

MARKET ACCESS IN CHINA—PUBLICATIONS AND AUDIOVISUAL MATERIALS: A MORAL VICTORY WITH A SILVER LINING

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“International arrangement [for protecting intellectual property] becomes the character of a great country: first, because it is justice; secondly; because without it you never can have, and keep, a literature of your own.”—Charles Dickens.¹

From the earliest days of the People’s Republic of China’s interest in international markets and membership in the World Trade Organization (WTO), U.S. reaction ranged from cautiously supportive to openly enthusiastic.² Many saw an opportunity not only to engage a billion potential consumers, but also to re-shape the polity in the image of a Western democracy. Given China’s status as the world’s most populous country, global enterprises based in WTO member nations immediately recognized the enormous potential of expansion into Chinese markets.³ Western foreign policy makers hoped that China’s accession and the expansion of markets would bolster concurrent liberal democratic ideals and force Chinese domestic reforms.⁴ Free markets, it was assumed, would naturally yield free society. But China has not been a passive participant in its international economic expansion. Indeed, when U.S. industries have sought economic

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1. WILLIAM GLYDE WILKINS, CHARLES DICKENS IN AMERICAN 33 (1911).

2. See KONG QINGJIANG, CHINA AND THE WORLD TRADE ORGANIZATION: A LEGAL PERSPECTIVE, 8–16 (2002); Charles Baum, *Trade Sanctions and the Rule of Law: Lessons from China*, 1 STAN. J. OF EAST ASIAN AFF. 46, 46 (2001).

3. KONG, *supra* note 2, at 13.

4. Baum, *supra* note 2, at 46 (quoting Charlene M. Barshefsky, United States Trade Representative, Remarks Prepared for Delivery to the University of Minnesota Law School Class of 2000: “[O]ur [WTO] agreement brings China further away from the legal void of the Maoist era, and closer to the rule of law.”). *But see* Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 264 (criticizing U.S. policy in China as being entirely motivated by economic self-interest to the detriment of fostering democratic reforms: “the United States has largely sold out its own democratic values in favor of short-term economic gains”).

expansion into China, they have frequently met with market-prohibitive government regulation and cultural inertia.⁵

The recent WTO dispute between the United States and China illustrates a fundamental tension between the two countries: the United States' desire for market access and China's fear of the liberalizing effect access to those goods might engender.⁶ In April of 2007, the United States formally challenged several of China's official policies, practices, and enforcement measures related to protection of Intellectual Property Rights (IPR) in two WTO disputes.⁷ Together, these cases contain the most complex challenge to a WTO member nation's policies in U.S. history, and represent the culmination of decades of contention.⁸ The second of these cases did not address any substantive challenges to IPR enforcement in China, but rather focused on the related issue of Chinese market access for U.S. content industries. While this decision represents a decided victory for the United States, most agree that the battle for a place in China's market is far from over.⁹ Nonetheless, some elements of the dispute indicate that China is indeed progressing towards a culture and polity that values intellectual property. It is here that many may find the real victory.

China is an undeniably significant, if enigmatic, market force in international trade.¹⁰ China has a robust national economy, ranked second in world trade of goods.¹¹ And perhaps more importantly, China represents one of the fastest growing economies in the world, with an average growth in

5. See, e.g., THOMAS LUM & DICK K. NANTO, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: CHINA'S TRADE WITH THE UNITED STATES AND THE WORLD 1 (2007) ("The trade is highly unbalanced in China's favor Some policymakers as well as leaders of industry and labor blame China for unfair trade practices, including deliberately undervaluing its currency . . . U.S.-China trade issues are often driven by larger policy objectives.").

6. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 1.1, WT/DS363/R (Aug. 12, 2009) [hereinafter *China—Publications & Audiovisual Materials*].

7. *Id.*; Panel Report, *China—Measures Affecting Protection & Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

8. WILLIAM M. MORRISON, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: CHINA-U.S. TRADE ISSUES 17–23 (2008).

9. See Sue Zeidler, *Hollywood Sees Win in China WTO Case as First Step*, REUTERS.COM, Aug. 14, 2009, <http://www.reuters.com/article/idUSTRE57d4nd20090814>.

10. See, e.g., MICHAEL J. TREBILCOCK & ROBERT HOWSE, REGULATION OF INTERNATIONAL TRADE 641 (3d ed. 2005).

11. WTO, China Trade Profile, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN> (last updated Oct. 2009).

GDP above 10 percent.¹² One-fifth of the world's population lives within its borders, representing a large region of potential consumers.¹³ This population is also becoming an increasingly sophisticated group of consumers, as Chinese economic expansion continues and Chinese citizens enjoy increased purchasing power.¹⁴

The U.S. content industry is similarly ambitious in its growth.¹⁵ Copyrightable products rank among the most important exports of the United States, both economically and politically; with one scholar even contending that the entertainment industries are the single most important driving force in the world market, outstripping any other commodity.¹⁶ The Motion Picture Association of America (MPAA) reports that “[t]he American motion picture industry carries a positive balance of trade around the world and a \$13.6 billion trade surplus. For decades, the motion picture and television production industry has been a cornerstone in America’s creative economy.”¹⁷ Beyond its economic impact, America’s content industry is also a key player in defining, presenting, and exporting “American culture.” Again, the MPAA lauds the industry, stating “Hollywood produces another form of wealth: the pictures in our head by which both we, and the world at large, define the phenomenon of American culture.”¹⁸

Despite the U.S. content industry’s continued efforts to engage the huge potential market in China, such efforts have often been frustrated, most consistently by piracy. According to the MPAA, “China is the most difficult

12. *Id.* See also AFP, *China Revises Figures, “Becomes World’s Number Three Economy”*, Jan. 14, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5iIkb0ROhMRHuiHORRDBbyOcPbtxA>.

13. See ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 22 (2005).

14. MORRISON, *supra* note 8, at 5–6 (noting increases in personal computer ownership, cell phone and automobile purchases, and travel amongst the Chinese).

15. See STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY* 8 (2009) (“This latest report confirms once again that the U.S. copyright industries have outpaced the rest of the economy in real growth and in its contribution to the overall growth achieved by the U.S. economy as a whole.”); Tyler Cowen, *French Kiss-Off: How Protectionism has Hurt French Films*, REASON (July 1998) available at <http://reason.com/archives/1998/07/01/french-kiss-off> (“After aircraft production, the entertainment industry is America’s largest source of trade surplus.”).

16. MICHAEL J. WOLF, *THE ENTERTAINMENT ECONOMY: HOW MEGA-MEDIA FORCES ARE TRANSFORMING OUR LIVES* 4 (1999) (“In the United States . . . entertainment ranks ahead of clothing and health care as a percentage of household spending,” and “entertainment is in many parts of the world the fastest-growing sector of the economy.”).

17. MPAA, *THE ECONOMIC IMPACT OF THE MOTION PICTURE & TELEVISION INDUSTRY ON THE UNITED STATES* 2 (2009), <http://www.mpaa.org/EconReportLo.pdf>.

18. *Id.* at 4.

market to crack for the U.S. motion picture industry,” with pirated DVDs flooding the market, and limits to the number of screens available to foreign films.¹⁹ Similarly, high piracy rates in China have plagued U.S. music producers, leading to an estimated industry loss of \$451 million in 2007.²⁰ Furthermore, estimates from the Chinese government suggest that there are around 500 million pirated books produced in the country each year.²¹

This Note will attempt to situate the recent market access dispute in the broader context of U.S.-China economic and political relations. The first Part surveys the history of China’s entry into the WTO, addressing specifically the obligations relevant to the WTO Panel dispute. The second Part presents the arguments made by the United States and China, and summarizes the Panel’s findings. Finally, Part III evaluates the extent to which the dispute and the Panel’s decision addressed and advanced U.S. economic and policy goals related to the trade of copyrighted goods in China.

I. THE TREATIES

This Part describes the various treaty obligations that arise under the umbrella of China’s WTO membership. First, it examines the controversial progression of China’s membership, focusing on China’s specific obligations under its accession agreement, and the concerns raised by other WTO member nations specific to China. Next, it details China’s obligations under the General Agreement on Tariffs and Trade (GATT), and the General Agreement on Trade in Services (GATS), both with reference to China’s National Treatment obligations. The terms of these agreements form the basis of the dispute in *China—Publications & Audiovisual Materials*.

A. THE HISTORY OF CHINA’S WTO MEMBERSHIP, AND THE TERMS OF THE ACCESSION PROTOCOL

In 1947, the Republic of China, as an original Signatory and a participant in early negotiations, entered into the GATT, predecessor of the WTO.²² However, the founding of the Peoples Republic of China in 1949 led to the Republic of China’s formal withdrawal from GATT.²³ For the next thirty

19. MORRISON, *supra* note 8, at 20–21 (quoting Statement by Dan Glickman, Chairman and Chief Executive Officer, Motion Picture Association of America before the House Ways & Means Committee, Subcommittee on Trade, hearing on Trade With China, February 15, 2007).

20. *Id.* at 21.

21. *Id.*

22. KONG, *supra* note 2, at 4.

23. *Id.*

years, China's domestic interests and ideological objections to free market systems superseded its interests in international trade with the West, and China had no participation in GATT.²⁴

However, during the early 1980s, pursuit of an "Open Door Policy" encouraged China to modernize its markets and reconsider its role as a participant in international trade and cooperation.²⁵ After attending proceedings as an official observer, China formally applied to join GATT in 1986.²⁶ Following general accession guidelines, GATT established a Working Party to examine China's application and make recommendations to the General Council regarding the necessary Protocols (or terms of China's accession).²⁷ After the submission of the Working Party's report, the General Council was to vote on accession, and would grant after two-thirds approval, representative signature, and ratification by China's legislative body.²⁸

China's application to join GATT was not without controversy. Almost immediately, the U.S. Congress expressed frustration regarding China's socialist economic development and socialist legality.²⁹ The U.S. government was particularly concerned with China's lack of IPR protection.³⁰ As a result of these concerns, Congress developed one of the United States' most powerful trade weapons, requiring the United States Trade Representative (USTR) to identify, investigate, consult with, and eventually sanction nations who failed to properly protect U.S. intellectual property or otherwise denied U.S. content goods equal market access.³¹

24. *See id.* at 5, 20 n.6 (suggesting that among the reasons for China's disinterest in the GATT/WTO is a perception of it as "the club for rich countries").

25. *Id.* at 5. *See* Deng Xiaoping, Chairman, Chinese People's Political Consultative Conference, Address to Press Delegation for the Federal Republic of Germany (Oct. 10, 1978).

26. KONG, *supra* note 2, at 5. The original petition was based on a theory that the Republic of China lacked the authority to withdraw the country from the agreement in the first place. *Id.*

27. Accession to the WTO follows an identical procedure. *See* WTO, The WTO General Council, http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm (last visited Feb. 26, 2010). "The General Council is the WTO's highest-level decision-making body in Geneva, meeting regularly to carry out the functions of the WTO. It has representatives (usually ambassadors or equivalent) from all member governments." WTO, Understanding the WTO: The Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Feb. 26, 2010).

28. *See* WTO, Understanding the WTO: The Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Feb. 26, 2010).

29. *See* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U.L. REV. 131, 136-37 (2000).

30. *Id.* at 136-38. China had virtually no IP rights until this era, and its first attempts at introducing IP schemes were often half-hearted and awkward. *Id.*

31. *Id.* at 140 (citing 19 U.S.C. § 2242(a)(1)(A) (2006)).

Beyond trade issues, GATT members also questioned China's application in light of political controversies and policy concerns. The 1989 Tiananmen Square massacre caused the Working Party to become increasingly meticulous in reviewing China's stability, economy, and trade regime.³² Furthermore, China neither formally nor publically embraced the idea of domestic capitalism until its adoption of the "socialist market economy" as a policy goal in 1992.³³

GATT's 1995 reorganization into the WTO forced China to renew its application.³⁴ Fortunately for China, the Working Party on accession to the WTO comprised the same members who formed the Working Party on China's accession to the GATT, so the review process moved relatively quickly thereafter.³⁵ After China concluded negotiations with all thirty-seven member nations, the Working Party finalized China's Draft Accession Protocol, the General Council approved, and China's National People's Congress ratified.³⁶ China became a member of the WTO on December 11, 2001, fifteen years after its initial application.³⁷

1. *Terms of China's Membership in the WTO*

The WTO is built largely upon three agreements: GATT, GATS, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS).³⁸ GATT, as the predecessor for the WTO, represents a set of long-standing trade agreements governing the trade of goods. GATS is a more recent collection of agreements comparable to GATT, only pursuant to the trade of services. Finally, TRIPS represents an agreement to apply GATT principles to WTO member nations' widely varying intellectual property regimes with the goal of establishing a baseline of IPR protection and enforcement.³⁹

In addition to these three pillar agreements, China also must abide by the terms of its Accession Protocol and accompanying Working Party Report.

32. KONG, *supra* note 2, at 6.

33. *See id.*

34. *Id.*

35. *Id.* at 6–7.

36. *Id.* at 7.

37. *Id.* Rivaling the time Accession took for China, the Working Party on the Accession of the Russian Federation formed in 1993, at the time of this writing Russian negotiations for membership are still underway, and it remains unclear if Russia will ever attain full member status. *See* WTO, Accessions Russian Federation, http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm (last visited Feb. 26, 2010).

38. WTO, Understanding the WTO: The Agreements, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Feb. 26, 2010).

39. WTO, Legal Texts: The WTO Agreements, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement (last visited Feb. 26, 2010).

These two documents assign a timeframe for China to come into compliance with the WTO agreements and emphasize WTO Working Party members' concerns specific to China.⁴⁰

The Accession Protocol contains two important provisions relating to China's commitment to open its domestic markets. First, the Chinese government had three years from accession (until December 11, 2004) to "progressively liberalize" its markets, and to afford "all enterprises" the right to trade in all goods not specifically exempt.⁴¹ Second, China had to treat foreign firms "no less favorabl[y]" than domestic firms with respect to the right to trade, except for trade in certain specific exempt goods.⁴²

The Working Party Report reinforces and emphasizes the language of the Accession Protocol provisions. China agreed to "progressively liberalize the scope and availability of trading rights . . . to all enterprises in China," regardless of national affiliation.⁴³ Similarly, the Report provides that "China would permit . . . foreign enterprises and individuals, including sole proprietorships of other WTO members, to export and import all goods," and that foreign enterprise trading rights in China must "be granted in a non-discriminatory and non-discretionary way . . . any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade."⁴⁴

2. *China's Accession to the WTO makes it Subject to the Organization's Dispute Resolution Process.*

In addition to the three pillar agreements, a primary function of the WTO is dispute resolution.⁴⁵ This was not always the case. The original 1947 GATT contained no provision for formal dispute resolution or adjudication, relying instead on a spirit of cooperation based on diplomatic consensus and negotiation.⁴⁶ When disputes did arise—when trade groups, associations, entrepreneurs, or foreign policy makers objected to a member nation's trade

40. See Ministerial Conference, *Accession of the Peoples Republic of China*, WT/L/432 (Nov. 23, 2001).

41. *Id.* ¶ 5.1.

42. *Id.* ¶ 5.2.

43. Working Party on the Accession of China, *Report*, ¶ 83(c)–(d) WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter Working Party Report] (providing in part that "Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting").

44. *Id.* ¶ 84(a), (b).

45. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010).

46. TREBILCOCK & HOWSE, *supra* note 10, at 112.

practices—the GATT leadership addressed them in an *ad hoc* manner that eventually led to the evolution of a third-party panel system.⁴⁷

This evolution culminated in the Understanding on Dispute Settlement (DSU), to which member nations agreed under the same set of negotiations that organized the WTO.⁴⁸ The DSU established a procedure for WTO dispute resolution.⁴⁹ A dispute formally begins when interested parties bring trade concerns to the attention of their nation's WTO trade representative, who in turn makes a request for consultations to the Dispute Settlement Body (DSB).⁵⁰ Perhaps in deference to the diplomatic nature of the enterprise, there are no strict definitions of grounds for dispute in the WTO: any interested party can approach their representative and raise objections regarding another member nation's official conduct, legislation, or any regulation that the objecting party perceives as a violation of the WTO agreements.⁵¹ After a series of mandated consultations, if the issues remain unresolved, the parties submit to adjudication before a Panel of three experts in the field the parties themselves select.⁵² The Panel then issues a Final Report, analogous to a U.S. judicial opinion, in which it reproduces the written and oral arguments of the parties, determines whether the conduct violates relevant WTO provisions, and has discretion to make recommendations on how to realign the objectionable conduct, if appropriate.⁵³

47. The Chairman of the Contracting Parties addressed the earliest disputes in GATT by assigning “working parties” that included the parties in dispute. *Id.* at 112–13.

48. *Id.* at 112–14.

49. *See generally id.* at 120–53 (providing detailed analysis and critiques of the DSU articles).

50. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010). The Dispute Settlement Body is a session of the General Council that includes ambassadors from every member nation held specifically to address a panel report. *Id.*

51. *See* General Agreement on Tariffs and Trade, art. XXIII(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (providing the broad basis for liability). A complaint can be based on “the existence of any other situation, the contracting party may . . . make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.” *Id.* art. XXIII (1)(c).

52. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010).

53. *See id.*; *see also* TREBILCOCK & HOWSE, *supra* note 10, at 137 (discussing the recent criticism of a panel's recommendations).

After receipt of the Final Report, either party can appeal the decision.⁵⁴ Either party may file a notice of appeal, provided it is within sixty days of circulation of the Final Report, and prior to the adoption of the Panel's recommendations by the DSB.⁵⁵ Following timely notice, the Appellate Body, a standing group of seven panelists, must complete its appellate review within ninety days.⁵⁶ Three randomly selected members of the Appellate Body hear the appeal, issue a decision, and give any party in violation a "reasonable" period of time to bring its conduct into compliance before authorizing sanction proceedings.⁵⁷ The results of the Appellate Body panel are final.⁵⁸

B. MEMBERSHIP IN THE WTO REQUIRES CHINA'S ADHERENCE TO GATT

As the predecessor of the WTO, GATT represents "the heart of the multilateral world trading regime."⁵⁹ GATT provides for mutually reduced tariffs, reduction of trade barriers, and the elimination of unfair trade practices.⁶⁰ To achieve those goals, GATT utilizes Most Favored Nation and National Treatment principles to regulate the international trade of goods.⁶¹ GATT's National Treatment provision controls the multilateral treatment of foreign goods by mandating internally non-discriminatory practices:

The products of the territory of any Member imported into the territory of any other Member 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

54. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010).

55. TREBILCOCK & HOWSE, *supra* note 10, at 138.

56. *Id.*

57. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010). The Appellate Body is set up by the Dispute Settlement Body and aims to represent the range of WTO membership. Appellate Body members have four-year terms, and are "persons of recognized authority, with demonstrated expertise in law, international trade, and the covered agreements generally." Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994).

58. WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 26, 2010).

59. TREBILCOCK & HOWSE, *supra* note 10, at 26.

60. *Id.* at 27.

61. *Id.* at 28 ("The principle of non-discrimination - often viewed as the cornerstone of the GATT . . . is amplified in two key provisions: Article I, adoption the Most Favoured National principle; and Article III, adoption the principle of National Treatment.").

internal sale, offering for sale, purchase, transportation, distribution or use.⁶²

GATT allows for several exceptions to its mandates in *Article XX*. Provided that such measures “would not constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade,” GATT members may adopt or enforce measures “necessary to protect public morals” under *Article XX(a)* regardless of their potential violation of other GATT provisions.⁶³ Other exceptions include measures necessary to protect human and environmental health, and measures relating to goods produced through prison labor, goods that constitute national treasures, or goods with historic or architectural value.⁶⁴

Somewhat surprisingly, the WTO Appellate Body has never had occasion to rule on whether a given measure meets the *Article XX(a)* public morals exception,⁶⁵ although it has ruled on the scope of other *Article XX* exceptions.⁶⁶ And it has ruled on disputes invoking the virtually identically worded “public morals” exception language in *Article XIV* of GATS.⁶⁷ From these disputes, WTO members, scholars, and jurists have developed an understanding that the “public morals” exception is meant to be an evolving standard, liberally and broadly interpreted.⁶⁸

C. MEMBERSHIP IN THE WTO REQUIRES CHINA’S ADHERENCE TO GATS

The WTO encompasses agreements relating to trade in services collectively known as GATS. The purpose of a separate agreement specific to trade in services is to provide a framework of rules, principles, and specific commitments related to, though legally distinct from, those in GATT.⁶⁹

62. GATT art. III:4.

63. *Id.* art. XX(a).

64. *See id.* art. XX.

65. TREBILCOCK & HOWSE, *supra* note 10, at 572.

66. *See, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6 1998) [hereinafter *US—Shrimp*].

67. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Apr. 20, 2005) [hereinafter *US—Gambling (AB)*]. The General Agreement on Trade in Services’ “public morals” exception states: Provided that such measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on trade in services” GATS allows the “adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order.” General Agreement on Trade in Services, art. XIV(a), April 15, 1994, WTO Agreement, Annex 1B 33 I.L.M. 1168 (1994) [hereinafter GATS].

68. *See* TREBILCOCK & HOWSE, *supra* note 10, at 573. (summarizing the WTO stance that “the interpretation of public morals should not be frozen in time”).

69. *Id.* at 358.

China's accession documents demonstrate the importance of this distinction. After making clear the importance of China's commitment to liberalize its markets and guarantee foreign enterprises the right to import and export, the Working Party Report emphasized "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."⁷⁰

China's commitments under GATS include a provision to ensure equal access to its service markets. GATS requires WTO members to afford service suppliers from other member nations "treatment no less favourable than that it accords to its own like services and service suppliers."⁷¹ In order to ensure a level trading field, GATS allows that the manner in which treatment will be "no less favourable" can be either "formally identical treatment or formally different treatment."⁷² The measure for determining a violation is the standard of treatment afforded domestic suppliers of similar services.⁷³

II. THE DISPUTE

Having established the context in which *China—Publications & Audiovisual Materials* arises, and the treaty obligations at issue, this Note will now summarize the Panel Report. First, the Note surveys the United States' specific claims characterizing China's treatment of importation and distribution of certain goods as violations of the Accession Protocol, GATT, and GATS. The second section discusses China's counter arguments to the United States' complaints, including the "public morals" exception China raised. The third section summarizes the Panels' findings and recommendations. Finally, the fourth section discusses the Appellate Body's review of the Panel's decision.

A. THE COMPLAINT

The dispute before the WTO Panel officially began when the USTR requested consultations with the Chinese government regarding measures that allegedly restricted foreign companies' trading rights and market access

70. *Working Party Report* ¶ 84(a) (emphasis added).

71. GATS art. XVII(1).

72. *Id.* art. XVII(2).

73. Specifically: "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." *Id.* art. XVII(3).

in a discriminatory manner.⁷⁴ Once raised, the dispute went through the requisite pre-resolution negotiation process.⁷⁵ The United States requested that the DSB compose a Panel to address issues that remained despite consultations.⁷⁶

The United States argued that China violated its National Treatment obligations to the WTO under the Accession Protocol, *Article III:4* of GATT, and *Article XIV* of GATS. Specifically, the United States pointed to measures that (1) restricted imports into China by limiting importation rights to Chinese state-owned entities; (2) imposed more cumbersome burdens on distribution ventures engaged in by foreign-invested enterprises than those imposed on wholly Chinese-owned distributors; and (3) discriminated against imported entertainment media by subjecting it to a significantly more stringent content-review regime.⁷⁷ The United States alleged that specific aspects of Chinese law and policy violated China's trade commitments under the WTO with regards to four sets of products: (1) reading materials (including traditional print and electronic distributions); (2) audiovisual home entertainment products (AVHE) (including DVDs); (3) sound recordings (including ringtones); and (4) motion picture films intended for theatrical release.⁷⁸

1. *Alleged Violations of the Accession Protocol & GATT: Import Restrictions*

The United States argued that twelve specific Chinese measures, relating to the importation and content review of the four categories of goods, violated the Accession Protocol.⁷⁹ For example, Article 4 of an important Chinese importation measure, the *Several Opinions*, barred foreign-invested enterprises from engaging in the "import [of] books, newspapers, periodicals, films for theatrical release, other audiovisual products (including sound

74. *China—Publications & Audiovisual Materials*, *supra* note 6, ¶ 1.1.

75. *Id.* ¶¶ 1.2–1.5. The first round of consultations, joined by the European Communities, took place in early June 2007 and failed to resolve the issues in dispute. Supplemental consultations were held in late July 2007 and also failed to find an acceptable resolution. *Id.*

76. *Id.* ¶ 1.6.

77. *Id.* ¶¶ 2.1–3(c).

78. *Id.* ¶ 4.3.

79. *Id.* ¶ 7.329. Those twelve measures are: the *Catalogue*; the *Foreign Investment Regulation*; the *Several Opinions*; the *Publications Regulation*; the *Importation Procedure*; the *Electronic Publications Regulation*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rule*; the *Audiovisual (Sub)-Distribution Rule*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*. *Id.*

recordings) or electronic publications.”⁸⁰ Under such measures, China was able to grant exclusive rights to import finished audiovisual products to wholly state-owned enterprises, such as the China National Publications Import and Export Corporation (CNPIEC).⁸¹

The United States also submitted to the Panel its complaint that, even with majority Chinese-owned distribution and exclusive CNPIEC importation rights, foreign goods were subject to yet another importation/distribution hurdle in China: they were held to a disproportionately strict content-review process.⁸² The United States pointed to the disparate treatment of foreign-content goods in virtually every market. For example, in sound recordings the United States noted that those “intended for electronic distribution must receive prior approval from MOC [the Ministry of Culture] before distribution. Domestic sound recordings, in contrast, require no such approval”⁸³ The United States also identified other Chinese regulations, like the *Internet Culture Rule*, that affect the import of sound recordings by establishing an intense state-run content-review regime.⁸⁴

2. *Alleged Violations of GATS: Distribution Restrictions*

The United States claimed that, in addition to prohibitions on imports, specific Chinese measures prevented foreign individuals and enterprises from engaging in the distribution of reading materials, sound recordings, and AVHE.⁸⁵ The regulation of such distribution services falls under the provisions of GATS.

Regarding reading materials, the United States argued that several measures prohibited foreign-invested enterprises from wholesale distribution via limited distribution (i.e., subscription),⁸⁶ as well as unlimited distribution.⁸⁷ These measures, the United States argued, worked to discriminate against foreign enterprise. For example, the *Publications (Sub-) Distribution Rule* required any Chinese distributors with foreign investment to demonstrate a

80. *Id.* ¶ 7.372. The full title of the measure is: *The Several Opinions on the Introduction of Foreign Capital into the Cultural Sector*. *Id.* ¶ 7.370.

81. *Id.* ¶ 4.10. More information regarding CNPIEC is available at <http://www.cnpeak.com/eng/>.

82. *Id.* ¶ 4.23.

83. *Id.*

84. *Id.* ¶ 7.1557.

85. *Id.* ¶ 7.918.

86. *Id.* ¶ 7.957. The measures affecting distribution of subscription materials are: the *Publications Regulation* and the *Imported Publications Subscription Rule*. *Id.* ¶ 7.958.

87. *Id.* ¶ 7.957. These measures are: the *Publications (Sub-) Distribution Rule*, and *Publications Market Rule*. *Id.* ¶ 7.938.

minimum level of invested capital (approximately US\$4 million), and a minimum time commitment (approximately 30 years) in order to lawfully engage in the wholesale distribution of reading materials.⁸⁸ No such minimum capital or time commitments were required of wholly Chinese-owned distribution operations.⁸⁹

The United States also alleged GATS violations pursuant to the distribution rights associated with physical AVHE Products.⁹⁰ Similar to the restrictions on reading materials, the United States argued that the measures affecting physical AVHE distribution set unenforceable limits on the percentage of foreign investment in these ventures, thereby unfairly discriminating against foreign distribution services in China.⁹¹

Finally, the United States also identified several measures it alleged violate China's GATS commitments as to the distribution of sound recordings.⁹² These measures, issued in part by the Chinese Ministry of Culture, state blanket prohibitions against foreign investment in "setting up and operating a business dealing in internet culture."⁹³

In sum, the United States argued that China, by establishing prohibitively high standards for foreign distributors in these three product categories, afforded more favorable treatment to domestic distributors than their foreign counterparts, thus violating their commitments under the National Treatment provision of GATS.

B. CHINA'S COUNTER ARGUMENTS

China raised one procedural and two substantive counter arguments to the United States' charges. Procedurally, China argued that the United States was barred from bringing some of their complaints.⁹⁴ China noted, and the Panel agreed, that several of the measures identified by the United States in its written submission to the Panel were not indicated in their earlier requests for consultations, and therefore ineligible for panel adjudication.⁹⁵ Substantively, China first argued that motion pictures intended for theatrical

88. *Id.* ¶¶ 7.1103, 7.1122.

89. *Id.* ¶ 7.1124.

90. *Id.* ¶ 7.1314. These measures are: the *Audiovisual (Sub-) Distribution Rule*, the *Catalogue*, the *Foreign Investment Regulation*, and the *Several Opinions*.

91. *See id.* ¶¶ 7.1362–75.

92. *Id.* ¶ 7.1143. Specifically, the United States identified the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, and the *Several Opinions. Id.*

93. *Id.* ¶ 7.1308.

94. *Id.* ¶ 4.164.

95. *See, e.g., id.* ¶¶ 4.163–68. According to WTO precedent in *Korea—Commercial Vessels*, the scope of the Panel's authority is limited by the content of the consultations. *Id.* (citing WT/DS273/R, (adopted Apr. 11, 2005)).

release do not qualify as “goods” within the meaning of the treaties.⁹⁶ Second, as an affirmative defense, China claimed its measures were an exercise of their right under the WTO to hold cultural goods to stricter regulatory standards by virtue of the “public morals” exception.⁹⁷

1. *Films for Theatrical Release are Not “Goods”*

The United States’ complaint challenged both the importation and distribution of films intended for theatrical release as GATT violations. China argued before the Panel that a motion picture is not a “good” under the language of China’s WTO Accession Protocol, and therefore GATT should not apply.⁹⁸ China presented this alternative view of a theatrical release film by characterizing it as “a sequence of pictures that is projected on to a screen . . . *per se* intangible and cannot be possessed Likewise, movie-goers do not buy the motion picture as such, but only the right to attend the projection.”⁹⁹

China argued that a motion picture was more akin to a service than a good by illustrating the process of a film’s theatrical release. The transaction begins when the producer and distributor execute a copyright licensing agreement.¹⁰⁰ The distributor then receives all associated materials, including prints, scores, and soundtracks, in order to facilitate distribution.¹⁰¹ After the film’s release and run, those materials are either returned or destroyed, leaving no trace of a tangible good.¹⁰²

China maintained that a motion picture’s intangibility means that it is not a good.¹⁰³ They advanced the definition used by the Appellate Body that “goods” are “items that are tangible and capable of being possessed.”¹⁰⁴ China noted that although the delivered film canisters often “carry” the motion picture, films are increasingly delivered digitally, further bolstering the argument that they are entirely intangible.¹⁰⁵

Finally, China argued that the presence of “importation of motion pictures for theatrical release” on its GATS Schedule clearly marks this

96. *Id.* ¶¶ 4.92–94.

97. *Id.* ¶¶ 4.107–20.

98. *Id.* ¶ 4.99.

99. *Id.*

100. *Id.* ¶ 4.97.

101. *Id.* ¶ 4.98.

102. *Id.*

103. *Id.* ¶¶ 4.99–100.

104. *Id.* ¶ 4.100.

105. *Id.*

product as a service rather than a good.¹⁰⁶ As discussed, *supra*, the entire purpose of GATS is to cover services legally distinct from GATT. China's argument was that measures relating to a product covered under GATS cannot also be challenged under GATT, or the Accession Protocol, which defer to GATS authority over services.¹⁰⁷

2. *Cultural Goods & the "Public Morals" Exception*

China most notably defended its regulations under *Article XX(a)*: the "public morals" exception. As discussed, *supra*, this provision allows for the "adoption or enforcement by any Member of measures: . . . (a) necessary to protect public morals" regardless of their potential violation of other GATT provisions.¹⁰⁸

China laid the foundation for this argument by emphasizing the nature of the products. Reading materials, AVHE, and sound recordings are cultural goods.¹⁰⁹ Cultural goods, China noted, have an influence over social and public morals.¹¹⁰ In order to protect its polity from damaging influences, "especially those that depict or vindicate violence or pornography," China argued that strict regulation of trade in these goods is necessary.¹¹¹

The importation measures at issue, China maintained, are its best means of addressing that necessity.¹¹² China said that its importation structure for these products is "designed to guarantee an effective and efficient application of content review decided by China and is in full compliance with China's WTO rights and obligations."¹¹³ It characterized the content review process as unavoidably part of importation, too cumbersome to conduct elsewhere, and because of the high volume of foreign materials and the vital interest China has in protecting public morals, it presented that the process must be undertaken by a number of administrative authorities with a set of different tasks.¹¹⁴

106. *Id.* ¶ 4.103.

107. *See supra* Section I.

108. GATT art. XX(a). *See supra* Section I.B

109. *China—Publications & Audiovisual Materials*, *supra* note 6, ¶ 4.107. China did not include motion pictures intended for theatrical release in the category of goods protected by the "public morals" exception perhaps because it had just made the argument that theatrical films were a service, and thus not subject to *Article XX(a)* of GATT.

110. *Id.* ¶ 4.108.

111. *Id.* ¶ 4.114.

112. *Id.* ¶¶ 4.107–114.

113. *Id.* ¶ 4.107.

114. *Id.* ¶ 4.110. China lists the different tasks assigned to the authorities: One group administers and reviews the entire process. Another, "selected, based on their capacity relating to content review" screens out anything "having a negative impact on public

China argued that *Article XX(a)* allowed for the differential treatment of the goods at issue. While acknowledging obligations to liberalize their markets under GATT and the Accession Protocol, the Chinese reasoned that these measures are allowed so long as they are administered “in a manner consistent with the WTO Agreement,” which includes *Article XX(a)*.¹¹⁵

C. PANEL’S FINDINGS

The United States prevailed on nearly every argument raised.¹¹⁶ The Panel found that films intended for theatrical release are goods, the importation and distribution of which is governed by China’s GATT commitments.¹¹⁷ Furthermore, the Panel determined that all but one of the contested measures failed to meet the preliminary test of “necessary” to qualify for the “public morals” exception.¹¹⁸ The one measure that the Panel found necessary on preliminary inquiry still failed to qualify for the exception due to the presentation of reasonably available alternatives.¹¹⁹ Accordingly, the Panel found all of the contested measures violated China’s WTO obligations.¹²⁰

1. *Films Intended for Theatrical Release are Goods*

The Panel first addressed China’s argument that films meant for theatrical release are services and not goods.¹²¹ The Panel considered whether film is tangible, the effect transition through a series of services may have on a good, and the classification structures associated with films meant for theatrical release.¹²²

The Panel looked to presentations by the United States, arguing against China’s interpretation of a film as a service based on intangibility.¹²³ While the United States conceded that some aspects of all the goods in question are intangible, the Panel noted the U.S. argument that intangible content does not transform the physical good into a service.¹²⁴ The series of images flashed

morals.” A third, the importing agent, will again “review the content of reading materials envisaged for importation and decide whether or not the reviewed goods shall be imported in the case of reading materials or be submitted to the relevant administrative authority for final approval in the case of electronic publications and audiovisual products.” *Id.*

115. *Id.* ¶ 4.112.

116. *Id.*

117. *Id.* ¶ 7.527.

118. *Id.* at ¶¶ 7.821–26.

119. *Id.* at ¶ 7.888.

120. *See infra* Section II.C.1–2.

121. *China—Publications & Audiovisual Materials*, *supra* note 6, ¶¶ 7.488–527.

122. *Id.*

123. *Id.* ¶ 7.503.

124. *Id.*

on a screen to make a motion picture may well be what holds value for the consumer; however, the United States maintained, there remains a tangible good in the film itself as the content of the canister.¹²⁵ Furthermore, the United States argued that *most* goods go through a series of services and yet that process does not transform the goods *into* services.¹²⁶

The Panel directed the majority of its analysis on the United States' final argument that China itself treats films as goods in its customs regulations.¹²⁷ In the schedule of goods China attached to its Accession Protocol documents, China lists "cinematographic film."¹²⁸ Furthermore, the language of GATT carves out certain exceptions to the national treatment of film; such exceptions, the United States argued, would be moot if films were not goods and GATT did not apply.¹²⁹

The Panel relied heavily on this final argument in determining that hard-copy cinematographic films intended for theatrical release are indeed goods relevant to China's trade commitments.¹³⁰ In addition to China's custom regulations, the schedule China attached to the Accession Protocol, and the relevant language in GATT specific to films, the Panel also noted that China collects customs duties when cinematographic films are imported, consistent with the treatment of goods, not services.¹³¹

2. *The "Public Morals" Exception*

The Panel found that the Chinese measures do not qualify for the "public morals" exception of *Article XX(a)*.¹³² According to GATT, China has a "right to regulate trade" so long as "[1] the regulation of importers has a reasonable link to the regulation of the goods at issue . . . and [(2)] the regulation of importers is WTO-consistent."¹³³ Both parties conceded, and the Panel concluded, that China's measures had a reasonable link to the goods.¹³⁴ Consequently, the Panel's main inquiry was whether China's

125. *Id.*

126. *Id.* ¶ 7.504. The United States, used the analogy of a stethoscope, and argued that a stethoscope is most frequently, if not exclusively, utilized in providing healthcare services, yet retains its character as an individual good. *Id.*

127. *Id.* ¶ 7.505.

128. *Id.*

129. *Id.* ¶ 7.506 (citing GATT art. III:10, IV).

130. *Id.* ¶ 7.526.

131. *Id.* ¶ 7.524.

132. *Id.* ¶¶ 7.907–13.

133. *Id.* ¶ 7.722.

134. *Id.* ¶ 7.723.

regulations were WTO-consistent and in particular whether they qualified under *Article XX(a)*.¹³⁵

There was no preexisting WTO jurisprudence on the GATT “public morals” exception;¹³⁶ however, the Panel was able to draw from previous analysis of other *Article XX* exceptions and other treaty language to aid its inquiry. For instance, the Appellate Body had established a two-tiered approach to examining any measure under *Article XX*.¹³⁷ First, does the measure arise under one of the listed exceptions, such as public morals? Second, is the measure “necessary”?¹³⁸

a) Do the relevant measures address public morals?

The question of whether the measure falls under an *Article XX* exception led the Panel to examine whether the challenged measures touched upon “public morals” and the meaning of that phrase in the WTO context.¹³⁹ Again, with no *Article XX(a)* jurisprudence to guide them, the Panel looked towards a closely related Appellate Body decision regarding the “public morals” exception of GATS in *US—Gambling*.¹⁴⁰ In *US—Gambling*, the Appellate Body examined U.S. measures prohibiting certain online gambling services brought before the WTO by Antigua and Barbuda.¹⁴¹ As an affirmative defense, the United States raised the “public morals” exception of GATS, and argued that the measures were necessary to protect against the U.S. concerns of “money laundering, organized crime, fraud, underage gambling and pathological gambling.”¹⁴² In that case, the Appellate Body took a very broad view of “public morals,” noting that member nations “should be given some scope to define and apply for themselves the concepts of ‘public morals’ . . . in their respective territories, according to their own systems and scales of values.”¹⁴³ Despite this broad definition, the

135. *Id.* ¶ 7.722–23.

136. TREBILCOCK & HOWSE, *supra* note 10, at 572.

137. *China—Publications & Audiovisual Material*, *supra* note 6, at ¶ 7.746 (citing Appellate Body Report, *Brazil—Measures Affecting Imports of Retreated Tyers*, ¶ 139, WT/DS332/AB/R (Dec. 17 2007)).

138. *Id.* ¶¶ 7.746, 7.781

139. *Id.* ¶ 7.750.

140. *US—Gambling (AB)*, *supra* note 67.

141. *Id.*

142. *Id.* ¶ 301 (quoting Panel Report ¶ 6.494).

143. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ¶ 6.461, WT/DS285/R (quoted in *China—Audiovisual Products*, *supra* note 6, ¶ 7.759).

measures in *US—Gambling* failed to qualify for the “public morals” exception of GATS.¹⁴⁴

Recognizing that “the content and scope of ‘public morals’ can vary . . . as they are influenced by each Members’ prevailing social, cultural, ethical and religious values,” the Panel assumed *arguendo* that the materials and measures were relevant to the protection of public morals, that if imported they “could have a negative impact on ‘public morals’ in China,” and moved to the more determinative “necessary” question.¹⁴⁵

b) Are the measures “necessary”?

In determining “necessary,” the Panel again relied upon a balancing test detailed in *US—Gambling*.¹⁴⁶ This test directs the Panel to determine “necessary” by balancing the (1) “contribution of the measure to the realization of the ends pursued by it” against (2) “the restrictive impact of the measure on international commerce.”¹⁴⁷ Even if that balance suggests a preliminary finding of “necessary,” however, the Panel must further examine whether a WTO-consistent alternative to the measures exists before finding a legitimate “public morals” exception.¹⁴⁸

The Panel identified only one measure as preliminarily “necessary”: *Article 42* of the *Publications Regulation* is a “criteria provision” that sets forth guidelines and requirements on who can import publication materials.¹⁴⁹ The Panel first decided that the conditions of this measure represent a “material contribution to the protection of public morals.”¹⁵⁰ As for the second prong of the “necessary” analysis, the Panel determined that some conditions of the measure do not “*a priori* exclude particular types of enterprise in China from the right to engage in importing,” while others are “unclear” in their restrictive impact.¹⁵¹ Given these findings, the Panel ruled “absent reasonably

144. *US—Gambling (AB)*, *supra* note 67, ¶ 372.

145. *China—Publications and Audiovisual Products*, *supra* note 6, at ¶ 7.763.

146. *US—Gambling (AB)*, *supra* note 67, ¶ 306. *See also* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 161–64, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WT/DS332/AB/R (Dec. 17, 2007).

147. *US—Gambling (AB)*, *supra* note 67, ¶ 306.

148. *Id.* ¶¶ 309–10. However, the Appellate Body noted that the responding party bears no burden “to identify the universe of less trade-restrictive alternatives.” *Id.*

149. *See China—Publications and Audiovisual Products*, *supra* note 6, ¶¶ 7.821–26. The Panel found that China failed to demonstrate that any of the other measures were “necessary” at the preliminary stage because they were all too trade restrictive. *Id.* ¶¶ 7.837–868.

150. *Id.* ¶ 7.828.

151. *Id.* ¶¶ 7.822, 7.836.

available alternatives,” *Article 42* of the *Publications Regulation*, and only *Article 42*, was “necessary” to protect public morals.¹⁵²

But the “absence of reasonably available alternatives” element prompted the Panel to consider the possible alternatives the United States presented.¹⁵³ For one, the United States pointed to China’s use of “in-house” content-review procedures for domestic producers as an alternative to the current implementation of the *Publications Regulation*, which in effect gives China’s state-owned enterprises a monopoly on importing.¹⁵⁴

The Panel evaluated this and other alternatives to determine whether they were “reasonably available.”¹⁵⁵ While the Panel noted, “implementing the US proposal might make it necessary for China to allocate additional human and financial resources to the authorities tasked with performing content review,” it also determined that, “it is not apparent to us that the cost to the Chinese Government would be any higher if the US proposal were implemented.”¹⁵⁶ China failed to raise any arguments that the U.S.-proposed alternative was unreasonable.¹⁵⁷ Therefore, given the existence of potentially equally effective and less restrictive alternatives to China’s practices, the Panel found that the *Article 42* was ultimately not “necessary” within the meaning of the “public morals” exception.¹⁵⁸

The Panel applied the balancing test to all other measures in question, and found that the results were inconsistent with a preliminary finding of “necessary.”¹⁵⁹ The Panel agreed that all measures were consistent with China’s particularly “high level of protection of public morals.”¹⁶⁰ However, because the measures so completely barred international commerce and only tangentially contributed to the protection of public morals, they failed to strike a reasonable balance, and could not be considered “necessary.”¹⁶¹

152. *Id.* ¶ 7.869.

153. *See id.* ¶¶ 7.873–75.

154. *Id.* ¶ 7.873.

155. *Id.* ¶¶ 7.901–06.

156. *Id.* ¶¶ 7.903–04. “To recall, the main difference would be that content review would be conducted, not by incorporated wholly state-owned enterprises, but by non-incorporated offices comprising the Government of China.” *Id.* ¶ 7.904.

157. *Id.* ¶ 7.905.

158. *Id.* ¶¶ 7.886–7.909.

159. *Id.* ¶ 7.911.

160. *Id.* ¶ 7.819.

161. *Id.* ¶ 7.868.

3. Recommendations

After finding China in violation of the Accession Protocol, GATS, and GATT, the Panel recommended simply that the DSB “request China to bring the relevant measures into conformity with its [WTO] obligations.”¹⁶²

D. APPEALS

China filed its notice to appeal on September 23, 2009.¹⁶³ China appealed the Panel’s legal findings, arguing that the “public morals” test was misapplied, and that the measures found to be in violation are indeed necessary within the meaning of *Article XX(a)*.¹⁶⁴ In addition, China appealed the Panel’s findings relating to the importation of films meant for theatrical release, stating that the Panel “erred in concluding that China’s trading rights commitments are applicable to the Chinese measures at issue, despite the fact that these measures do not regulate hard-copy cinematographic film, which is the subject of the US claim.”¹⁶⁵

The United States also filed an appeal on October 6, 2009.¹⁶⁶ In its appeal, the United States argued that the Panel erred when finding any element of the *Publications Regulation* “can be characterized as ‘necessary’ [under *Article XX(a)*] to protect public morals in China.”¹⁶⁷

The Appellate Body issued its report on December 21, 2009.¹⁶⁸ Of primary concern to the Appellate Body was the extent to which the “public morals” exception, or any of the *Article XX* exceptions, is available as an affirmative defense for violations outside the GATT.¹⁶⁹ In addition to GATT violations, China had argued before the panel the appropriate applicability of the exception to alleged violations of its Accession Protocol.¹⁷⁰ In conducting its substantive analysis, the Panel had assumed *arguendo* the exception’s applicability.¹⁷¹ The Appellate Body warned about the use of *arguendo* assumptions, stating “it may not always provide a solid foundation upon

162. *Id.* ¶ 8.4.

163. Notification of an Appeal by China, WT/DS363/10 (Sept. 23, 2009); see also John W. Miller, *China Cites ‘Morals’ in Its WTO Appeal*, WALL ST. J., Sept. 23, 2009, at A9.

164. Notification of an Appeal by China, *supra* note 163, at 2.

165. *Id.* at 3 (citing *China—Publications & Audiovisual*, *supra* note 6, ¶¶ 7.528–60, 7.584).

166. Notification of an Other Appeal by the United States, WT/DS363/11 (Oct. 6, 2009).

167. *Id.* (citing *China—Publications & Audiovisual*, *supra* note 6, ¶¶ 7.829–36).

168. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China—Publications (AB)*].

169. *Id.* ¶¶ 205–233.

170. *Id.*

171. *Id.* ¶ 213.

which to rest legal conclusions,”¹⁷² and “risks creating uncertainty.”¹⁷³ Despite these admonishments, the Appellate Body affirmed the applicability of the *Article XX* exception in this instance, suggesting a trend towards broadening their applicability in general.¹⁷⁴

The Appellate Body also affirmed the Panel’s conclusion regarding the characterization of films intended for theatrical release as goods.¹⁷⁵ In doing so, it addressed China’s arguments regarding procedural flaws in the U.S. complaint, possible translation issues of a contested term, and the characterization of the regulated activity as a service rather than a good.¹⁷⁶ The Appellate Body clarified the Panel’s analysis and conclusion by reaffirming the principle that trade in goods and services are not always mutually exclusive, and that such trade may be subject to both WTO categories of obligations.¹⁷⁷

The Appellate Body agreed with the United States, and found that the Panel erred when making a preliminary finding of “necessary” for the *Publications Regulation*.¹⁷⁸ The Panel based its finding partially on a determination that the measure made a material contribution to the goal of protecting public morals.¹⁷⁹ The Appellate Body rejected this finding as based on the Panel’s false assumptions regarding the extent to which the measure’s limitation on the number of importation entities actually affected the ease with which government officials could then conduct content review.¹⁸⁰ The Panel made these assumptions, the Appellate Body noted, without any reference to supporting evidence.¹⁸¹ The Appellate Body, however, affirmed all other findings within the Panel Report, and upheld the Panel’s conclusion that the contested measures were not “necessary” to protect public morals.¹⁸²

172. *Id.*

173. *Id.* ¶ 215.

174. *Id.* ¶ 233; see also WORLDTRADELAW.NET, DISPUTE SETTLEMENT COMMENTARY, 23–25, [http://worldtradelaw.net/dsk/ab/china-publications\(dsc\)\(ab\).pdf](http://worldtradelaw.net/dsk/ab/china-publications(dsc)(ab).pdf) (last updated Jan. 21, 2010) (login required).

175. *China—Publications (AB)* ¶¶ 159–204.

176. *Id.*

177. *Id.* ¶¶ 194–95.

178. *Id.* ¶¶ 279–97.

179. See *supra* note 150, and accompanying text.

180. *China—Publications (AB)* ¶ 291.

181. *Id.* ¶ 294. The Appellate Body admonished that “the Panel neither addressed quantitative projections nor provided qualitative reasoning.” *Id.*

182. *Id.* ¶ 415(e).

III. THE IMPLICATIONS

As articulated by the Panel, and upheld by the Appellate Body, the two prongs of the “public morals” test of *Article XX(a)* encapsulate the dual interests of parties involved: public policy and economic goals related to the trade of content goods. The Panel evaluates the question of whether a measure touches upon public morals with an understanding that a member has the right, as a matter of public policy and national sovereignty, to regulate the cultural content its population consumes. The “necessary” analysis—and particularly the question of how effective versus how trade prohibitive a given measure is and whether viable alternatives exist—is an economic argument. When setting the first bar low, the WTO acts in deference to cultural specificity. The “public morals” exception test compensates for that concession by making the second economic bar high.

Just as the United States has economic and policy goals concerning China’s trade practices,¹⁸³ China has two opposing motivations for its measures restricting import, distribution, and screening of U.S. content goods. The first, and the one China was most explicit about in its arguments, is its desire to control the population’s exposure to socially and morally challenging content. The second, and somewhat natural corollary, is that China’s behavior is meant to carve out and protect market space for its own domestic content goods.

This Part will examine the policy and economic implications of the *China—Publications & Audiovisual Materials* dispute, analysis, and decision. First, while the United States has consistently maintained objections to the type of social and political control exhibited in China’s public policy towards foreign content, challenging such conduct in the WTO might not be wise for the United States or its content industries due to international tensions regarding perceived U.S. cultural colonialism. Second, while certainly frustrating to U.S. content industries’ desire for expansion into China’s markets, to the extent that China’s actions reflect protectionist sentiments, these measures might actually represent a significant milestone in the development of China’s IPR regime. Finally, the structure of the WTO, its dispute resolution procedures, and China’s history of adhering to recommendations made therein, present unique challenges to timely resolution.

183. *See supra* Introduction.

A. GAINING MARKET ACCESS WITHOUT RAISING FEARS OF CULTURAL COLONIALISM

As discussed, *supra*, U.S. content industries represent a significant player in the United States' economic, political, and cultural standing in the world.¹⁸⁴ China, like many other WTO member nations, has not welcomed the U.S. economic and cultural influx with open arms.¹⁸⁵ While negotiating with WTO members on the wording of their copyright laws in the early 1990s, prior to accession, China maintained a strong resistance to opening its market to foreign cultural enterprises, almost entirely on ideological grounds.¹⁸⁶

Similarly, during the organization of the WTO itself, several nations—notably France and Canada—wanted to create a specifically exempt category of cultural goods and services in order to combat perceived cultural colonialism.¹⁸⁷ Indeed, at the end of the twentieth century “keeping out American films [as well as music, and TV shows] became one of the most important French national policies.”¹⁸⁸ Several European and Latin American countries have established quota systems and tax subsidies to protect domestic content industries from the Hollywood juggernaut.¹⁸⁹

Article XX protects WTO members from compromising certain exclusionary rights through their membership in GATT. The Appellate Body has interpreted the *Article XX* exceptions as setting a delicate balance between one member invoking an exception and another exercising its affirmative trading rights, “so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves.”¹⁹⁰ Widespread practice amongst members seeking to keep out foreign content goods would seem to suggest that carving out trade-agreement exceptions for exclusionary treatment of such goods is a common goal. Indeed, the Panel noted in *China—Publications & Audiovisual Materials* that the “public morals” exception,

184. *Id.*

185. TREBILCOCK & HOWSE, *supra* note 10, at 636–40 (discussing arguments for exclusion of certain domestic content industry products).

186. MERTHA, *supra* note 13, at 72.

187. TREBILCOCK & HOWSE, *supra* note 10, at 636–38. The exception never materialized, partially because the nature of GATS allows for nation specific flexibility when developing their schedule. *Id.* at 637.

188. Tyler Cowen, *French Kiss-Off*, REASON (July 1998), available at <http://reason.com/archives/1998/07/01/french-kiss-off>.

189. *Id.*

190. *US—Shrimp*, *supra* note 66, ¶ 159.

being the first in the long list of possible *Article XX* categories, was clearly very important to the drafting members.¹⁹¹

However, the Panel administered the test in such a way as to shift the controversy entirely away from the policy question of public morals and toward the economic analysis. As discussed, *supra*, the Panel set the bar very low for whether a measure touches upon public morals.¹⁹² In so doing, the Panel essentially ignored the culturally specific subjective element of the “public morals” exception analysis in favor of the more easily determined “necessary” question, which turns on a more objective economic cost/benefit analysis of the measures themselves. Having established summarily that there is a “public moral” policy interest worth protecting, the Panel shifts its analysis to how well themember’s practices protect that interest and balance that performance against any less prohibitive and no-more costly alternatives the opposition presents. This is all done without any means of establishing the relative value of the right the measure serves. With much of the “public moral” exception analysis falling on the question of cost efficiency, and particularly on finding cost-neutral alternatives, it is difficult to imagine how any WTO member could pass such a high economic bar, and successfully raise the public morals defense.

The Panel’s application of the “necessary” test was entirely in keeping with Appellate Body *Article XX* precedent,¹⁹³ but with such an unbalanced balancing test, it is not likely to remain free from controversy. Especially given the history of other WTO members intent on carving out a national space for their own domestic content industries, the ruling might be perceived as an example of the United States and major content industry players (such as the MPAA) running roughshod over the cultural preferences of another member.

B. THE CONTINUING DEVELOPMENT OF IPR IN CHINA

Conventional wisdom holds that the most significant barrier to U.S. content industries entering the Chinese market is piracy.¹⁹⁴ While lack of

191. *China—Publications & Audiovisual*, *supra* note 6, ¶ 7.817 (“We do not consider it simply accident that the exception relating to ‘public morals’ is the first exception identified in the ten-subparagraphs of Article XX.”).

192. *See supra* Section II.C.2.

193. *See supra* Section II.C.

194. *See generally* MERTHA, *supra* note 13; Brent T. Yonehara, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L.R. 389 (2002).

protection for IPR in China is hardly a new concern,¹⁹⁵ the staggering statistics, undeniable empirical analysis, and anecdotal evidence combine to present a picture of a modern intellectual property piracy epidemic.¹⁹⁶ Because of piracy, one study estimated that the U.S. motion picture industry lost \$6.1 billion worldwide in 2005.¹⁹⁷ In China, the same study put U.S. motion picture revenue loss at \$244 million, and singled out the country as the world's piracy rate leader.¹⁹⁸

Although the parties in *China—Publications & Audiovisual Materials* never explicitly address piracy, it is undeniable that piracy is able to thrive, in part, because the only option for consumers is on the wrong side of the law. Generations of limited market access and censorship have increased the market for pirated goods in China.¹⁹⁹ In a press release regarding the dispute, USITR Ron Kirk commented that the decision would “level the playing field for American companies working to distribute high-quality entertainment products in China, so that legitimate American products can get to market and beat out the pirates.”²⁰⁰ The United States also raised another dispute in the WTO challenging China's lack of IPR enforcement on the same day, underscoring the interrelatedness of market access and piracy concerns.²⁰¹

Of course, such race-to-the-market strategies assume a great deal about the Chinese entertainment consumer. There are a number of reasons to doubt that, even given the option of a legitimate version of a content product, the average Chinese consumer would choose the official IPR-protected product over a pirated copy.²⁰² Foreign influence is largely

195. Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 2 (2001) (“[T]his crusade has been an ongoing effort since the turn of the twentieth century.”).

196. See, e.g., Mathew Quirk, *The Movie Pirates*, THE ATLANTIC (June 2007), available at <http://www.theatlantic.com/doc/200706/movie-pirates> (“China is consistently portrayed as the Wild East of movie piracy, and rightly so.”).

197. L.E.K., THE COST OF MOVIE PIRACY 4 (2006).

198. *Id.* at 4, 7. The monetary number is artificially low because it is determined based on loss-per-screen and China severely limits the number of screens available to foreign films. *Id.*

199. See Jordana Cornish, Note, *Cracks in the Great Wall: Why China's Copyright Law has Failed to Prevent Piracy of American Movies within its Borders*, 9 VAND. J. ENT. & TECH. L. 405, 424 (2006).

200. Press Release, Office of the United States Trade Representative, World Trade Organization Report Upholds U.S. Trade Claims Against China (Aug. 12, 2009) available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/august/world-trade-organization-report-upholds-us-trade-cl>.

201. MORRISON, *supra* note 8, at 16 (referencing Panel Report, *China—Measures Affecting Protection & Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009)).

202. See, e.g., Peter K. Yu, *supra* note 29, at 165 (noting reasons including “Confucian beliefs ingrained in the Chinese culture, the country's socialist economic system, the leaders’

responsible for China's IPR regime,²⁰³ which in its current form dates only from the latter quarter of the twentieth century.²⁰⁴ One consequence of this recent evolution is the gap between China's black letter IPR law on one hand and the willingness and ability of Chinese officials to enforce those laws and the cultural appreciation for IPR protection on the other.²⁰⁵ Other factors that contribute to the alarming piracy rates in China include tight restrictions on the number of foreign movies (the Chinese government only allows twenty per year), lengthy delays in China's content review process for foreign film screenings, and official demands on domestic theaters to screen only domestic films.²⁰⁶

Local content industry protectionism appears to be growing in China and presents ongoing challenges to U.S. attempts at market entry. In a decision at the end of 2009, after the WTO Panel's report, China announced purchasing guidelines for all government technology buyers that would "establish an accreditation system that gives Chinese intellectual property preferential treatment."²⁰⁷ The same state-sponsored import companies at issue in *China—Publications and Audiovisual Materials* have shown a willingness to withdraw foreign films administratively in favor of providing screen time and market access for domestic product.²⁰⁸

While certainly frustrating for foreign content industries, domestic content protectionism can actually be a powerful motivation for increasing the strength of *both* international and domestic IPR. In its history, the United States has a poor track record with recognizing copyright in foreign works.²⁰⁹

skepticism toward Western institutions, the xenophobic and nationalist sentiments of the populace, the government's censorship and information control policy, and the significantly different Chinese legal culture and judicial system.").

203. MERTHA, *supra* note 13, at 3 n.6 ("The principal engine of IPR development in China . . . has been direct pressure brought about by other countries, chiefly the USA, . . . [which has] essentially set the pace and priorities of China's drive to establish an IPR regime.") (quoting Economist Intelligence Unit, *China Hand: The Complete Guide to Doing Business in China* (Hong Kong: Economist Intelligence Unit, 1996), 5).

204. Baum, *supra* note 2, at 54 (noting the first copyright principles were legally established in China in 1986).

205. See Rogoyski & Basin, *supra* note 4, at 252–54.

206. MORRISON, *supra* note 8, at 20–21.

207. Loretta Chao, *China Firms Defend Tech-Purchase Rules*, WALL ST. J. Dec. 14, 2009, at A4 ("[G]overnment procurement so far isn't included in China's [WTO] commitments.").

208. See, e.g., Wang Shanshan, "Da Vinci Code" Pulled from Theatres, CHINA DAILY, June 9, 2006, available at http://www.chinadaily.com.cn/china/2006-06/09/content_612411.htm (pulling the popular though controversial religious thriller to "make way for domestic films").

209. See Edward G. Hudon, *Literary Piracy, Charles Dickens and the American Copyright Law*, 50 A.B.A. J. 1157 (1964).

It was not until the end of the nineteenth century that the United States recognized copyright for British authors.²¹⁰ Prior to that point, publishers in the United States practiced rampant piracy against other English-speaking nations, prompting Charles Dickens to dub them “American Robbers” and tour the country lecturing on the benefits of recognizing foreign copyright.²¹¹ He found an audience for his lectures amongst American authors who “suffered from neglect,” unable to compete with their more popular, recognized, and accomplished compatriots on the other side of the Atlantic, whom American publishers preferred partially because they did not have to pay any licensing fees.²¹² As a result, it was actually American authors who became the major proponents for the recognition of foreign copyright, partially out of understanding that if the domestic content industry were to thrive, rampant piracy of foreign works would have to be curtailed.²¹³ This evolution would seem to suggest that local content protectionism can play a significant role in effectively combating piracy and strengthening IPR as a whole.

It is important to note that, unlike China, the United States had generations of modern western philosophical thought upon which to establish the principles of international copyright protection, as well as *sui generis* protection for domestic works, and the relative absence of government interference in the trade and consumption of content goods.²¹⁴ China is in the unenviable position of having to build respect for, traditions in, and enforcement of IPR virtually simultaneously.²¹⁵ While the trade-prohibitive conduct with regards to U.S. content goods clearly violated China’s WTO obligations, it should not be ignored that China’s aggressive defense of its content industry marketplace might actually be an encouraging sign for both domestic and foreign content producers—an indication of strengthening internal justifications for protecting IPR in China.

210. Done through the Chace International Copyright Act. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

211. Hudon, *supra* note 209, at 1158 (quoting WILKENS, CHARLES DICKENS IN AMERICA 237 (1911)).

212. *Id.*

213. *Id.*

214. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 192–200 (2008).

215. Peter Ganeva, *Introduction*, in INTELLECTUAL PROPERTY LAW IN CHINA xi, xi–xv (Christopher Heath ed., 2005).

C. WTO PROCEDURAL DELAYS IN GAINING MARKET ACCESS

Ultimately WTO dispute resolution is not the ideal forum for U.S. content industries seeking to gain meaningful access to Chinese markets quickly. It is a lengthy process wherein the affected parties must lobby the USTR to begin the series of consultations, which in turn begins the process of formal panel review. Several years after the initial objections, with a panel report in hand, the dispute is eligible for review by the Appellate Body. Even if the Appellate Body concludes that there was no error in the Panel's findings, the offending party would still have the fluid "reasonable" period of time to somehow bring their conduct into compliance with WTO obligations. Although it is true that *China—Publications & Audiovisual Materials* is a landmark decision, and a victory for U.S. content industries, any change in how these goods reach China's market will likely be slow in coming.²¹⁶

WTO dispute resolution procedures evolved from a desire to find diplomatic solutions and avoid confrontation. Lengthy consultation requirements²¹⁷ and a general reliance "upon the willingness of members to implement decisions"²¹⁸ demonstrate the diplomatic foundations and assumptions inherent in WTO dispute resolution. In *China—Publications & Audiovisual Materials*, the United States raised objections to China's conduct several years before formal arbitration even began.²¹⁹ Indeed, restrictions China placed on market access for certain goods were a point of contention pre-dating China's WTO accession, and a topic the Working Party Group discussed.²²⁰

Even after a dispute has gone through the lengthy formal arbitration process, and the DSB adopts the Panel's recommendation, the dispute is often far from over. As seen in *China—Publications & Audiovisual Materials*, the recommendations are not very specific and simply call for the offending member to bring their conduct into compliance with WTO commitments.²²¹ How China decides to bring its measures into compliance may also be a point of contention, and could reopen the dispute for another round of

216. Zeidler, *supra* note 9 (quoting Greg Frazier, executive vice president of the MPAA: "Nothing in China is right around the corner except for pirated DVDs.").

217. *Supra* Section I.A.2.

218. Baum, *supra* note 2, at 64.

219. MORRISON, *supra* note 8, at 17–20.

220. *Id.* at 17.

221. *See supra* Section II.C.3.

lengthy arbitration in the WTO.²²² Furthermore, China has a less-than-encouraging record of promptly complying with international agreements.²²³

IV. CONCLUSION

The United States won a significant victory in *China—Publications & Audiovisual Materials*. There is a market in China for these content goods, and the decision makes clear that cumbersome restrictions on the right to import, distribute, and conduct content review for those goods is in violation of China's WTO obligations. Being able to circumvent some of these government restrictions will undoubtedly aid foreign content industry providers in entering the Chinese market in a timely manner, and thereby combat piracy.

However, the victory is not without controversy. While the WTO process runs its course, China has a "reasonable period of time" to bring its conduct into WTO compliance. Even now that the Appellate Body has affirmed the decision, it is certainly possible that something as benign as institutional inertia may cause the violating conduct to continue, despite China's earnest attempts to bring its measures into compliance. A victory in the WTO, even a resounding one, does not ensure immediate or even swift market access.

Furthermore, by aggressively pursuing access to the markets through the WTO, and defeating "public morals" exception claims, there is a danger that the United States will appear to the rest of the world as cultural imperialists. Content industries produce cultural goods capable of having dramatic social and political influence. The "public morals" exception was included in GATT to serve a vital purpose. China's challenges to the way the Panel applied the exception will likely resonate with several other countries who have demonstrated a commitment to protecting their domestic national content industries.

Beyond the legal victory and the potential practical and political ramifications, there is nonetheless an element of this dispute that should be encouraging for U.S. content industries. The fact that these measures are in place in China, and being defended at least partially under the guise of creating space for domestic content industries, gives support to the idea that

222. See, e.g., Panel Report, *US—Gambling*, *supra* note 143 (ruling on Antigua's claim, after prevailing in the initial Panel Report and Appellate Body review, that the United States failed to take steps to comply with the DSB's recommendations).

223. See Baum, *supra* note 2, at 64 ("China's record of adherence to such international agreements . . . is not positive"). *But see* KONG, *supra* note 2, at 133 ("China has a generally satisfactory history of adhering to international treaties").

China is moving towards a polity with greater respect for cultural goods and the IPR embedded therein.