

# China and Cultural Products at the WTO

## WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/AB/R (circulated 21 December 2009, adopted 19 January 2010)

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### 1. BACKGROUND

The treatment of so-called ‘cultural’ products (books, magazines, film, television, radio, and related products) has long been the subject of passionate debate in the World Trade Organization (WTO), as well as its predecessor, the General Agreement on Tariffs and Trade (GATT) 1947.<sup>1</sup> In the last days of the Uruguay Round of international trade negotiations in 1994, the United States and the European Union failed to resolve their disagreement on this issue,<sup>2</sup> with the result that the relationship between trade and culture under the current WTO agreements is fraught with uncertainty. In 1997, the WTO’s Appellate Body rejected an argument by Canada that certain laws and regulations created to protect its periodical industry had a cultural basis, finding instead that Canadian and foreign periodicals are directly competitive or substitutable products, despite their different editorial content, and that measures designed to ‘ensur[e] that Canadians have access to Canadian ideas and information through genuinely Canadian magazines’ amounted to local industry protectionism contrary to Canada’s national treatment obligations under GATT Article III

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<sup>1</sup> See generally Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: Cambridge University Press, 2007); Mary Footer & Christoph Graber, ‘Trade Liberalization and Cultural Policy’, *Journal of International Economic Law* 3 (2000): 115.

<sup>2</sup> John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd rev. edn (The Hague: Kluwer, 1999) 328; GATT Trade Negotiations Committee, *Uruguay Round – Trade Negotiations Committee Meeting*, NUR 077 (26 Nov. 1993); WTO Council for Trade in Services, *Audiovisual Services: Background Note by the Secretariat*, S/C/W/40 (15 Jun. 1998) [24], [30]; GATT, *Peter Sutherland Responds to Debate on Audiovisual Sector*, NUR 069 (14 Oct. 1993).

of the 1994.<sup>3</sup> More than ten years later, it is China that has raised the cultural flag in a dispute that addresses several previously unanswered questions concerning cultural products in WTO law, the general exceptions in GATT Article XX of 1994, and the interpretation of WTO members' commitments under the General Agreement on Trade in Services (GATS). For the first time, a WTO dispute concerning measures of ostensible cultural policy played out against the background of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, which was adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization on 20 October 2005 and entered into force on 18 March 2007.<sup>4</sup>

## 2. WTO-INCONSISTENT CHINESE MEASURES

In *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (hereinafter *China – Publications and Audiovisual Products*),<sup>5</sup> the Appellate Body considered a narrow range of issues arising from a United States challenge to Chinese laws and regulations affecting products such as books, newspapers, periodicals, audiovisual home entertainment products, sound recordings, and films for theatrical release. The Appellate Body largely endorsed the report of the Panel at first instance,<sup>6</sup> which had found that China had acted inconsistently with: the 'trading rights' provisions of its Protocol of Accession to the WTO;<sup>7</sup> its national treatment commitments under GATS Article XVII; its market access commitments under GATS Article XVI; and its national treatment obligations under Article III:4 of GATT 1994.<sup>8</sup> These findings of violation stand, and China is required to comply with the corresponding recommendation of the WTO's Dispute Settlement Body that it brings the offending measures into conformity with WTO law.

This case represents a major success for the United States, following its much more limited success in an earlier complaint against China with respect to intellectual property rights.<sup>9</sup> It also has broader systemic implications and confirms the significant changes taking place as both China and other WTO members adjust to its accession to the organization, which took place in late 2001.<sup>10</sup>

<sup>3</sup> Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* (hereinafter *Canada – Periodicals*), WT/DS31/AB/R (circulated 30 Jun. 1997, adopted 30 Jul. 1997), 28–29, 30–32.

<sup>4</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UN Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV (20 Oct. 2005).

<sup>5</sup> WT/DS363/AB/R (circulated 21 Dec. 2009, adopted 19 Jan. 2010).

<sup>6</sup> See generally Tania Voon, 'International Decision: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products', *American Journal of International Law* 103, no. 4 (2009): 710.

<sup>7</sup> Protocol on the Accession of the People's Republic of China, annexed to WTO Ministerial Conference, Accession of the People's Republic of China: Decision of 10 November 2001, WT/L/432 (23 Nov. 2001).

<sup>8</sup> Panel Report, *China – Publications and Audiovisual Products*, WT/DS363/R (circulated 12 Aug. 2009, adopted 19 Jan. 2010), [8.1].

<sup>9</sup> Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (circulated 26 Jan. 2009, adopted 20 Mar. 2009).

<sup>10</sup> WTO Ministerial Conference, Report of the Working Party on the Accession of China, WT/MIN(01)/3 (10 Nov. 2001); WTO Ministerial Conference, Accession of the People's Republic of China: Decision of 10 November 2001, WT/L/432 (23 Nov. 2001). China accepted the Protocol on the Accession of the People's Republic of China (annexed to the Decision of 10 Nov. 2001) on 11 Nov. 2001 and, in accordance with its terms, became a WTO member

### 3. DISTINGUISHING BETWEEN GOODS AND SERVICES IN THE CONTEXT OF 'CULTURAL' PRODUCTS

With one exception, *China – Publications and Audiovisual Products* concerned solely physical products. Nevertheless, a key aspect of China's appeal related to the distinction in WTO law between goods (which are typically governed by GATT 1994) and services (typically governed by GATS). Although some cultural products – such as hard copies of books – are clearly goods, others – such as television – take an intangible form and might therefore be classified as services. The increasingly arbitrary distinction between goods and services remains of vital importance in the WTO, particularly in the context of cultural products, because of the different standards established under GATT 1994 and GATS. For example, GATT 1994 imposes absolute obligations on all WTO members to accord national treatment to the products of other members, whereas GATS imposes national treatment obligations on each member only in service sectors in which that member has undertaken national treatment commitments. Conversely, GATS omits certain exceptions that appear in GATT 1994 with respect to cinematograph films (GATT Article IV) and subsidies (GATT Article III(8)(b)).<sup>11</sup>

Before the Appellate Body, China contended that the Panel had erred in holding that China had violated the terms of its Accession Protocol by limiting the business of importing films into China to enterprises designated or approved by the State Administration on Radio, Film, and Television and by subjecting the importation of audiovisual products to a licensing system. The trading rights provisions in China's Accession Protocol apply only to goods and not to services, and China maintained that the relevant measures regulate not the importation of goods but the content of films, the services associated with importation, and the licensing of related copyrights.<sup>12</sup> The Appellate Body responded:

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.<sup>13</sup>

Accordingly, the Appellate Body agreed with the Panel that the relevant Chinese measures, even if focused on film content, necessarily regulate the importation of goods because the content is embedded in a physical film reel.<sup>14</sup> Moreover, just as the services aspects of a periodical (editorial and advertising content) may be subject to GATS while the physical product embodying those aspects is simultaneously subject to GATT 1994,<sup>15</sup> so too the fact that China's contested measures may affect both goods and services does not shield them

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on 11 Dec. 2001; WTO Director-General Mike Moore, Protocol on Accession of the People's Republic of China Done at Doha on 10 November 2001: Notification of Acceptance, Entry into Force, WLI/100 (20 Nov. 2001).

<sup>11</sup> For further discussion, see Tania Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS', *UCLA Entertainment Law Review* 14, no. 1 (2007): 1.

<sup>12</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [169], [201].

<sup>13</sup> *Ibid.*, [195].

<sup>14</sup> *Ibid.*, [188].

<sup>15</sup> Appellate Body Report, *Canada – Periodicals*, 17.

from the application of China's trading rights obligations with respect to goods under its Accession Protocol.<sup>16</sup>

The Appellate Body's reasoning on this issue suggests that a WTO member who has refrained from making specific commitments in respect of audiovisual services such as film distribution under GATS cannot therefore claim an exemption from its GATT obligations regarding the related physical audiovisual products such as digital video discs (DVDs). Equally, the exceptions for hard copy cinematograph films in GATT Article IV are unlikely to preclude the application of GATS to the services associated with the exploitation of those films (such as motion picture projection services).

#### 4. INTERPRETING GATS COMMITMENTS IN DYNAMIC SECTORS

The exceptional claim covering non-physical products in this dispute concerned a Chinese prohibition on foreign-invested enterprises engaging in the electronic distribution of sound recordings via the Internet. The primary question arising under this claim before both the Panel and the Appellate Body was whether China's GATS commitments extend to this form of distribution. Specifically, China asserted that its national treatment commitments in respect of 'Sound recording distribution services' in the audiovisual sector encompass distribution of only hard copy sound recordings, for example, in the form of compact discs (CDs). The Appellate Body upheld the Panel's ruling that China's national treatment commitments regarding 'Audiovisual Services: Sound recording distribution services' do extend to distribution of sound recordings through electronic means and that the prohibition is therefore inconsistent with those commitments.<sup>17</sup> As the Appellate Body pointed out, China chose not to include in its commitment an explicit indication that sound recording distribution covered only distribution of physical media.<sup>18</sup>

The Appellate Body appeared to distance itself from certain reasoning in the Panel Report by emphasizing that the meanings of the words 'sound recording' and 'distribution' in China's GATS Schedule are not fixed as at the time of China's WTO accession. In reaching this conclusion, the Appellate Body cited a decision of the International Court of Justice<sup>19</sup> (a relatively rare occurrence)<sup>20</sup> concerning the evolutionary nature of some treaty terms.<sup>21</sup> In contrast, the Panel had determined that 'the technical feasibility or commercial reality of a service at the time of a service commitment' may be a relevant circumstance in interpreting the scope of that commitment under Article 32 of the *Vienna Convention on the Law of Treaties*.<sup>22</sup> On that basis, the Panel assessed the period leading up to

<sup>16</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [193], [195], [196].

<sup>17</sup> *Ibid.*, [412]–[413].

<sup>18</sup> *Ibid.*, [364], [375], [377].

<sup>19</sup> International Court of Justice, Judgment, Case Concerning the Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), 13 Jul. 2009.

<sup>20</sup> However, see Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (circulated 12 Oct. 1998, adopted 6 Nov. 1998), n. 109.

<sup>21</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [396]–[397].

<sup>22</sup> 1155 UNTS 331 (adopted 22 May 1969).

China's WTO accession and concluded that the electronic distribution of sound recordings was both technically feasible and a commercial reality well before that date.<sup>23</sup> Rather than overruling this interpretation, the Appellate Body rather awkwardly characterized the Panel as *not* having 'relied' on the fact that electronic distribution of sound recordings was feasible upon China's accession: 'the Panel simply found that this element did not establish that China could not have undertaken a commitment on the electronic distribution of sound recordings in 2001'.<sup>24</sup> In any case, the Appellate Body's non-reliance on technical feasibility and commercial reality at the time China acceded to the WTO must be correct, if WTO members' GATS commitments are to remain relevant notwithstanding technological changes, particularly in dynamic sectors such as audiovisuals and telecommunications.<sup>25</sup>

This dispute thus makes clear that GATS obligations can apply to the distribution of intangible products, including the electronic distribution of sound recordings. Several uncertainties regarding the distinction between cultural goods and services remain. In particular, is the distribution of audiovisual products in electronic form (such as via television, the Internet, or mobile phone) a pure service subject only to GATS, or is it also subject to GATT 1994? If treated as goods pursuant to GATT 1994, members could impose customs duties on electronic transmissions of this kind, assuming this was technically feasible. *China – Publications and Audiovisual Products* does not resolve this issue; nor have WTO members themselves been able to negotiate a solution. Instead, they have agreed a temporary moratorium on imposing these duties.<sup>26</sup>

## 5. APPLYING ARTICLE XX(A) BEYOND GATT 1994

The remaining part of China's appeal in this dispute raises the relationship between cultural policy and public morals. China claimed that certain measures that the Panel had found inconsistent with China's Accession Protocol were nevertheless justified as 'necessary to protect public morals' within the meaning of GATT Article XX(a) because they form part of 'a content review mechanism . . . that operates to prevent the dissemination of cultural goods with a content that has a negative impact on public morals in China'.<sup>27</sup> The challenged measures restricted the importation of reading materials and finished audiovisual products to specified 'import entities', which were also involved in the process of reviewing the content of these products. The Panel held, and the Appellate Body did not question, that monitoring the content of cultural products and preventing their importation if they contain prohibited content are measures to protect public morals.<sup>28</sup> However, both

<sup>23</sup> Panel Report, *China – Publications and Audiovisual Products*, [7.1237], [7.1247].

<sup>24</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [408].

<sup>25</sup> See generally Lee Tuthill & Laura Sherman, 'Telecommunications: Can Trade Agreements Keep Up with Technology?', in *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, ed. Juan Marchetti & Martin Roy (New York: Cambridge University Press/WTO, 2008), 151.

<sup>26</sup> WTO, Seventh Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 8, 13, 22 and 27 October and 2, 4 and 6 November 2009: Summary by the Secretariat of the Issues Raised, WT/GC/W/614 (27 Nov. 2009), 1.

<sup>27</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [231].

<sup>28</sup> Panel Report, *China – Publications and Audiovisual Products*, [7.766].

the Panel and the Appellate Body found that certain conditions imposed on the designation of import entities – including the exclusion of foreign-invested enterprises and enterprises not owned by the Chinese State – were not *necessary* to protect public morals and therefore fell outside the Article XX(a) defence.<sup>29</sup> In interpreting the necessity test and other aspects of Article XX(a), the Appellate Body relied on its own previous jurisprudence<sup>30</sup> interpreting both GATT Article XX paragraphs other than Article XX(a)<sup>31</sup> and the ‘public morals’ equivalent to GATT Article XX(a) found in GATS Article XIV(a).<sup>32</sup>

The Appellate Body’s reasoning concerning Article XX(a) GATT differed from the Panel’s in one important respect. The Panel rejected China’s defence under this provision on its merits, assuming *arguendo* that Article XX(a) operates as an exception to obligations in China’s Accession Protocol.<sup>33</sup> The Appellate Body, although it has used a similar technique itself in previous cases,<sup>34</sup> implicitly criticized the Panel’s approach, rightly pointing out that basing a decision on a mere assumption about the application of Article XX(a) could create uncertainty and undermine a key purpose of WTO dispute settlement of providing security and predictability to the multilateral trading system.<sup>35</sup> Thus, the Appellate Body explained that, in this particular case:

the absence of clarity on the issue of whether China may rely on Article XX(a) as a defence to a violation of paragraph 5.1 of its Accession Protocol may leave the participants uncertain as to the regulatory scope that China enjoys in implementation and as to whether any implementing measure is, in fact, consistent with China’s WTO obligations or susceptible to further challenge in proceedings under Article 21.5 of the DSU.<sup>36</sup>

The Appellate Body went on to determine that China could invoke Article XX(a) as a justification for inconsistencies with the trading rights provisions in its Accession Protocol.<sup>37</sup> The Appellate Body based its ruling on the introductory clause of paragraph 5.1 of Part I of the Accession Protocol, which states that the trading rights provisions are ‘[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’. Nevertheless, the ruling could lend weight to an argument by China or other members that have acceded to the WTO since its creation in 1995 that the

<sup>29</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [336]–[337].

<sup>30</sup> See, for example, Appellate Body Report, *China – Publications and Audiovisual Products*, [239]–[242], [251]–[253], [288], [304]–[305], [309], [318]–[319], [327].

<sup>31</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (circulated 3 Dec. 2007, adopted 17 Dec. 2007); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (circulated 11 Dec. 2000, adopted 10 Jan. 2001); Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (circulated 29 Apr. 1996, adopted 20 May 1996).

<sup>32</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (circulated 7 Apr. 2005, adopted 20 Apr. 2005).

<sup>33</sup> Panel Report, *China – Publications and Audiovisual Products*, [7.914].

<sup>34</sup> See, for example, Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand; United States – Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R (16 Jul. 2008), [310], [319].

<sup>35</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [214]–[215]. See the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art. 3.2.

<sup>36</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, [214].

<sup>37</sup> *Ibid.*, [415(a)].

exceptions in both GATT Article XX and GATS Article XIV apply to all the obligations contained in their accession protocols.

More broadly, the Appellate Body's decision that Article XX(a) applies to certain parts of China's Accession Protocol could foreshadow a potential willingness to apply the general exceptions in GATT 1994 and GATS (or even other exceptions) to parts of the treaty other than GATT 1994 and GATS. For example, while the legal arguments would be subject to some doubt, GATT Article XX of 1994 could conceivably be relevant to the *Agreement on Subsidies and Countervailing Measures* or the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. Similarly, GATT Article XXIV of 1994 could potentially apply to the *Agreement on Safeguards*, prevailing over the most-favoured nation rule in Article 2.2 of that agreement.<sup>38</sup> Rulings on these issues must await another day, and the Appellate Body's careful reliance on the opening words of paragraph 5.1 of Part I of the Accession Protocol ensure that it could in a future case insist that its decision with respect to the applicability of GATT Article XX(a) to China's Accession Protocol was limited to the particular factual and legal circumstances at issue. Evidently, the wider the applicability of the public morals exception in GATT Article XX(a) and GATS Article XIV(a), the greater the scope for WTO members to maintain cultural policy measures in respect of goods and services, whether traditionally recognized as 'cultural' or not.

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<sup>38</sup> See Nicholas Lockhart & Andrew Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and Its Limits', in *Challenges and Prospects for the WTO*, ed. Andrew Mitchell (London: Cameron May, 2005), 225, 229–230; Tania Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements', *International and Comparative Law Quarterly* 59, no. 3 (2010): s. IV.B(iii).

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