293] The Appellate Body observes that a similar linkage between "applied" and "to protect" is found in Article III of GATT 1994. There, the Appellate Body has indicated the view that "although the purpose of a measure is not easily ascertained, it can often be discerned from the measure's design, architecture, and structure."[294] The same approach is appropriate here; for a measure to come within Annex A(1), "scrutiny of such circumstances must reveal a clear and objective relationship between that measure and the specific purposes enumerated in Annex A(1)(a)."[295]

Continuing its analysis of Annex A(1), the Appellate Body observes that the term "relevant" in the last sentence is "a key element within this sentence" because it related to the earlier word "include." Taken together, the words "suggest that measures of a type not expressly listed may nevertheless constitute SPS measures when they are 'relevant,' that is when they are 'applied' for a purpose that corresponds to one of those listed in subparagraphs (a) through (d)."[296] For the Appellate Body, this approach is further reinforced by the use in the last part of the sentence of the words "including" and "*inter alia*," meaning that the list is indicative rather than exhaustive.[297]

The Panel analyzed the purpose of the mitigation measures (to avoid introduction, establishment, and spread of the diseases and pests) and determined a "close linkage" between the purposes and managing risks.[298] The Panel then analyzed whether the sixteen measures came within the list of examples in the last sentence of Annex A(1), classifying them as regulations, requirements or procedures. It concluded that the measures, individually and as a whole, constituted SPS measures under Annex A(1).[299] The Appellate Body accepted that "contrary to what Australia alleges, the Panel did indeed assess whether the sixteen measures at issue individually meet the requirements of Annex A(1) to the SPS Agreement."[300] Accordingly, the Appellate Body upheld the Panel's conclusion that the measures, individually and as a whole, are SPS measures under Annex A(1).[301]

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293. *Id.* (citing Appellate Body Report, *Australia – Salmon*, *supra* note 253, ¶ 200, explaining that the appropriate level of protection is an objective).

294. *Id.* ¶ 173 (citing Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, p. 29 [in the early cases the Appellate Body did not use paragraph numbers], WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (*adopted* Nov. 1, 1996)).

295. *Id.* ¶ 173.

296. *Id.* ¶ 175.

297. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 176.

298. *Id.* ¶ 178.

299. *Id.* (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.163, 7.172).

300. *Id.* ¶ 179.

301. *Id.* ¶ 184.

### b. SPS Agreement, Articles 5.1, 5.2, and 2.2

#### i. Member Positions and Panel Analysis

New Zealand also argued successfully to the Panel that the Australian SPS measures were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, and thus with Article 2.2 as well. The Panel's conclusion was based on the determination that a risk assessment concluding that the likelihood of entry, establishment, and spread of fire blight and ACLM, and of the potential consequences in Australia, was not proper within the meaning of Article 5.1 and Annex A(4) of the SPS Agreement. The Panel further considered that the IRA failed to adequately take into account the available scientific evidence, relevant process and production methods in New Zealand and Australia, and "the actual prevalence of fire blight and viable ALCM."[302]

With regard to the eight importation steps (SPS measures) relating to fire blight, the Panel decided that four of the eight steps were not sufficiently supported by scientific evidence and thus were not "coherent and objective."[303] Because the estimations of likelihood of several of the steps were questionable, the Panel concluded that the overall estimations were also questionable.[304] With regard to the IRA's analysis of exposure, the Panel found some of the assumptions and qualifications unconvincing, causing doubts about the risk assessor's evaluation. There as well the Panel concluded that the IRA's estimations did not rely on adequate scientific evidence and thus were not coherent and objective.[305] The Panel reached similar conclusions with the IRA's analysis of potential biological and economic consequences, leading it to reject the risk assessment as inconsistent with Articles 5.1, 5.2, and 2.2, and Annex A of the SPS Agreement.[306]

A similar analysis by the Panel of the IRA analysis regarding ALCM led the Panel to similar conclusions; the IRA's reasoning was found to be not objective and not coherent with regard to a variety of factors relating, inter alia, to ALCM cocoon occupancy and mating and the trade and climactic conditions for the spread of ALCM in Australia.[307] These deficiencies in the view of the Panel lead to "reasonable doubts about the risk assessment with respect to its evaluation of the likelihood of entry, establishment and spread of ALCM," with the Panel concluding that the IRA analysis was unsupported by coherent reasoning and

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302. Appellate Body Report, *Australia – Apples*, *supra* note 220, ¶ 187, (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.471, 7.886, 7.904).

303. *Id.* ¶ 191 (quoting Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.447).

304. *Id.* ¶ 192 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.355).

305. *Id.* ¶ 193 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.448).

306. *Id.* ¶¶ 194–95 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.472, 7.510).

307. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 196 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.870).

sufficient scientific evidence.[308] These deficiencies in the view of the Panel led Australia to over-estimate the consequences of ALCM with regard to the establishment and spread of ALCM in Australia.[309]

On appeal, Australia challenged the Panel's application of standards for scientific "sufficiency" and "objectivity and coherence." Australia also criticized the Panel for misapplying the standards of objectivity and coherence set out in *US/Canada – Continued Suspension* to the instant case and requiring the IRA to explain how expert judgments were made at intermediate steps of the analysis.[310] New Zealand argued that the Australian approach, in which analysis by the Panel was limited only to "conclusions ultimately reached" and whether expert judgments fall "within a range considered legitimate by the standards of the scientific community" was designed to shield the IRA from effective review.[311] Rather, in New Zealand's view, the criteria identified in *US/Canada – Continued Suspension* requiring that a risk assessment be "objective and coherent" and with conclusions that "find sufficient support in the scientific evidence" should apply equally to reasoning and conclusions based in part on expert judgment.[312]

The Appellate Body began review of the Panel's conclusions by setting out pertinent parts of Articles 5.1, 5.2, and 2.2 of the SPS Agreement. It notes that Article 5.1 (risk assessment) provides:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

The term "risk assessment" for pests is defined in Annex A(4):

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; . . .[313]

The Appellate Body observes that "Article 5.2 of the SPS Agreement contains a list of factors that must be taken into account in a risk assessment: In

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308. *Id.*

309. *Id.* ¶ 197 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.885).

310. *Id.* ¶ 201 (citing Australia's Appellant's submission, ¶¶ 76, 77, 96, 97, 84–90, 122).

311. *Id.* ¶ 202 (citing New Zealand's Appellee's submission, ¶¶ 2.39–40).

312. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 202 (citing New Zealand's Appellee's submission, ¶¶ 2.4445).

313. *Id.* ¶ 205 (as excerpted by the Appellate Body).

the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment."[314]

Science, according to the Appellate Body, "plays a central role in risk assessment."[315] Thus, risk assessment is "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinion."[316] Moreover, the list of factors in Article 5.2 is not a "closed list" and does not exclude factors that are not susceptible to quantitative analysis.[317] Whether the risk assessment is proper under Article 5.1 and Annex A(4) requires "assessing the relationship between the conclusions of the risk assessor and the relevant available scientific evidence."[318] In this process, the Appellate Body decided in *EC – Hormones*, Articles 2.2 and 5.1 are to be read together, because of the Article 2.2 requirement ("Basic Rights and Obligations") that SPS measures be based on scientific principles and evidence:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

ii. Articulating a Standard of Review, Part 1

According to the Appellate Body, in determining the conformity of the IRA with the above-quoted provisions the standard of review "must reflect the balance established . . . between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves."[319] This in turn reflects the standard of review set out in Article 11 of the DSU: "[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ."[320]

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314. *Id.* ¶ 206.

315. *Id.* ¶ 207.

316. *Id.* (quoting Appellate Body Reports, *US /Canada – Continued Suspension*, *supra* note 251, ¶ 527 (quoting Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 187)).

317. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 207, (quoting Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 187).

318. *Id.* ¶ 208.

319. *Id.* ¶ 211 (quoting Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 115).

320. *Id.* ¶ 211 (quoting DSU, *supra* note 12, art. 11).

Once again relying on *EU – Hormones*, the Appellate Body explains what the standard of review is *not*: "[T]his standard of review requires that a panel reviewing a risk assessment under Article 5.1 of *the SPS Agreement* [must] neither undertake a *de novo* review, nor give 'total deference' to the risk assessment it reviews."[321] The Appellate Body notes that it "further clarified the standard of review" applicable here in *US/Canada – Continued Suspension*. There, the Appellate Body explained that it directed that the panel should not "substitute its own scientific judgment for that of the risk assessor" or "determine whether the risk assessment is correct."[322] Rather, as stated in *US/Canada – Continued Suspension*, the Panel must "determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence . . . ."[323] The Panel, again as defined in *US/Canada – Continued Suspension*, must "assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent."[324]

In *US/Canada – Continued Suspension*, and again in the instant case, the Panel's analysis is twofold, scrutiny of the underlying scientific basis and scrutiny of the reasoning of the risk assessor based on the underlying science.[325] In the first part, the Panel's role is limited to determining if the scientific basis "constitutes 'legitimate science according to the standards of the relevant scientific community.'"[326] In the second, the Panel must assess whether "the reasoning of the risk assessor is objective and coherent" and "whether the results of the risk assessment sufficiently warrant the challenged SPS measures."[327] This is necessary because of the need under the SPS Agreement (Articles 2.2, 5.1, and 5.2) for a "rational or objective relationship" between the SPS measures and scientific evidence.

Still, Australia and New Zealand differ in the extent to which the standard of review articulated in *US/Canada – Continued Suspension* should have been applied in the present case. Australia contended that the standard applicable to intermediate expert judgments here should be the same as the standard for evaluating scientific evidence in the earlier case.[328] Not so, said New Zealand; that would establish a lower threshold for review of a risk assessment than was established in *US/Canada – Continued Suspension* and could "eliminate the need

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321. *Id.* ¶ 212 (citing Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 117).

322. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 213.

323. *Id.* (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 590).

324. *Id.* ¶ 214 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 590).

325. *Id.* ¶ 215.

326. *Id.*

327. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 215 (citing Appellate Body Reports, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 591).

328. *Id.* ¶ 217 (citing Australia's Appellant's submission, ¶ 77).

to assess the link between the scientific evidence and the conclusions reached in a risk assessment."[329]

According to the Appellate Body, in *US/Canada – Continued Suspension*, it suggested a methodology for the panel to "verify the consistency of a risk assessment with Article 5.1" that was "centered on the notion that the risk assessment should be evaluated in the light of the scientific evidence on which it relies."[330] Also in that case, whether the risk assessment was based on "legitimate science" and whether the reasoning of the risk assessor was "objective and coherent" were major considerations.[331] The first consideration is particularly important if the Member has relied on minority scientific opinions; it may acquire "greater prominence" but that is not the situation in the present case.[332] Here, the Panel determined that the IRA conclusions were not "objective and coherent" because they exaggerated certain risks and were not adequately supported by the scientific evidence.

According to the Appellate Body, the Panel acted consistently with the requirements of *US/Canada – Continued Suspension*.[333] Australia's argument that the Panel should have limited itself to a simple review of whether the intermediate conclusions in the IRA were within the legitimate range is erroneous.[334] Thus, "the reasoning employed by the risk assessor plays an important role in revealing whether or not such a relationship [between the conclusions of the risk assessor and the scientific evidence] exists."[335] Australia's distinction between intermediate conclusions and the ultimate conclusions in the IRA is a distinction that is not made in *US/Canada – Continued Suspension*; the Appellate Body rejects it here.[336] In the view of the Appellate Body, the Panel correctly reviewed the intermediate conclusions of the IRA as to whether they were supported by the scientific evidence as to the likelihood of the entry, establishment, and spread, and the consequences of fire blight and ALCM.[337]

Australia had explained to the Panel that the IRA officials used their "expert judgment" when in their view there was limited evidence or the biological process was highly variable.[338] This approach concerned the Panel because the Panel found little evidence in the IRA as to how such expert judgment was "translated into quantitative estimates" and effectively questioned whether expert

329. *Id.* ¶ 218 (citing New Zealand's Appellee's submission, ¶ 2.6162).
330. *Id.* ¶ 219.
331. *Id.* ¶ 220.
332. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 221.
333. *Id.* ¶ 222.
334. *Id.* ¶ 223.
335. *Id.* ¶ 225.
336. *Id.* ¶¶ 226–29.
337. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 230.
338. *Id.* ¶ 232 (citing Panel Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 7.438).

judgment was used as a substitute for scientific data.[339] Australia objected to the Panel's lack of flexibility and demanded that the IRA explain how the expert judgment was reached in intermediate steps.[340] New Zealand countered that while the "as appropriate to the circumstances" language in Article 5.1 provides some flexibility, it does not allow deviation for Article 5.1's substantive obligations; "mere recourse to expert judgment" doesn't permit, in New Zealand's view, disregarding the criteria set out in *US/Canada – Continued Suspension.*[341]

The Appellate Body sides with New Zealand. If a Member determines that the scientific evidence is inadequate, it has the option of imposing provisional SPS measures under Article 5.7 of the SPS Agreement.[342] As the Appellate Body decided in *Japan – Apples*, if the available scientific evidence does not allow an adequate assessment of risks, the evidence is insufficient to meet the requirements of Article 5.1. Further, in *US/Canada – Continued Suspension*, the Appellate Body further explained that where the scientific evidence is sufficient to perform a risk assessment, SPS measures may nevertheless be taken only if they are "based on" a risk assessment that meets the requirements of Articles 5.1 and 2.2.[343] The Panel's concern here was that where scientific evidence was available, the IRA nevertheless relied on the use of expert judgment, without explaining what approach was used.[344]

The Appellate Body warns that the "appropriate to the circumstances" language in Article 5.2 "should not be interpreted as authorizing a risk assessor to deviate from the requirements of Articles 5.1 and 5.2 or to ignore the available scientific evidence, even where expert judgment is used."[345] Nor is the Appellate Body persuaded that the approved international standards for risk assessment require more than simply identifying where expert judgment is used, as Australia argues. Rather, those transparency and documentation requirements (in ISPM 2 and 11) apply to the "entire risk assessment process from initiation to pest risk management, not excluding the use of expert judgment in situations of scientific uncertainty."[346] Accordingly, in the view of the Appellate Body, the Panel was correct in concluding that the IRA should have explained how it arrived at expert judgments used in intermediate steps and that the IRA should have based its conclusions on available scientific evidence.[347]

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339. *Id.* ¶ 233 (citing Panel Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶¶ 7.432–40).

340. *Id.* ¶ 234 (citing Australia's Appellant's submission, ¶ 97).

341. *Id.* ¶ 235 (citing New Zealand's Appellee's submission, ¶ 2.73).

342. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 238.

343. *Id.* ¶ 239 (citing Appellate Body Report, *Japan – Apples*, *supra* note 250, ¶ 179; Appellate Body Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 674).

344. *Id.* ¶ 240.

345. *Id.* ¶ 244.

346. *Id.* ¶ 247.

347. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 248.

Australia also challenges the Panel's finding of deficiencies in the intermediate conclusions of the IRA, essentially arguing that any flaws were not material, relying on *Australia – Salmon (Article 21.5 – Canada).*[348] New Zealand counters that the Panel did focus on the materiality of the flaws in the IRA.[349] For the Appellate Body, it is significant that the Panel in *Australia – Salmon (Article 21.5 – Canada)* did not establish a general materiality standard but simply found the methodological flaws were not sufficient to prevent the Panel from having confidence in the risk assessment.[350] Moreover, in the present case, the Panel followed *US/Canada – Continued Suspension* in determining "whether the reasoning *articulated* on the basis of the scientific evidence is objective and coherent and whether the *particular conclusions* drawn by the Member find sufficient support in the scientific evidence relied upon."[351] In the present case, the Panel appropriately reviewed the risk assessment and refrained from performing the risk assessment.[352]

In the final analysis, the Appellate Body understands that the Panel "considered that the faults it found with the IRA's reasoning on the importation steps and the factors relating to entry, establishment and spread were numerous and serious enough to render the IRA inconsistent with Article 5.1 of the SPS Agreement."[353] Here, because of the way in which the IRA conducted its analysis, the Panel's approach—"a comprehensive analysis of all the steps and factors reviewed"—was appropriate.[354] Under such circumstances, the Panel was not required to analyze explicitly each of the flaws in the IRA; it was sufficient that the "Panel clearly indicated that taken together these faults were enough to mean that the IRA did not constitute a proper risk assessment . . . ."[355]

c. Article 11 of the DSU and Standard of Review, Part 2

Having earlier addressed the appropriate standard of review for the Panel determination of the conformity of the IRA with Articles 5.1, 5.2, and 2.2 of the SPS Agreement,[356] the Appellate Body here addresses Australia's claim that the Panel failed to make an objective assessment of the matter before it as required by

348. *Id.* ¶ 249 (citing Australia's Appellant's submission, ¶ 90, (quoting Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, ¶ 7.57, WT/DS18/RW (Feb. 18, 2000) (*adopted* Mar. 20, 2000)).

349. *Id.* ¶ 249.

350. *Id.* ¶ 250.

351. *Id.* ¶ 382 (citing Appellate Body Reports, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 591).

352. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 251.

353. *Id.* ¶ 258.

354. *Id.*

355. *Id.* ¶ 259.

356. *See supra* notes 72–77 and accompanying text.

Article 11 of the DSU. This additional challenge to the Panel's methodology relates to Australia's claim that the Panel disregarded portions of its own expert testimony that were relevant to the case and misunderstood the methodology used by the IRA in performance of the risk assessment.[357] In addressing the issue the Appellate Body again attempts to chart a path that is consistent with the "objective assessment" requirements of DSU Article 11.

According to Australia, it was the Panel's duty to engage with all of the important evidence that was relevant.[358] Here, says Australia, the Panel disregarded "critical aspects of its appointed experts' territory that were favourable to Australia."[359] The Panel reproduced testimony but failed to discuss it or simply disregarded it entirely. New Zealand defended the Panel, pointing out that it enjoys discretion in deciding "whether a given piece of evidence is relevant for its reasoning."[360] The Panel is not required to discuss each and every piece of evidence, particularly where there were doubts as to the independence and impartiality of two of the experts on which the Panel relied.[361]

The Appellate Body, in assessing Australia's assertions, again relies on its prior reports. In *EC – Hormones*, the duty to make an objective assessment of the facts under DSU, Article 11, includes an obligation to consider the evidence and make factual findings.[362] Further, under *EC – Hormones*, the "'deliberate disregard of' or 'refusal to consider' evidence is incompatible with a panel's duty to make an objective assessment of the facts."[363] The "objective assessment" obligation also requires the Panel to consider the totality of the evidence before it.[364] Finally, in *US/Canada – Continued Suspension*, the Appellate Body notes its "further clarification" that a panel "has a duty to engage with evidence that is relevant to the case of one of the parties."[365]

However, this is only one side of the picture. The Appellate Body emphasizes that a panel, as trier of facts, "enjoys a margin of discretion in the assessment of the facts, including the treatment of evidence."[366] Further, the Appellate Body stated in *US – Wheat Gluten*, "[W]e will not interfere lightly with

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357. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 265.

358. *Id.* ¶ 266 (citing Australia's Appellant's submission, ¶ 128).

359. *Id.* (quoting Australia's Appellant's submission, ¶ 129).

360. *Id.* ¶ 267.

361. *Id.*

362. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 269 (citing Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 133).

363. *Id.* ¶ 269.

364. *Id.* (citing Appellate Body Report, *EC—Hormones*, ¶ 133); *id.* ¶ 270 (citing Appellate Body Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶¶ 553, 615).

365. *Id.* ¶ 270 (citing Appellate Body Report, *US/Canada – Continued Suspension*, ¶¶ 553, 615.

366. *Id.* ¶ 271 (citing Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶¶ 135, 138).

the panel's exercise of its discretion."[367] Yet that margin of discretion is effectively limited when a panel is making its DSU Article 11 assessment under Article 5.1 of the SPS Agreement; "a panel cannot use the evidence, including the testimony of its appointed experts, to conduct its own risk assessment. Rather the panel must use evidence to review the risk assessment of the WTO Member."[368]

The Appellate Body reminds us that in *US/Canada – Continued Suspension*, the Panel overstepped its bounds by failing to review the European Communities' risk assessment and instead "conduct[ed] a survey of the advice presented by the scientific experts and based its decisions on whether the majority of experts . . . agreed with the conclusion drawn in the European Communities' risk assessment."[369] There, the Panel went further to "effectively conduct its own risk assessment," and in doing so, unduly relied on the majority views in the scientific community.[370] Still, a panel, while reviewing and considering all the evidence it receives from the parties or its own experts, cannot be "expected to refer to all the statements made by the experts it consulted."[371] A panel, in determining the proper extent of the discussion of testimony should consider factors such as the relevance of the testimony, the context, and the importance attached to the testimony by the parties.[372]

Having earlier concluded that the Panel correctly applied the standard of review in assessing the IRA, the Appellate Body applies the principles related above to the Panel's treatment of expert testimony. In the present case, the Panel sought the testimony of experts in four distinct fields, fire blight, European canker, ALCM, and pest risk assessment.[373] The essence of Australia's challenge is that the Panel, having appointed experts (apparently with the concurrence of both Australia and New Zealand), did not properly take into account some written and oral statements, and written responses following the meeting with the Panel by some of the experts. Overall, the Appellate Body was not sympathetic to Australia's focus on relatively few oral statements in response to questions, in particular allegedly inconsistent statements made at different times by one Dr. Decker. The Appellate Body cautioned that "the statements made by the experts

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367. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 271 (quoting Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 151, WT/DS33/AB/R (Dec. 22, 2000) (*adopted* Jan. 19, 2001)).

368. *Id.* ¶ 272.

369. *Id.* ¶ 274 (quoting Appellate Body Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶ 598).

370. *Id.* ¶ 274 (citing Appellate Body Report, *US/Canada – Continued Suspension*, *supra* note 251, ¶¶ 597–98).

371. *Id.* ¶ 275 (citing Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶ 138).

372. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 276.

373. *Id.* ¶ 279.

at the meeting with the Panel should not be assessed in isolation, but in the light of the written responses that the meeting was intended to clarify and elaborate."[374]

Ultimately, the Appellate Body agreed with the Panel that Dr. Decker's statements were not without ambiguity and did not support Australia's position.[375] Consequently, the Panel's failure to "provide some explicit reasoning as to why it chose to rely on other written statements that Dr. Decker made on the same issue" did not, in the view of the Appellate Body, establish that the Panel had disregarded significant evidence relevant to Australia's position.[376] The Appellate Body also rejected challenges to the Panel's conclusion, relying on other experts, that the IRA tended to "overestimate the severity of the consequences of fire blight, particularly on plant life or health and on domestic trade."[377]

Noting that "a panel must not use the experts to second-guess the risk assessor by conducting its own risk assessment" but instead must "review the risk assessment and verify that it is objective and coherent,"[378] the Appellate Body decided that the Panel "correctly used the appointed experts to review the IRA's risk assessment, not to conduct a de novo review."[379] It reached the same conclusions regarding other specific challenges to the Panel's use of expert testimony by Australia, ultimately holding that the Panel, in treating expert testimony, acted consistently with the DSU Article 11 "objective assessment" requirement,[380] and reiterating that "the Panel was required to verify that the IRA's conclusions on the potential consequences of the pests were objective and coherent, not that they were correct" and that the general statements of the experts were thus not determinative.[381]

The Panel had determined that "because of methodological flaws that magnify the risk assessed, the IRA is not a proper risk assessment within the meaning of Article 5.1 of the SPS Agreement."[382] Australia challenged this determination under DSU Article 11 on the ground that the Panel failed to understand the risk assessment methodology used in the IRA with regard to certain technical aspects of the IRA.[383] In particular, Australia objected to the Panel's conclusion that the choice of probability intervals for events with a "negligible" likelihood of occurring was not properly justified, with the key result

374. *Id.* ¶ 284.
375. *Id.* ¶ 287.
376. *Id.* ¶ 288.
377. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 296 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.469).
378. *Id.* ¶ 298.
379. *Id.* ¶ 299.
380. *Id.* ¶¶ 291–315.
381. *Id.* ¶ 313.
382. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 319 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.510).
383. *Id.* ¶ 316 (citing Australia's Appellant's submission, ¶ 155).

that the probability of the entry, establishment, and spread of the pests at issue had been over-estimated.[384]

The Appellate Body disagreed. It noted that "[t]he IRA had adopted a semi-quantitative methodology and used a correspondence ('nomenclature') to convert quantitative probability intervals into qualitative descriptors."[385] Most significantly, the Appellate Body agreed with the Panel that, "in a semi-quantitative risk assessment such as the IRA, the objectivity of the correspondence is fundamental to the objectivity and coherence of the results of the risk assessment."[386] Under such circumstances, the risks of not imposing SPS measures—which justified SPS measures in the IRA—would be affected (over-estimated). In summation, according to the Appellate Body, Australia failed to demonstrate that the Panel acted inconsistently with the requirements of DSU Article 11 in its treatment of expert testimony and the IRA's risk assessment methodology.[387]

d. Article 5.6 of the SPS Agreement:[388] "Trade-Restrictiveness"

Article 5.6 of the SPS Agreement, in language reminiscent of the *chapeau* of Article XX of GATT 1994, provides that:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

Article 5 further provides, in a footnote, that:

> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

384. *Id.* ¶ 319, (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.508). If the risk estimation were overestimated, this would provide grounds for more severe SPS measures than would otherwise be the case. *See supra* p. 334, matrix.

385. *Id.* ¶ 320.

386. *Id.*

387. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 327.

388. *See* SPS Agreement, *supra* note 254.

The Panel found that the SPS measures applied by Australia regarding fire blight and ALCS were more trade-restrictive than required, and thus inconsistent with Article 5.6.[389] According to the Panel, a Member proving a violation of Article 5.6 must show that it is "i) reasonably available taking into account technical and economic feasibility; ii) achieves the importing Member's appropriate level of sanitary or phytosanitary protection; and iii) is significantly less restrictive to trade than the SPS measure(s) at issue in the dispute."[390] There appears to be no disagreement that these criteria are considered in the aggregate.

The burden of proof to show excess trade-restrictiveness was on New Zealand. According to the Panel, to show that the respondent's measures are inconsistent with Article 5.6, a complainant is required to establish a prima facie case that an alternative meets the elements listed above.[391] In brief, the Panel agreed with New Zealand that New Zealand had met its burden of proof in demonstrating the risks of fire blight could be limited by limiting imports into Australia to mature, symptomless apples and that the risks of ALCM could be eliminated by inspection a 600-fruit sample of each lot (instead of a 3,000-apple sample in Australia's SPS measures).[392]

On appeal, Australia challenged the Panel's overall finding that its SPS measures were inconsistent with Article 5.6, contending that the Panel had erred in law by concluding that New Zealand had made a prima facie case.[393] In other words, according to Australia, the Panel misinterpreted Article 5.6 as well as the rules governing burden of proof.[394]

The Appellate Body began its analysis by noting that in *Australia – Salmon* the Appellate Body had set out the three-pronged test for inconsistency with Article 5.6, as set out above and followed by the Panel in *Australia – Apples.*[395] Here, the Appellate Body notes that Article 2.2 "informs" and "imparts" meaning to Article 5.6, noting that Article 2.2 provides in pertinent part that:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect

389. Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.1403, 8.1(e), 7.1197, 7.1266, 7.1328, 7.1365.

390. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 328 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶ 7.1098).

391. *Id.* ¶ 329 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.1104–7.1105).

392. *Id.* ¶ 330 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.1109–7.1118, 7.1267–7.1284).

393. *Id.* ¶ 334. Australia did not appeal the Panel's findings with regard to European canker.

394. *Id.* ¶ 335.

395. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 337.

> human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.[396]

The Appellate Body takes note of the similarity of the "only to the extent necessary" language of Article 2.2 and the "no more trade-restrictive than required to achieve" the relevant objectives in Article 5.6.[397]

However, the relationships among different paragraphs of Article 5 must not be exaggerated: "For example, Article 5.1 seeks to ensure that a Member's SPS measure has an appropriate scientific basis, whereas Article 5.6 seeks to ensure that appropriate limits are placed on the trade-restrictiveness of a Member's SPS measure."[398] Thus, the legal analysis of a measure's inconsistency with Article 5.1 is separate from that of inconsistency with Article 5.6, and "violation of one obligation does not, without more, imply the violation of the other."[399] Here, the appeal relates to the second condition of Article 5.6, whether the alternative measure proposed by New Zealand meets Australia's appropriate level of protection, which, as defined in Annex A(5), means the level of protection deemed appropriate.[400] In making this analysis, a panel must determine both the level of protection set as appropriate by the imposing Member and the level of protection achieved by the alternative measure advocated by the Complainant.[401]

Australia had objected to the Panel's conclusion regarding New Zealand's Article 5.6 claim by contending that the Panel had asked the wrong legal question and, because of its concern to avoid a prohibited de novo review, did not satisfy itself that New Zealand had demonstrated that the alternative measures proposed by New Zealand would have achieved Australia's appropriate level of protection.[402] The Panel had followed a two-step procedure, first assessing whether New Zealand demonstrated that the risks of importing were exaggerated by Australia and, if New Zealand was successful, determine whether that result would cause doubt as to whether Australia's appropriate level of protection was exceeded. If such doubt exists, then the Panel would consider whether the alternative measures would nevertheless meet Australia's appropriate level of protection.[403] In performing that task, the Panel indicated that its duty was to avoid a de novo risk assessment while assessing whether New Zealand had

396. *Id.* ¶ 338 (quoting SPS Agreement, *supra* note 254, art. 2(2)).
397. *Id.* ¶ 339.
398. *Id.* ¶ 341.
399. *Id.*
400. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 342.
401. *Id.* ¶ 344.
402. *Id.* ¶ 348 (citing Australia's Appellant's submission, ¶¶ 180–81).
403. *Id.* ¶ 350 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.1143–7.1144).

raised a presumption, not successfully rebutted by Australia, that the "alternative measures have a sufficient risk reduction effect."[404]

According to the Appellate Body, the Panel's approach was incorrect. The Complainant does not have to prove that the Respondent's risk assessment over-estimated the risks. Rather, "the Panel was required to undertake its own analysis of the question of whether the alternative measures proposed by New Zealand would achieve Australia's appropriate level of protection."[405] Consequently, the Panel should have made "affirmative findings that New Zealand had made its case, rather than on negative finds, such as that New Zealand had 'cast doubt' upon Australia's risk assessment," and the Panel was free to adopt analytical approach even if that differed from the IRA's.[406] In Article 5.6 analyses:

> Caution not to conduct a *de novo* review is appropriate where a panel reviews a risk assessment conducted by the importing Member's authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim . . . . [T]he legal question is whether the importing Member could have adopted a less trade-restrictive measure. This requires the panel itself to objectively ask, *inter alia*, whether the alternative measure proposed by the complainant would achieve the importing Member's appropriate level of protection.[407]

Here, the Panel "unduly relied on findings that it had made in reviewing the IRA under Article 5.1 and failed to find affirmatively that New Zealand's alternative measures would meet Australia's appropriate level of protection."[408] This was error, and the Panel's finding that Australia's measures were inconsistent with Article 5.6 is reversed.[409]

What can a complainant such as New Zealand do to prevail on a challenge to the importing Member's SPS measures under Article 5.6? According to the Appellate Body, the complainant is not *required* to present its own risk assessment relating to the alternatives it suggests. However, the Appellate Body "cannot conceive of how a complainant could satisfy its burden of demonstrating that its proposed alternative measure would meet the appropriate level of protection under Article 5.6 *without* relying on evidence that is scientific in

404. *Id.*
405. *Id.* ¶ 354.
406. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 355.
407. *Id.* ¶ 356.
408. *Id.* ¶ 358.
409. *Id.* ¶ 359.

nature."[410] In other words, Members are *strongly* encouraged to conduct their own risk assessments when seeking to challenge SPS measures under Article 5.6.

Given the deficiencies in the Panel's analysis, can the Appellate Body complete the analysis? According to the Appellate Body with respect to fire blight, "there is sufficient basis in the Panel record to find that Australia's appropriate level of protection is 'providing a high level of sanitary or phytosanitary protection aimed at reducing risk to a very low level, but not zero.'"[411] With regard to the risks associated with the alternative measures proposed by New Zealand, the Panel reviewed "a fair amount of the evidence" but did not make findings on much of it.[412] Nor are there adequate affirmative findings. Consequently, the Appellate Body is unable to compare the level of protection offered by New Zealand's alternative measures and Australia's appropriate level of protection, and the analysis cannot be completed.[413]

With regard to ALCM, the situation is similar, and in addition there is "no indication as to what the Panel considered to be the *overall* risk associated with the alternative measure relating to ALCM proposed by New Zealand, that is, the risk of entry, establishment and spread of ALCM, as well as the associated potential biological and economic consequences."[414] Since the Appellate Body cannot make a finding on "the level of risk associated with New Zealand's alternative measure for ACLM" or the comparison with Australia's level of protection, the analysis cannot be completed.[415]

e. New Zealand's other Appeal: Annex C(1)(a) and Article 8

Given that New Zealand's most recent request for access to the Australian apple market occurred in 1999, as discussed in the Introduction, it is not surprising that at least one of New Zealand's claims would relate to delays in the process in New Zealand. In this respect, the SPS Agreement, Annex (C)(1)(a), provides:

> 1. Members shall ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that:
>
> > (a) such procedures are undertaken and completed without undue delay and in no less

410. *Id.* ¶ 364.

411. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 385 (quoting Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.963, 7.1121, 7.1136).

412. *Id.* ¶ 385.

413. *Id.*

414. *Id.* ¶ 402.

415. *Id.*

> favourable manner for imported products than for like domestic products . . . .

Annex C(1) relates to Article 8, "Control, Inspection and Approval Procedures":

> Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

The Panel found that this claim was outside the terms of reference on the grounds that the IRA process was not identified in the Panel request and is distinct from the measures challenged by New Zealand.[416] Since the Panel request did not refer to the procedure leading to the adoption of the SPS measures, it had not been properly identified in the Panel request.[417]

The Appellate Body agreed with the Panel's conclusion. The Appellate Body noted that Article 6.2 of the DSU provided in pertinent part: "The request for the establishment of a panel shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[418]

For the Appellate Body, both the identification and the brief summary are jurisdictional. Nor can defects be cured in subsequent proceedings.[419] Yet the Panel erred here in failing to take account of the difference between *measures* and *claims*, in particular by finding that New Zealand's claims, not the measure, were outside the terms of reference.[420] Rather, the Panel should have confined its analysis under Article 6.2 to determining if New Zealand had identified the specific measures at issue, and separately, the legal basis for its complaint.[421] Since the Panel had already determined that the panel request identified the sixteen measures, and Annex C(1)(a) and Article 8 as the basis for New Zealand's

416. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 409.

417. *Id.* ¶ 412 (citing Panel Report, *Australia – Apples*, *supra* note 263, ¶¶ 7.477, 8.1(f)).

418. *Id.* ¶ 415 (quoting DSU, *supra* note 12, art. 6.2).

419. *Id.* ¶ 418 (citing Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 127, WT/DS213/AB/R (Nov. 28, 2002) (*adopted* Dec. 19, 2002)).

420. *Id.* ¶ 421.

421. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 424.

claims, the matter was properly within the Panel's term of reference.[422] Accordingly, the Panel's determination is reversed.[423]

Can the Appellate Body complete the analysis? Australia urges the Appellate Body not to do so, because the Panel failed to make any "relevant factual findings" on the matter.[424] The Appellate Body does so, but New Zealand still loses.

The Appellate Body begins its analysis by noting the link between "procedures" and "phytosanitary measures" under Annex C(1), but decides that in the context of this case, it is unnecessary to identify the "SPS measures" and "procedures" to which both Annex C(1) and Article 8 apply.[425] Instead, the Appellate Body focuses on the meaning of "without undue delay." According to the Appellate Body, relying on the Panel Report in *EC – Biotech Products*, Annex C(1) "requires Members to ensure that relevant procedures are undertaken and completed with appropriate dispatch, that is, that they do not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable."[426] Determining if a Member has complied with this criterion requires a case-by-case analysis.[427]

Is eight years, as here, "undue delay?" The Appellate Body, perhaps a little defensively, recognizes that "in ordinary circumstances, eight years is a very long period of time to complete a risk assessment."[428] However, New Zealand's evidence is deficient: it relates to whether the "IRA process" was unduly delayed, and the "IRA process" is not a measure at issue.[429] Consequently, this evidence "does not establish that the 16 measures at issue have *not* been undertaken or completed *without* undue delay, or that they prevented or impeded the undertaking or completion of other relevant procedures without undue delay."[430] Accordingly, New Zealand has failed to establish (meet its burden of proof) that Australia failed to complete its procedures "without undue delay" as required by Article 8 and Annex C(1)(a).[431]

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422. *Id.* (Nor, according to the Appellate Body, was there any prejudice to Australia from including the matter in the terms of reference.)

423. *Id.* ¶ 426.

424. *Id.* ¶ 431 (citing Australia's Appellee's submission, ¶ 20).

425. *Id.* ¶¶ 435, 436.

426. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 437 (citing Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.1495, WT/DS291/R, WT/DS292/R, WT/DS292/R (Sept. 29, 2006) (*adopted* Nov. 21, 2006)).

427. *Id.* ¶ 437.

428. *Id.* ¶ 441.

429. *Id.*

430. *Id.* ¶ 441 (emphasis added).

431. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 442.

5. Commentary

a. Explaining and Refining the Standard of Review

With *Australia – Apples*, the Appellate Body has continued its ongoing process (following, in particular, *EC* – Hormones and *US/Canada – Continuing Suspension*) of providing guidance to panels and the Members as to how the "objective assessment" language of DSU Article 11 is to be applied in reviewing measures implemented by the Members under the SPS Agreement. (With one exception[432] the only standard of review the drafters provide the panels and the Appellate Body is DSU Article 11.) *Australia – Apples* may be particularly useful in terms of guidance because the standard of review was explained with regard to three key provisions of the SPS Agreement, Articles 5.1, 5.2, and 5.6. It is evident from the instant case that the guidance provided by the Appellate Body in these earlier cases has not gone unnoticed; the Panel here has managed to avoid most of the errors committed by the Panel in *US/Canada – Continuing Suspension*, although its work was not entirely free from error, as discussed in section D(4) above. Presumably, the complainant, seeking a less trade-restrictive alternative under Article 5.6 of the SPS Agreement, and the Panel adjudicating that complaint, will benefit from the Appellate Body's additional guidance as to how to present and analyze such claims, respectively, although, as Australian authorities suggested at the time the report was issued, it may introduce a "'significant element of uncertainty' on standard of review" (presumably with regard to Article 5.6).[433]

That being said, it is still less than perfectly clear where the standard of review of SPS measures falls on the continuum between the Scylla of de novo review and the Charybdis of a high standard of deference for administrative

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432. Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) has a significantly more detailed standard of review (quoted *infra* note 433), but it applies only to disputes under the Antidumping Agreement. Moreover, some have argued that despite the language of Article 17.6(ii), the Appellate Body has not treated its review of antidumping measures significantly differently from its review of measured challenged under other covered agreements that lack this specificity. The problem largely derives from the fact that under the Vienna Convention on the Law of Treaties (VCLT arts. 31–32), it can be argued that in any given situation, there is but one "correct" interpretation of a treaty provision, so that a relevant provision of the ADA essentially never admits of more than one permissible interpretation. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review and Deference to National Government*, 90 AM. J. INT'L L. 193, 199, 200 (1996) (discussing the negotiation of Article 17.6 of the Antidumping Agreement and the unlikelihood that an analysis under the VCLT would result in more than one interpretation).

433. *DSB Adopts Rulings in "Apples" Case*, WTO (Dec. 17, 2010), http://www.wto.org/english/news_e/news10_e/dsb_21dec10_e.htm [hereinafter *DSB Adopts Rulings*].

decisions, such as that reflected in the U.S. Supreme Court decision in *Chevron*[434] and in Article 17.6 of the Antidumping Agreement[435] (on which Article 17.6 was in significant part based). This is due in part to the deficiencies of DSU Article 11:

> [T]he standard of "objective assessment" is couched in rather broad terms that do very little to provide substantive guidance on the nature and intensity of the scrutiny panels should apply in reviewing national measures. The term "objective assessment" speaks more obviously to the fairness, impartiality, and even-handedness of panels' examination than to the discretion that they must afford to domestic decision-makers.[436]

While one may wish to criticize the negotiators for providing the panels and the Appellate Body with a woefully inadequate standard of review in DSU Article 11, it is also evident that one standard of review would not have worked uniformly well for all of the covered agreements. Nor is it likely under present circumstances, should the Doha Development Round negotiations be resumed, that the Members could reach consensus on a more detailed standard of review in the DSU. Thus, the applicable standard of review in specific covered agreements, including the SPS Agreement, will continue to be defined (and perhaps refined) by the Appellate Body.

In our view, the problem lies in the varying nature of the measures that are subject to challenge in the Dispute Settlement Body and with the varying work of the panels, which must make legal findings, findings of fact, and apply the law to the facts. In some instances, as with challenges of non-discrimination and denial of national treatment under GATT 1994 Article III, the measure (act or

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434. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

435. Article 17.6 provides that: "In examining the matter referred to in paragraph 5: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

436. Jan Bohanes & Nicholas Lockhart, *The Standard of Review in WTO Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 378, 383 (Daniel L. Bethlehem, et al., eds., 2009); *see also* Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT'L ECON. L. 491, 495 (2004).

omission) is undertaken without any significant national administrative process. At the other end of the spectrum, the Members are legally bound to follow detailed national administrative procedures designed to assure a high level of transparency and procedural due process—as in safeguards measures applied under the Agreement on Safeguards, the imposition of countervailing duties under Section V of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), or the imposition of antidumping duties under the Antidumping Agreement. (While the special standard of review in Article 17.6 of the Antidumping Agreement does not apply to the Agreement on Safeguards or to countervailing measures under the SCM Agreement, one can reasonably argue that, in the interest of conformity and consistency, they should.) As Jan Bohanes and Nicholas Lockhart explain:

> [T]he decision-making process by which a national measure was adopted at the national level also influences the intensity of review applied by a WTO panel. In particular, if a measure results from a treaty mandated investigative procedure, conducted at national level, that dictates a more lenient level of review than applies to a measure where no similar national proceeding is required under WTO law.[437]

SPS measures (and presumably those brought under the Agreement on Technical Barriers to Trade) arguably fall somewhere in between, although to the best of our knowledge the Appellate Body has not analyzed the problem in this manner. In most instances under the SPS Agreement, the Member imposing (or reimposing) the SPS measures has conducted a detailed administrative analysis based on available scientific evidence and often the collection of new data, as in *Australia – Apples*, *US/Canada – Continued Suspension*, and *EC – Hormones.* However, while Article 5 of the SPS Agreement provides detailed substantive procedures as to how the "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection" is to be undertaken, the SPS Agreement lacks many of the transparency and procedural due process requirements set out in the Agreement on Safeguards, the Antidumping Agreement, and Part V of the SCM Agreement. Governments may nevertheless follow a transparent administrative process that provides a high level of procedural due process, although the language of the SPS Agreement does not explicitly require them to do so. The Panel in *EC – Hormones* stated, "[T]here is a minimum procedural requirement contained in Article 5.1,"[438] but the Appellate Body rejected this requirement for risk assessments.[439] Still, because Members

437. Bohanes & Lockhart, *supra* note 436, at 384.

438. Panel Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 8.113, WT/DS26/R/USA (Aug. 18, 1997).

439. Appellate Body Report, *EC – Hormones*, *supra* note 249, ¶¶ 189, 193.

are free to adopt SPS measures adapted to individual needs, panels should be less constrained with their review than under the trade remedy agreements.[440]

Under such circumstances, it may be that a less deferential standard or review, but one still much less rigorous than a de novo review, is the most reasonable approach, at least so long as the Members whose SPS measures are challenged can demonstrate a high level of transparency and procedural due process in their internal procedures.[441] Also, as discussed in Part b below, the standard of review for measures under the SPS Agreement varies among different provisions.

### b. Challenging SPS Measures Under Article 5.6

While much of the standard of review analysis in *Australia – Apples* follows the key earlier Appellate Body reports, particularly *US/Canada – Continued Suspension*, the Appellate Body breaks some new ground with regard to efforts by complainants to demonstrate that alternative, significantly less trade-restrictive measures exist under Article 5.6 and that those imposed by the importing Member are thus inconsistent with Article 5.6. Here, the Panel is faced with a very different situation. Rather than analyzing a Member's risk assessment, as in Australia's IRA in the instant case, it must determine whether the complainant has offered an alternative set of SPS measures that meet the Article 5.6 requirements. This effectively requires a much less deferential review of the evidence, and the cautioning against conducting a de novo review does not apply when a complainant is challenging the respondent's risk assessment under Article 5.6. In effect, the panel must evaluate the scientific evidence on its own. Moreover, while the Appellate Body does not in so many words require that the complainant perform its own risk assessment based on scientific evidence, it strongly implies that for the panel to be able to meet its responsibilities for review under Article 5.6, such an independent risk assessment on the part of the complainant will be essential for the complainant to meet its burden of demonstrating a prima facie case in support of the alternative measures.

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440. Bohanes & Lockhart, *supra* note 436, at 413.

441. To date, all of the SPS actions have been brought against developed country Members, Australia (2), Canada (2), the EU (2), Japan (1), and the United States (2). *See* Appellate Body Report, *Australia – Apples*, *supra* note 256; Appellate Body Report, *Australia – Salmon*, *supra* note 253; Appellate Body Report, *US/Canada – Continued Suspension*, *supra* note 251; Appellate Body Report, *Japan – Apples*, *supra* note 250; Panel Report, *EC – Biotech Products*, *supra* note 426; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999) (*adopted* Mar. 19, 1999); Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (Sep. 29, 2010) (*adopted* Oct. 25, 2010).

c. Costs and Compliance

What is this case really about, beyond the obvious desire of New Zealand to have access to Australia's apple market after more than ninety years? It is also about the costs to New Zealand growers of complying with Australia's excessively onerous SPS measures. The record does not provide details of compliance costs, but it is evident that they must be substantial. Otherwise, why would New Zealand advocate that in reducing the risk of transmission of ALCM, 600 apples from each lot be inspected, rather than the 3,000 apples per lot as specified in Australia's challenged SPS measures? This of course goes to the heart of the objectives of the SPS Agreement, in the Preamble where SPS measures may not be applied in a manner so as to constitute a "disguised restriction on international trade" or the much discussed requirement of Article 5.6 under which Members must "ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."

On November 30, 2010, after the Appellate Body issued its report but before its adoption by the Dispute Settlement Body a few weeks later, Australian authorities had indicated their attention to implement the ruling.[442] On February 1, 2011, Australia and New Zealand notified the Chairman of the Dispute Settlement Body that they had agreed that the "reasonable period of time" for implementation[443] was by August 17, 2011, or eight months from the date of the adoption of the Appellate Body Report by the DSB. It was anticipated that this period of time for implementation "will allow Australia to be in a position to issue import permits for New Zealand apples from that date, based on any conditions that may arise out of the current review."[444]

d. Transparency and Open Hearings

The list of WTO Members who have abandoned secrecy with regard to the oral hearings is growing. Australia and New Zealand jointly requested the Appellate Body to authorize public observation of the oral hearing. Their request was supported by third participants: the United States, the European Union, and Chinese Taipei.[445] None of the other third participants (Chile, Japan, and Pakistan) objected. The Appellate Body followed the same approach as in earlier

442. *DSB Adopts Rulings*, *supra* note 433.

443. DSU, *supra* note 12, art. 21.3 (providing that the parties are to agree on the reasonable period of time within 45 days after the adoption of the report by the Appellate Body, or Feb. 1, 2011).

444. *Australia – Measures Affecting the Importation of Apples from New Zealand*, Agreement under Article 21.3(b) of the DSU, WT/DS367/19 (Feb. 1, 2011), *available at* http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147604.pdf.

445. Appellate Body Report, *Australia – Apples*, *supra* note 256, ¶ 9.

instances of public oral hearings,[446] and followed similar procedures, providing a closed-circuit television broadcast to a separate room at WTO headquarters. Notice was provided to the public, and advance registration was required. Arrangements were made to allow any third participant to maintain the confidentiality of oral statements and responses to questions and a number of seats were reserved for WTO delegates (who were also required to register in advance).[447] In making this ruling, the Appellate Body noted, inter alia, that "public observation in previous cases operated smoothly"[448] and referred to the fact that both parties "consider that public observation of the oral hearings in past appellate proceedings has strengthened the credibility and legitimacy of the WTO dispute settlement system . . . ."[449]

One can reasonably hope and expect that public observation of Appellate Body oral hearings will continue to become more common, in part because several of the Members advocating open hearings, particularly the United States and the European Union, are among the most frequent parties before the Appellate Body.

446. *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R) and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS321/AB/R), *supra* note 251; Second Recourse to Article 21.5 of the DSU by Ecuador, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/RW2/ECU (Apr. 7, 2008); *Recourse* to Article 21.5 of the DSU by the United States, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/RW/USA (Nov. 26, 2008); Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R), (Nov. 11, 2008); Recourse to Article 21.5 of the DSU by the European Communities, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/RW (May 14, 2009); Recourse to Article 21.5 of the DSU by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/RW (Aug. 18, 2009).

447. *Australia – Apples*, Annex III, Procedural Ruling AB-2010-2, ¶ 7, at 163.

448. *Id.* ¶ 5.

449. *Id.* ¶ 2.