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The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations

Jingxia Shi
Yale Law School, jingxia.shi@yale.edu

The ‘Specificity’ of Cultural Products versus the ‘Generality’ of Trade Obligations

Reflecting on ‘*China--Publications and Audiovisual Products*’

Jingxia Shi* Weidong Chen**

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[**Abstract**] The duality of cultural products presents themselves both as commercial objects and assets which convey values and identity. The recently decided WTO case of *China--Publications and Audiovisual Products* provides an opportune chance to examine the interface between the ‘specificity’ of cultural products and the ‘generality’ of trade obligations. Based on the DSB reports, this comment centers its analysis on four key issues, including invoking the *UNESCO Convention* as cultural defense, applying ‘*public morals exception*’ to cultural products, the distinction and overlap between cultural goods and services, and how much culture can count for in determining the ‘*likeness*’ between imported and domestic cultural products, *etc*.. The comment ends with concluding remarks on the case decisions, lessons China may have learned, and the necessity of reconciliation between free trade and cultural diversity in the context of economic globalization.

The flame knows no rest, for it lives in perpetual conflict between two opposite tendencies. On the one hand, it cleaves to its wick, drinking thirstily of the oil that fuels its existence. At the same time, it surges upward, seeking to tear free of its material tether.

----*Yanki Tauber, Beyond the Letter of the Law*[1]

I. INTRODUCTION

Much ink has been spilled over the incompatibility of free trade with cultural diversity, one of the most dynamic as well as comprehensive concepts to outline in '*trade linkage problems*'.[2] The dual nature of cultural products[3] creates a drastic confrontation between two contrasting logics—culture-as-identity[4] and culture-as-

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* Professor, Law School, China University of International Business & Economics (UIBE), Beijing 100029, P. R. of China; Ph.D in International Economic Law (Wuhan, 1998), L.L.M (Yale, 2007). E-mail: <jingxia.shi@yale.edu>. I wish to thank Professor Michael Reisman at Yale Law School for inspiring and supporting all the research work related to this comment. The usual caveat applies.
** Associate Professor, Law School, China University of International Business & Economics (UIBE), Beijing 100029, P. R. of China; Ph.D in Public International Law (Wuhan, 2002), Visiting Scholar, the Graduate Institute of International and Development Studies, Switzerland. E-mail: <chenweidong1976@hotmail.com>.

[1] YANKI TAUBER, BEYOND THE LETTER OF THE LAW: A CHASSIDIC COMPANION TO THE ETHICS OF THE FATHERS 220 (1995).

[2] The relationship between culture and trade belongs to a broad family of 'trade linkage issues'. *See e.g.*, David Leebron, *Linkages*, 96 AME. J. INT'L L., 5 (2002); Denis Goulet, *The Evolving Nature of Development in the Light of Globalization*, 6 J. L. & SOC. CHALLENGES 1, 11-13 (2004); Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N. C. L. REV. 1353, 1357-1435 (2000); Rostam J. Neuwirth, *The 'Cultural Industries': A Clash of Basic Values?--A Comparative Study of the EU and the NAFTA in Light of the WTO*, *in* EUROPEAN CONSTITUTIONAL VALUES AND CULTURAL DIVERSITY 90 (Francesco Palermo & Gabriel N. Toggenburg *eds*., 2003).

[3] Cultural products convey and construct cultural values, produce and reproduce cultural identity. In the meantime, they constitute a key sector of production in the new knowledge economy. For more analysis on the duality of cultural products, *see e.g.*, Trevor Knight, *The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals*, 57 U. T. FAC. L. REV. 165 (1999).

Note that international law conformed to the human tendency to objectify by first extending cultural protection to specific items such as folklore, crafts, and skills. *See* 1 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 890 (Rudolf Bernhart et. al. *eds*., 1992). However, a significant component of culture today is embodied in more contemporary cultural products, including cultural goods and services.

[4] This logic, spearheaded by France and Canada, is concerned that economically predominant forces will homogenize or dilute national cultures. *See generally*, Glenn A. Gottselig, *Canada And Culture: Can Current Cultural Policies Be Sustained In The Global Regime*, 5 INT'L J. COMM. L. & POL'Y 1-70 (2000); Thomas M. Murray, *The US-French Dispute Over GATT Treatment Of Audiovisual Products And The Limits Of Public Choice Theory: How An Efficiency Market Solution Was "Rent-Seeking"*, 21 MD. J. INT'L L. & TRADE 203 (1997).

commerce,[5] with little likelihood of a plausible synthesis.[6] Furthermore, the coexistence of dual law-makers and legal instruments adds more discord to this quandary. With free trade as its leitmotif, the WTO regime does not legalize '*cultural exception*', nor does it grant special treatment to cultural products. The *United Nations Educational, Scientific, and Cultural Organization* [hereinafter *UNESCO*], on the other side, has fortified its role in an effort to mitigate the negative implications on cultural diversity caused by economic globalization. In addition to the *Universal Declaration of Cultural Diversity* [hereinafter *UNESCO Declaration*] in November 2001,[7] it adopted the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* [hereinafter *UNESCO Convention on Cultural Diversity* or *UNESCO Convention*], which became effective as of Mar. 18, 2007.[8] This has furthered the collision between culture and trade.

The case of *Canada--Periodicals*[9] in 1997 provoked the first wave of hot debates on this topic. Different from that case which only concerns periodicals,

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[5] This logic is typically represented by the U.S.. Cultural industries make significant contributions to the American economy and represent an enormous export interest. The U.S. strongly criticizes the import restriction as a pretext of trade protectionism. *See generally*, Eireann Brooks, *Cultural Imperialism vs. Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J. INT'L BUS. & L. 112 (2006); Frederick Scott Galt, *The Life, Death, And Rebirth of the "Cultural Exception" In the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection And Intervention In The Face of American Pop Culture's Hegemony*, 3 WASH. U. GLOBAL STUD. L. REV. 909 (2004).

[6] *See e.g.*, David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545, 563-575 (1997) (*discussing how international law manages the conflict between national culture and global governance*).

[7] *UNESCO Declaration on Cultural Diversity*, adopted by the 31st Session of the General Conference of UNESCO in Paris, Nov. 2, 2001, http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (last visited Apr. 20, 2010).

[8] The Convention was adopted at UNESCO's 33rd general conference on Oct. 25, 2005, http://portal.unesco.org/culture/en/ev.phpURL_ID=33232&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 20, 2010). 148 members of UNESCO supported the final draft, with Israel and the U.S. voting against, and Australia, Honduras, Liberia and Nicaragua abstaining.

[9] *Canada--Certain Measures Concerning Periodicals* [hereinafter *Canada--Periodicals*], WT/DS31. Request for Consultations received on Mar. 11, 1996, Panel Report circulated on Mar. 14, 1997, and Appellate Body Report circulated on June 30, 1997.

China--Publication and Audiovisual Products [10] provides an unparalleled opportunity to look at how the Dispute Settlement Body [hereinafer *DSB*] has dealt with the 'specificity' of cultural products in contrast with the 'generality' of trade obligations, particularly after the *UNESCO Convention* entered into force.

Against the backdrop, this comment unfolds in the following way. Subsequent to a lead-in of the case background and brief description of procedural posture, the comment, without attempting to cover all aspects in the case, centers its analysis on four key issues. These include the possibility of invoking the UNESCO intruments to defend domestic cultural measures; applying '*public morals exception*' to cultural products; distinction and overlap between cultural goods and services and corresponding trade obligations; and last, how much cultural content can count for in judging '*likeness*' between imported and domestic cultural products. The comment ends with concluding remarks on the case decisions, the lessons that China may have learned, and the difficulties and necessity associated with the reconciliation between free trade and cultural diversity in the era of economic globalization.

II. THE CASE BACKGROUND AND A PROCEDURAL POSTURE

II.1 China's Cultural Sectors: Pre- and Post- WTO Accession

In China, cultural products serve as essential instruments in disseminating government policy and shaping public opinions. Prior to its WTO accession, China's cultural industries, particularly audiovisual sectors, were largely state-

[10] *China--Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [hereinafter *China--Publications and Audiovisual Products*], WT/DS363.

owned with a general ban on foreign investment to be engaged in this field. Licensing system was also widely used to control market access. These restrictions were considered necessary since the sector indeed performs multiple political, economic, social and cultural functions.[11]

The integration of Chinese economy into world market since 1980s, however, has gradually rendered it hard for China to insulate its cultural sectors from foreign participation and competition. China made one of the most ambitious GATS commitments when it became a WTO Member in late 2001.[12] The commitments on audiovisual sectors appear a bold, despite limited, undertaking given that this is a heavily regulated area in China. The WTO membership greatly enhances foreign access to Chinese market for cultural products.[13] How China fulfills these commitments has been given much heed from other WTO Members. China overhauled domestic laws and regulations and began to allow foreign involvement in cultural sectors in order to carry on its WTO commitments.[14]

The U.S. is keen on the prospect of an open Chinese markets and stronger commercial opportunities for its highly competitive cultural products. However, a close reading of China's commitments reveals that a large part of cultural sectors still remain exclusive, with new restrictions introduced in the politically and

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[11] For more discussions on China's media and cultural sectors, *see generally*, MEDIA IN CHINA: CONSUMPTION, CONTENT, AND CRISIS (Stéphanie Donald et al. *eds*., 2002).
[12] *See* Aaditya Mattoo, *China's Accession to the WTO: The Services Dimension*, 6 J. INT'L ECON. L. 299, 299 (2003). *See also* WTO, *WTO Ministerial Conference Approves China's Accession*, http://www.wto.org (last visited Mar. 23, 2010).
[13] China's market access commitments on audiovisual sectors cover distribution services of audiovisual products and internet service, inspring a prospect for international media companies to take a share in this huge market. *See* WTO, *The Schedules of Specific Commitments of the P. R. of China*, http://www.wto.org (last visited Mar 23, 2010).
[14] *See* Zhangdong Niu, *The Door Is Wedged Open: China's Regulation on Foreign Access to Audiovisual Markets*, 18(8) ENT. L. R. 265, 265 (2007).

economically sensitive areas.[15] Despite the changing landscape of China's regulations in the aftermath of its accession to the WTO, information flow remains heavily censored, and media distribution channels are still under tight control.[16] Although content review for each sub-sector varies, they are generally worded in vague language with a view to political and economic needs.[17] This situation severely hampers the prospect of foreign producers and distributors to benefit from the world's fastest-growing market.

II.2 A Procedural Posture and Summary of Case Decisions

The case was brought on Apr. 10, 2007, by the U.S., before the WTO regarding an array of Chinese measures affecting trading rights[18] and distribution services for certain publications and audiovisual home entertainment (hereinafter '*AVHE*') products. Subsequent to two unsuccessful consulations, the U.S. requested the establishment of a Panel.[19] The Panel delivered its final report on August 12, 2009.[20] Both China and the U.S. appealed. The Appellate Body circulated its report

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[15] *See e.g.*, *The Several Opinions on Introducing Foreign Investment Into the Cultural Sector*, Order [2005] 10 of the Ministry of Culture, July 6, 2005, Article 4 (*prohibiting foreign investment into some specific cultural sectors*).

[16] Under China's existing practices, '*content review*', or '*censorship*', is tied to the importation and distribution of publications and audiovisual products. The state-approved companies may review the materials they import and decide what to reject. *See* Zhangdong Niu, *supra* note 14, at 268.

[17] For a critique of censorship, *see e.g.*, Ningyan Mei, *China and the Prior Content Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television*, 25 HASTING COMM. & ENTER. L. J. 265 (2003).

[18] 'Trading rights' is one of the central issues in this case. China joined the WTO after its founding in 1995 and thus had to accept disciplines on the right to import and export as part of the price of accession imposed by other Members. These disciplines are included in China's Accession Protocol and Working Party Report, which constitute an integral part of WTO agreements. *See Protocol on the Accession of the People's Republic of China*, WT/L/432 (Nov. 23, 2001); *Working Party on the Accession of China--Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (Oct. 1, 2001).

For more analysis on these WTO-plus provisions, *see* Julia Ya Qin, *The Challenge of Interpreting 'WTO-PLUS' Provisions*, 44 JOURNAL OF WORLD TRADE 127-172 (2010).

[19] DSB: *Minutes of the Meeting Held on 19 November 2007*, ¶ 67, WT/DSB/M/242 (Feb. 11, 2008); *Constitution of the Panel Established at the Request of the United States: Note by Secretariat*, WT/DS363/6 (Mar. 28, 2008).

[20] Final Report of the Panel, *China--Measures Affecting Trading Rights and Distribution Services for Certain*

on Dec. 21, 2009.[21] The DSB adopted the Appellate Body report and modified Panel Report on Jan. 19, 2010. China notified the DSB of its intention to implement the DSB's recommendations and rulings on Feb. 18, 2010.[22]

In the case, the U.S. claimed that China has failed to live up to its WTO commitments on trading rights and distribution services involving certain cultural products.[23] The U.S. also argued that some measures reduce the competitiveness of American products and provide enhanced pirates opportunities in Chinese market.[24] The measures are contained in a series of administrative regulations issued by various China's government agencies, which the U.S. held to be inconsistent with China's obligations under the Accession Protocol, GATT III:4, GATT XI:1, GATS XVI, and GATS XVII, *etc*.[25]

China invoked the UNESCO instruments and GATT Article XX(a) to defend its measures as necessary to protect culture and maintain public morals. China also argued that some products at issue are not goods and therefore not subject to trading rights or national treatment obligations. Though some of these defending efforts

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Publications and Audiovisual Entertainment Products, WT/DS363/R (Aug. 12, 2009) [hereinafter Panel Report, *China--Publications and Audiovisual Products*].

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

[22] *China--Publications and Audiovisual Products*, Communication from China and the United States concerning Article 21.3(c) of the DSU, WT/DS363/15 (Mar. 9, 2010).

[23] For China's commitments on the trading rights and distribution services, *see Protocol on the Accession of the People's Republic of China*, ¶¶ 5.1.-5.2, WT/L/432 (Nov. 23, 2001); *Working Party on the Accession of China - Report of the Working Party on the Accession of China*, ¶¶ 83-84, WT/ACC/CHN/49 (Oct. 1, 2001).

Interestingly, it was predicted that distribution services are likely to remain fertile ground for conflict between trade and culture. *See* Mary E. Footer & Christoph B. Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT'L ECON. L. 115, 137 (2000).

[24] *China--Publications and Audiovisual Products*, First Submission of the United States, ¶ 9 (May 13, 2008).

[25] *China--Publications and Audiovisual Products*, Request for Consultations by the United States, WT/DS363/1 (Apr. 16, 2007).

failed, China did succeed in removing several measures from the Panel's terms of reference on procedural grounds.

The Panel found that China acts inconsistently with its WTO obligations in a number of ways. In particular, China unfairly restricts trading rights and market access, as well as fails to provide national treatment in some areas.[26] The appeal mainly involves three issues, China's trading rights commitments, GATT Article XX(a) public morals exception, and China's GATS obligations. The Appeallate Body upheld most of the Panel's rulings.[27]

Conclusively, though the U.S. did not get the maximum possible out of the case, the rulings hand a significant victory to America's creative industries as a key step toward ensuring market access for American products, as well as for American exporters and distributors in China.[28] Moreover, the rulings may complement the American strategy and efforts to combat intellectual property piracy in China.[29] Interestingly enough, the rulings even meets with favorable response in some quarters from China.[30]

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[26] *See generally*, Panel Report, *China--Publications and Audiovisual Product*, ¶¶ 8.1-8.2..
[27] Appellate Body Report, *China--Publications and Audiovisual Products*, ¶¶ 414-416.
[28] *See 'Finding Is A Victory For America's Creative Industries'*, http://www.ustr.gov/about-us/press-office/press-releases/2009/december/wto-appellate-body-confirms-finding-against-china (last visited Apr. 25, 2010).
The U.S. record and movie companies hail the decision as a major victory and call upon China to use this occasion to adopt measures that will expand opportunities for creators regardless of their nationality and to abandon all practices that hinder legitimate commerce. Citing from Jonathan Lynn, *WTO Dispute Panel Paps China on Audiovisual Goods*, Aug. 12, 2009, http://www.reuters.com/article/industryNews/idUSTRE57B5YP20090812 (last visited Apr. 25, 2009).
[29] Dan Glickman, President of the Motion Picture Association of America, called the Panel finding '*a major victory in the MPAA's years-long battle to open the Chinese movie market*'. BRIDGES WEEKLY, *WTO Rules Against Chinese Restrictions on Foreign Books, Movies, Music*, Sep. 7, 2009, http://ictsd.org/i/news/bridgesweekly/54713/ (last visited Apr. 25, 2010).
[30] The President of Huayi Brothers, the China's biggest privately owned media company, welcomed the ruling and called it '*good news for private companies*'. *Id.*

In the following sections, based on the analysis and findings in the Panel Report and the Appellate Body Report, the comment will focus on four issues to explore how the WTO tribunals cope with the conflict arising out of the 'specificity' of cultural products and the 'generality' of trade obligations from the perspective of dispute resolution.

III. ARE THE UNESCO INSTRUMENTS AVAILABLE AS DEFENSES IN WTO DISUPTE SETTLEMENT?

In *Canada--Periodicals*, Canada's cultural arguments were not endorsed by the WTO tribunals.[31] *China--Publications and Audiovisual Products* exclusively involves cultural products, China chose to defend its measures, among other arguments, from the angles of cultural protection and diversity.

III.1 Parties' Arguments and Tribunal's Decisions

China held that the U.S. is essentially attempting to obtain enhanced market access in China, while ignoring the unique nature of products concerned. China tried to justify its measures by invoking the *UNESCO Convention on Cultural Diveristy* and *UNESCO Declaration*. Citing the definitions of '*culture*' and the nature of cultural products envisaged by these instruments, China intended to prove that cultural goods fall under a specific category of goods.[32] China emphasized that cultural goods are '*vectors of identity, values and meaning*' and have a strong impact on public morals and they '*must not be treated as mere commodities or*

[31] *See e.g.*, Chi Carmody, *When "Cultural Identity Was Not At Issue": Thinking About Canada--Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231 (1999).
[32] Panel Report, *China--Publications and Audiovisual Products*, ¶ 4.89, ¶ 4.276.

consumer goods'. Imported cultural goods, China further argued, may collide with standards of right and wrong conduct specific to China.[33] This legitimates China's regulatory framework and relevant measures.

The U.S. pointed out that the *UNESCO Convention* expressly provides that nothing in the Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties.[34] Likewise, nothing in the text of WTO agreements provides an exception in terms of cultural products.[35] Two third parties, Australia and Korea, both expressed their stance as to this issue and leaned onto the U.S.'s side.[36]

The Panel did not address this sensitive issue by avoiding directly answering if there is a general cultural concern that China might invoke. Instead, the Panel noted that, in essence, China's defense presented the issue whether the measures at issue can be maintained on the grounds that they are covered by China's '*right to regulate trade*' in a WTO-consistent manner and that the right takes precedence over the relevant obligations.[37] In so doing, the Panel actually transformed the cultural concern into discussing concrete WTO obligations. On appeal, China again stressed that cultural products have a specific nature and requested the Appellate

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[33] *Id.*, ¶ 7.712.
[34] *UNESCO Convention on Cultural Diversity*, Article 20 (2).
[35] Panel Report, *China--Publications and Audiovisual Products*, ¶ 4.207.
[36] Australia agreed that cultural values can contribute to public morals but did not think China can rely on the cited UNESCO instruments to demonstrate such a relationship, not only because of the aspirational status of the *UNESCO Declaration*, but also due to the provision of the UNESCO Convention. *Id.*, ¶ 5.13.
Korea considered that China's argument in this regard was misplaced since the *UNESCO Convention* itself precludes a situation where it is used as a ground to justify alleged violations of the WTO agreements. Furthermore, the DSU explicitly prohibits a Panel from accepting such an argument. *Id.*, ¶ 5.61.
[37] *Id.*, ¶ 7.721.

Body to be 'mindful' of this nature of cultural products.[38] Likewise, the Appellate Body did not squarely deal with the inquiry whether cultural concern can serve as a general defense available for China.

III.2 The Difficulties in Invoking UNESCO Instruments as Cultural Defenses

The adoption of *UNESCO Declaration* and entry into force of *UNESCO Convention* have returned the limelight to the suitability of WTO rules for cultural products. One of the original purposes vested in these UNESCO instruments was to create a safe haven for domestic cultural policy measures and protect them from WTO disciplines.[39] However, as *China--Publication and Audiovisual Products* demonstrates, it is practically hard for China to raise concrete arguments based on these instruments. Other than merely stating that '*cultural products are special*', China actually used the 'specificity' of cultural products to justify its measures under GATT Article XX(a) instead of the *UNESCO Convention*. This plausibly furnishes certain ground for the WTO tribunals to bypass the thorny issue as to the status of *UNESCO Convention* in the WTO dispute settlement.

In addition to the fact that the *UNESCO Declaration* lacks international legal binding effect, China was primarily concerned that the *UNESCO Convention* may not be considered by the WTO tribunals. To reinforce this concern, the Panel's standard term of reference directs it to consider '*covered agreement or agreements*

[38] Appellate Body Report, *China-Publications and Audiovisual Products*, ¶ 25.
[39] The ambitious role assigned to the UNESCO Convention by its proponents is to fill a lacuna regarding cultural objectives in international law and serve as a cultural counterbalance to the WTO regime. *See e.g.*, Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance To The WTO*? 9 J. INT'L ECON. L. 553, 553-54 (2006).

cited by the parties to the dispute'.[40] The *UNESCO Convention* does not fit itself into the concept of '*covered agreement*'.

Nevertheless, international law may have certain bearings on the interpretation of WTO treaty provisions in disputes settlement. It is well-settled in WTO case law that the principles codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties [hereinafter *VCLT*] are customary rules of interpretation within the meaning of Article 3.2 of the DSU.[41] In fact, the WTO tribunals have made use of these provisions to consider international law in previous cases.[42] Here, assuming that the WTO tribunals could extend their consideration to the *UNESCO Convention*, might there be a chance for China to invoke the *Convention* to justify its measures? The answer to this inquiry remains elusive due to a couple of reasons.

First, in connection with the use of international law in WTO disputes, DSU Article 3.2 imposes a key requirement--when a WTO tribunal is interpreting

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[40] DSU, Article 7.2 (*Panels shall address the relevant provisions in any* ***covered agreement or agreements*** *cited by the parties to the dispute*).

[41] Article 3.2 of the DSU refers implicitly to Article 31 and 32 of VCLT. (*The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements* ***in accordance with customary rules of interpretation of public international law****.)*

[42] There are some cases demonstrating the Appellate Body's willingness to consider international law rules outside the WTO in determining the 'ordinary meaning' of particular words under Article 31(1) of the VCLT. For example, in *United States--Import Prohibition of Certain Shrimp and Shrimp Products* [hereinafter *US--Shrimp*], the Appellate Body drew support from other international instruments, including *United Nations on the Law of the Sea*, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, to interpret the meaning of '*exhaustible natural source*', even not all WTO Members, nor even the parties to the dispute were party to all these instruments. *See e.g.*, Appellate Body Report, *US--Shrimp*, ¶ 110-132, WT/DS58/AB/R (Oct. 22, 2001).

existing provisions in accordance with the customary rules, it is not, impermissibly, adding to or diminishing the Members' existing obligations.[43]

Second, under Article 31(3)(c) of VCLT, the WTO tribunals shall take into account '*the relevant rules of international law applicable in the relations between the parties*' when interpreting WTO provisions. The accepted relationship between the WTO and customary international law is that provided there is no inconsistency between what is accepted as customary international law and WTO law, generally recognized principles of international law can supplement gaps in the WTO agreements.[44] However, the Panel decision in *EC--Biotech*[45] has arguably raised the bar for what may count as a '*rule of international law*' in the WTO context. That decision suggests that in order for a '*rule of internaitional law*' to be considered in a WTO disupte, the rule must have been ratified by all parties of the WTO agreement being interpreted.[46] This standard has invited a considerable amount of criticism.[47] It was argued that retaining the Panel's unrealistic standard in *EC--Biotech* will effectively isolated the WTO regime from other bodies of international

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[43] DSU, Article 3.2 (*Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*). *See also* Robert Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power*, *in* THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FROM WTO 11, 15 (Thomas Cottier & Petros Mavroidis *eds*., 2003).

[44] Panel Report, *Korea--Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) ("*Customary international law … applies to the extent that the WTO treaty agreements do not 'contract out' from it*".)

[45] *European Communities--Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-293 [hereinafter *EC--Biotech*].

[46] Panel Report, *EC--Biotech*, ¶¶ 7.68-7.70, WT/DS291-293/R (Sept. 29, 2006).

[47] For instance, the U.N. General Assembly's International Law Commission (ILC) criticized that the new standard "*makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) would ever be allowed*." International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 450, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi). This effectively renders the WTO agreements isolated " '*islands' permitting no references inter se in their application*.", *id*. ¶ 472.

law in today's interdependent world.[48] In general, the Appellate Body report in previous cases has precedential value.[49] *EC-Biotech* did not go through appellate proceeding and the precedential value of its Panel Report remains unclear.

In the authors' view, an obvious obstacle for China to invoke the *UNESCO Convention* lies in the fact that the U.S. is not a Member of the *Convention* and strongly against it. This makes it hard to imagine that the *Convention* can exert any obligation on the U.S., unless the UNESCO instruments have become generally recognized international legal principles, which is seemingly not a fact. Furthermore, there are practical difficulties in invoking the *UNESCO Convention* as a defense in the WTO dispute settlement due to its provisions. The central operative provision of the *Convention* for yielding a desired shielding effect for domestic cultural measures is contained in its Article 20, which defines the relationship of this *Covention* to other international treaties as '*mutual supportiveness, complementarity and non-subordination*'. While making a general claim to non-subordination in paragraph 1, it alters this statement partially in paragraph 2 stating that applying this *Convention* cannot modify rights and obligations of the Parties under any other treaties.[50]

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[48] *See e.g.*, Mark Wu, *Small States, Big Veto: Customary International Law in the WTO After EC--Biotech*, 32 YALE J. INT'L L. 261, 266-67 (2007).

[49] The DSU imposes no formal principle of *stare decisis* on Panels or the Appellate Body. *See e.g.*,, Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999). But in practice, Panels and the Appellate Body routinely take into account previous decisions, and Panel and Appellate Body Reports are typically consistent with previous Appellate Body Reports. *See* Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANS'L L. & POL'Y 1 (1999); *see also* Raj Bhala, *The Power of the Past: Towards De Jure Decisis in WTO Adjudication*, 33 GEO. WASH. INT'L L. REV. 873 (2001).

[50] UNESCO Convention, article 20 (*Relationship to other treaties: mutual supportiveness, complementarity and non-subordination*).

Resultingly, despite an important step towards the recognition of the 'specificity' of cultural products, the *UNESCO Convention* has not become a counterbalance against the 'generality' of trade obligations of WTO members as such.[51] These concerns led China to consider that a concrete defense based on the UNESCO instruments might be too fragile to sustain. The above analysis also leads to a safe conclusion that it is less likely that China's argument, even if advanced, would be supported by the WTO tribunals. This outcome may hint again that cultural concern is not within the WTO tribunals' direct reach. How to minimize an undesirable incongruence between free trade and cultural diversity also remains uncharted by this case.

IV. APPLYING 'PUBLIC MORALS EXCEPTION' TO CULTURAL PRODUCTS

Recognizing the difficulties in invoking the UNESCO instruments, China attempted to justify its measures on general exception clause, specifically GATT Article XX(a) relating to measures '*necessary to protect public morals*'. Prior to this case, the 'public morals exception' was only applied once in *US--Gambling*.[52] The findings in that case accordingly provide the WTO tribunals with seasoned guidance on applying this exception in the present case. Both the Panel and the Appellate Body discussed this issue in great detail, which furnishes a practical illustration how the exception applies to cultural products.

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[51] *See* Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention And International Trade Law*, 9 J. INT'L ECON. L. 515, 515-16 (2006). *See also* Christoph Beat Graber, *supra* note 39, at 553-574 (2006).
[52] Panel Report, *United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Apr. 20, 2005) [hereinafter Panel Report, *U.S.--Gambling*].

IV.1 The Concept of 'Public Morals'

China maintained that the preservation of public morals is a crucial policy objective and forms '*a central element of social cohesion and the capacity of communities to live together*'. The concept of '*public morals*' covers a wide range of issues from the depiction or vindication of violence or pornography to other important values, including the protection of Chinese culture and traditional values to which China grants the utmost importance. China alleges that there is a close link existing between the import entities, content review mechanism for imported cultural products, and protection of public morals.[53]

The U.S. did not challenge China's assessment of the importance of public morals as a pursued value or interest. Nor did it even argue that the measures at issue are not measures to protect public morals. Instead, the U.S. challenged the means through which China had chosen to achieve its objectives.[54] Australia, as the third party, held that not all items having genuine cultural value to a Member will automatically be encompassed by the term '*public morals*'. China had to show that there exists a relationship between cultural value of the products at issue and the standards of right and wrong conduct maintained in China.[55]

The Panel agreed that '*the term public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation*',[56] which was

[53] Panel Report, *China--Publications and Audiovisual Products*, ¶¶ 7.711-7.716.
[54] *Id.*, ¶¶ 7.717-7.720.
[55] *Id.*, ¶¶ 5.12-5.13.
[56] *Id.*, ¶ 7.759.

adopted by the WTO tribunals in *US--Gambling*.[57] Moreover, the Panel noted that when defining the concept of '*public morals*', the content of these concepts can vary in time and space, depending upon a range of factors, including prevailing social, **cultural**, ethical and religious values.[58] The Panel recognized that a WTO Member has sovereign rights to determine the level of protection of the values and objectives covered by Article XX(a).[59] Based upon these considerations, the Panel concluded that China enjoys some scope to individually define the concept of '*public morals*'.[60]

IV.2 The 'Necessity' of China's Measures at Issue to Protect 'Public Morals'

Given the significance of '*necessity*' test in determining whether China's defense can succeed on the ground of protecting public morals, the Parties to the disputes laid much emphasis on this issue.

China argued that, considering the potential impact of cultural goods on public morals, China's longstanding policy had been to implement a high level of protection reflected in a complete prohibition of cultural goods with inappropriate content and the possible dissemination of cultural goods with content that could have a negative impact on public morals.[61] This is also key to ensure that Chinese

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[57] Panel Report, *U.S.--Gambling*, ¶ 6.465; Appellate Body Report, *U.S.--Gambling*, ¶ 299.
[58] Panel Report, *U.S.--Gambling*, ¶ 6.461; Appellate Body Report, *Brazil--Measures Affecting Imports of Retreaded Tyres* [hereinafter *Brazil--Retreaded Tyres*], ¶ 210, WT/DS332/AB/R (Dec. 3, 2007).
[59] Appellate Body Report, *European Communities--Measures Affecting Asbestos and Products Containing Asbestos* [hereinafter *EC--Asbestos*], ¶ 168, WT/DS135/AR/R (Mar. 12, 2001); Appellate Body Report, *Korea--Measures Affecting Imports of Fresh, Chilled and Frozen Beef* [hereinafter *Korea--Beef*], ¶ 176, WT/DS161,169/AB/R (Dec. 11, 2000).
For more analysis, *see e.g.*, PETER VAN DEN BOSSCHE, FREE TRADE AND CULTURE: A STUDY OF RELEVANT WTO RULES AND CONSTRAINTS ON NATIONAL CULTURAL POLICY MEASURES 64-65 (2007).
[60] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.759.
[61] *Id.*, ¶¶ 4.277.

traditional cultural values are not impaired by imported cultural goods. To achieve the goal, China applies a content review for the importation of cultural goods operated through a system of selecting importation entities, in order to provide an effective and efficient review process.[62] Although this may result in limiting the right to trade, content review system is consistent with China's '*right to regulate trade*'.[63]

Invoking the Appellate Body's opinion in *U.S.--Gambling*, the U.S. contended that China's measures lie far too distant from the pole of '*indispensibility*' to qualify as '*necessary*'.[64] In particular, the U.S. submitted that fundamentally, denying trading rights to all foreign importers and privately owned Chinese importers cannot be justified under Article XX(a).[65] Furthermore, China never explains why the entities involved in content review need to monopolize the importation process.[66]

The Panel examined three different groups of relevant provisions on the content review system. For each measure, the Panel: (*i*) identified the contribution made to the protection of public morals; (*ii*) identified the restrictive impact on trade; (*iii*) '*weighed and balanced*' three factors, *i.e.*, the extent of the contribution, the restrictive impact on trade, and 'the fact that the protection of public morals is a

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[62] According to China, the selection of import entities is a decisive element of content review mechanism. Specifically, China argues that its selection critiria, *i.e.*, (*i*) an appropriate organizational structure of the selected entities; (*ii*) a reliable, competent and capable personnel within the selected entities; (*iii*) appropriate geographical coverage by the selected entities, and (*iv*) a limited number of selected entities, contribute to an efficient and effective content review and to the fulfilment of its objective. *Id.*, ¶¶ 4.107-4.109, 4.278.
[63] *Id.*, ¶¶ 7.713-7.714.
[64] *Id.*, ¶ 7.718 (*A necessary measure is…located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'*.)
[65] *Id.*, ¶ 7.717.
[66] *Id.*, ¶ 7.720.

highly important interest in China.[68] Particularly by analyzing the link between challenged measures and the objective of protecting public morals, the Panel characterized some of the measures as '*necessary*'.[69]

This preliminary conclusion must be confirmed by comparing the measure with possible alternatives with less trade restrictive effect.[70] On this issue, the U.S. contended that China has numerous alternatives to achieve its content review objectives without restricting trading rights.[71] After analyzing the U.S.'s proposal that the Chinese government be given sole responsibility for conducting content review, the Panel found that China had not demonstrated that the proposed alternative is not a genuine alternative or is not reasonably available.[72] These findings led the Panel to a conclusion that none of the measures at issue is '*necessary*' within the meaning of Article XX(a).[73]

At this point, the Panel completed all steps involved in a '*necessity*' analysis. According to WTO practice, it must subsequently examine whether the measure satisfies the requirements of the chapeau of Article XX.[74] This approach equips the WTO tribunals with sufficient latitude at its disposal to prevent an over-broad application or abuse of general exceptions.[75] Here, given the Panel's conclusion that

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[68] *Id*., ¶¶ 7.820-7.828.
[69] These include the 'suitable organization and qualified personnel requirement' and 'the State plan requirement'. *Id.*, ¶¶ 7.821-7.836.
[70] Appellate Body Report, *Korea--Beef*, ¶ 166; Appellate Body Report, *U.S.*--Gambling, ¶ 308.
[71] Panel Report, *China--Publications and Audiovisual Products*, ¶¶ 4.320, 7.719.
[72] *Id*., ¶¶ 7.897-7.908.
[73] *Id*., ¶ 7.911.
[74] *See e.g*., Appellate Body Report, *Brazil--Retreaded Tyres*, ¶ 139, WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, *United States--Shrimp*, ¶ 147. This test was also confimed by the Appellate Body to apply *mutatis mutandis* for the general exceptions clause under the GATS. *See* Appellate Body Report, *U.S.*--Gambling, ¶ 292.
[75] *See* Nicolas F. Diebold, *The Morals and Order Exception in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECON. L. 43, 74 (2008).

China had not demonstrated that its measures are '*necessary*' to protect public morals, there was no need to examine whether the measures satisfy the requirements of GATT Article XX chapeau.[76]

On appeal, China challenged the Panel's analysis under Article XX(a), as well as its ultimate finding with respect to '*necessity*'. China also requested the Appellate Body to complete the analysis and find its measures to be '*necessary*'.[77] The Appellate Body upheld the Panel's conclusions on the '*necessity*' test.[78]

IV.3 Commentary on Applying 'Public Moral Exception' in the Case

It is argued that this case is more about the conflict between economic liberalization, political censorship and ideological control in China.[79] The authors believe that content review mechanism has led to this argument to a large extent. In the meantime, content review mechanism complicates China's defenses, given the pronounced fact that this mechanism also aims to exclude cultural products which may generate a negative impact on China's political system and ideology.

In dealing with this sensitive issue, China, among other arguments, emphasized that content review is '*necessary*' to protect public morals and the selection of import entities is '*necessary*' to avoid any possible circumvention of review process. The U.S. employed a wise strategy in challenging content review mechanism. Instead of challenging the system itself, the U.S. focused on the

[76] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.912.
[77] Appellate Body Report, *China--Publications and Audiovisual Products*, ¶¶ 234-235.
[78] *Id.*, ¶¶ 250-337.
[79] *See* Henry Gao, *The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle: An Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China on Restrictions on Certain Cultural Products*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 313, 313 (2007).

discrimination against foreign enterprises caused by the implementation of content review.

As stated above, the Panel recognized that the protection of public morals ranks among the most important values or interest as a matter of public policy. Thus in reviewing the '*necessity*' test, the Panel bore in mind the high level of protection of public morals that China has determined to be appropriate for its territory.[80] As far as the analytical approach is concerned, the Panel first assumed for the sake of argument that the measures fall within the purpose of protecting public morals, and then evaluated these measures on the basis of their trade-restrictiveness and contribution to the purported goals in judging '*necessity*'.[81] The Appellate Body revised this *auguendo* approach but took similar techniques in analyzing the '*necessity*' test. In its report, the Appellate Body addressed the measures' contribution to protecting China's public morals, their restrictive effect on trade, reasonably available alternatives, and upheld most of the Panel's conclusions.[82]

As noted, both the Panel and the Appellate Body laid their analytical emphasis on whether the measures at issue can meet the '*necessity*' test when they made decisions on GATT Article XX(a). In so doing, the WTO tribunals sidestepped the highly sensitive issue as to whether China may conduct much-

[80] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.819.
[81] Strict logic dictates that the Panel first should examine the availability issue and then decide whether the measures could pass the two-tier test of GATT Article XX. Altering the order of analysis for strategic reasons or to avoid undesired issues or claims is regarded by some commentators as an exercise of substantive judicial economy as judicial avoidance. For more analysis, *see* Alberto Alvarez-Jiménez, *The WTO Appellate Body's Exercise of Judicial Economy*, 12 J. INT'L ECON. L. 393, 407 (2009).
[82] Appellate Body Report, *China--Publications and Audiovisual Products*, ¶¶ 233-337.

maligned content review or censorship on cultural products.[83] Instead, they recognized that China is entitled to take measures protecting its public morals as long as these measures duly fall under the purview of '*necessity*'. The approach taken by the tribunals in analyzing '*necessity*' reflects that the WTO tribunals can be receptive to non-trade concerns underlying trade-restrictive measures. Nevertheless, given that China's content review system involves not only cultural protection, but also political or ideological concerns, this outcome does not imply that China will open its market to more products, but with more providers dealing with the same amount of products.

V. DISTINGUISHING CULTURAL GOODS FROM CULTURAL SERVICES

Under the WTO framework, the treatment of cultural products depends on whether the products are categorized as goods or services since the GATT applies to goods while services are subject to the GATS. Because the GATS provides more flexibility and less stringent disciplines, the current level of protection is relatively low for cultural goods, but high for cultural services. As a result, classifying the downloading of a movie as a good or as a service makes a stark difference.

V.1 Identifying the Issue and Associated Difficulties

[83] Although China's censorship rules were only a subtext in this case, the case findings could have ramifications for China's internet censorship policies. For example, the California First Amendment Coalition, a freedom of expression advocacy group, has petitioned the USTR to initiate WTO dispute proceedings with China over its internet censorship rules. The USTR's office is currently considering this petition. *See CFAC Taking on the Great Firewall of China*, June 14, 2009, http://www.firstamendmentcoalition.org/2009/06/chinawto/ (last visited Apr. 25, 20092010); *see also* Nick Rahaim, *Using free trade to force China to permit more free speech*, http://www.firstamendmentcoalition.org/2009/06/commentary23/ (last visited Apr. 25, 20092010).

As culture becomes an increasingly important profit-making business and technology makes international dissemination of such products easier, a question emerges as to how to classify these actitivies for the purpose of trade regulation. It is often impossible to fit cultural products neatly into either category of good or service.[85] Some cultural products, such as CDs, books, and paintings, are obvious goods while cultural performance more closely resembles services. However, many cultural products have both service and good components,[86] which has caused a longstanding controversy within the GATT/WTO regime.[87]

Take digital cultural products as an example. The U.S. conceivably favors classifying digital products into goods in order to trigger stricter GATT disciplines and a more trade-liberalizing outcome for electronic commerce.[88] In stark contrast, the Eurpean Union sticks to the view that electronic delivery constitutes supplies of services and thus falls within the scope of the GATS.[89] This approach would ensure

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[85] *See* Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of A Nation's Soul*? 22 DENVER J. INT'L L. POL'Y 155, 187-88 (1993).

[86] For instance, although cinema is specifically mentioned in GATT Article III (*National Treatment*) and Article IV (*Special Treatment for Cinematographic Films*), cinema may be considered as a service in the GATS and some other international instruments. *See e.g.*, OECD, *Code of Liberalization of Current Invisible Operations* 2008, Annex V to Annex A, Films (*Article 1 provides that for cultural reasons, systems of aid to the production of printed films for cinema exhibition may be maintained provided that they do not significantly distort international competition in export markets*).

[87] In 1961, a Working Party was established at the request of the U.S. to examine the appliction of GATT 1947 to television programs. The Working Party made draft recommendations but did not resolve the issue. For the background and development of this issue, *see* GATT, *Application of GATT to International Trade in Television Programs*, L/1615, Nov. 16, 1961; GATT, *Application of GATT to International Trade in Television Programs: Statement Made by the United States Representative on 21 November 1961*, L/1646, Nov. 24, 1961; GATT, *Application of GATT to International Trade in Television Programs: Revised United States Draft Recommendations*, L/1908, Nov. 10, 1962; GATT, *Application of GATT to International Trade in Television Programms: Report of the Working Party*, ¶¶ 6-10, Annex 1, L/1741, Mar. 13, 1962; GATT, *Application of GATT to International Trade in Television Programs: Proposal by the Government of the United States*, L/2120, Mar. 18, 1964; Uruguay Round Group of Negotiations on Services, *Working Group on Audiovisual Services, Note on the Meeting of 27-28 August 1990*, ¶ 8, MTN.GNS/AUD/1, Sep. 27, 1990.

[88] WTO, *Work Programme on Electronic Commerce: Submission by the United States*, ¶ 7, WT/COMTD/17; WT/GC/16; G/C/2; S/C/7; IP/C/16, Feb. 12, 1999. *See also* SACHA WUNSCH-VINCENT, THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS: EC-US PERSPECTIVES 52 (2006).

[89] WTO Council for Trade in Services, *Communication from the European Communities and Their Member States: Electronic Commerce Work Programme*, S/C/W/183, Nov. 30, 2000, ¶ 6(a).

that the EU's exclusion of audiovisual service from GATS commitments applies to music, films, and similar products delivered electronically.[90] Trade in materials, sound recordings, films, and other apparatuses used to diffuse television signals, however, is subject to rules related to the free movement of goods.[91] There are some cases heard by the European courts mirroring this view.[92]

Along with the substantive separation between goods and services appearing increasingly arbitrary,[93] the traditional classification of audiovisual services under the GATS no longer reflects the realities.[94] Technological development and media convergence have further blurred the distinction, as satellites and the Internet allow cultural products to reach wide audiences without being packaged and shipped across borders.[95] The technologically induced increase in the complexity between goods and services is also paralleled by a gradual expansion of trade rules not only to services, but also to intellectual property rights, and other trade-related measures.

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[90] *See* William Drake & Kalypso Nicolaidis, *Global Electronic Commerce and GATS: The Millenium Round and Beyond*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 399-408 (Pierre Sauve & Robert Stern *eds*., 2000).

[91] For instance, in *Cinéthèque* case, the importation of audiovisual material in the form of videocassettes was ruled to involve goods instead of service. *See* ECJ, Case 60-61/84 *Cinéthèque SA v. Fédération Nationale des Cinémas Francais* (1985), 1985 ECR 2605, ¶¶ 10-22.

In another case involving favorable treatment given to French printers of newspapers, the Court ruled that 'printing work cannot be described as a service, since it leads directly to the manufacture of a physical article which, as such, is classified in the Common Customs Tariff'. *See* ECJ, Case 18/84 *E.E.C. Commission v. France* (1985), 1985 ECR 1339, ¶ 12. *See also* KEITH ACHESON & CHRISTOPHER MAULE, MUCH ADO ABOUT CULTURE: NORTH AMERICAN TRADE DISPUTES 59-60 (1999).

[92] For example, in the *Sacchi* case, it is ruled that the transmission of television signals, including those containing advertising, comes under the rules of the Treaty of Rome related to services. ECJ, Case 155/73 *State v. Sacchi* (1974), 1974 ECR 409, ¶¶ 6-12.

[93] Hahn observes that it is largely arbitrary, from a policy standpoint, that a Hollywood blockbuster would be subjected to a completely different legal regime if it was to be projected onto foreign screens not from a cinematographic film (a good governed by the GATT), but by using digitally transmitted data sent from a central distribution point (a service governed by the GATS). *See* Michael Hahn, *supra* Note 51, at 527.

[94] Moreover, audiovisual services may also overlap with other service sectors, such as '*recreational, cultural and sporting services*' given the fact that some WTO Members have included '*cinema theater operation services*' in this sector. *See* WTO, Council for Trade in Services, *Communication from the United States—Audiovisual and Related Services*, S/CSS/W/21. Dec. 18, 2000, ¶¶ 3, 10(i).

[95] *See* Michael Braun & Leigh Parker, *supra* note 83, at 187-88.

The issues are currently the subject of a work program on electronic commerce.[96]

In sum, the imprecision of goods-service boundary remains an unsettled subject for culture and trade. The radical divergence among central negotiating parties call for greater efforts to harmonize the treatment of cultural products within the trade regime.[97] Before a line is traced somewhere, conflicts of this nature appear bound to multiply and may pose a threat to cultural policy measures,[98] as indicated by *China--Publications and Audiovisual Products*.

V.2 How have the WTO Tribunals Distinguished Cultural Goods from Services?

The line between what constitutes audiovisual goods and services has been left largely unclear by the WTO agreements. In practice, the thorny issue was ever examined in *Canada-Periodical*.[99] *China--Publications and Audiovisual Products* offers a recent illustration of how the WTO tribunals classify '*films distributed for theatrical release*' and '*audiovisual products used for publication'*.

In the case, China argued that films for theatrical release, unfinished AVHE products, and unfinished sound recordings, are not goods, and their importation is part of services subject to China's GATS commitments. China listed several reasons to support its arguments, including the intangibility of motion pictures; the nature of

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[96] WTO Secretariat, *Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 16 May and 11 July 2003: Summary by the Secretariat of the Issues Raised*, WT/GC/W/509 (July 31, 2003); WTO, *Work Program on Electronic Commerce Adopted by the General Council on 25 September 1998*, ¶¶ 2.1, 3.1, WT/L/274 (Sep. 30, 1998).

[97] *See e.g.*, Tania Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, 14 UCLA ENT. L. REV. 1, 17-18, 31 (2007) (*advocating the application of GATS to digital audiovisual products, though with invigorated MFN and national treatment obligations and subject to a limited exception for discriminatory subsidies*).

[98] For further analysis of the problematic distinction between goods and services, *see* Fiona Smith & Lorna Woods, *A Distinction without Difference: Exploring the Boundary between Goods and Services in the World Trade Organization and the European Union*, 12(1) COLUM. J. EUR. L. 1 (2005).

[99] In *Canada-Periodicals*, the Appellate Body ruled that periodicals are goods comprised of editorial content and advertising content. Both components can be viewed as having service attributes, but they combine together to form a physical product – periodical itself. Appellate Body Report, *Canada--Periodicals*, at 17-19.

tangible film as a mere accessory of service;[100] international classification instruments showing that motion pictures are services, *etc*..[101] On the contrary, the U.S. contended that the subject of its claims concern goods. The U.S. warned that China's reasoning, if accepted, would transform all goods commercially exploited through associated services into services themselves.[102] The EU did not support the U.S.'s line of arguments on this issue.[103] Australia maintained that films for theatrical release are goods.[104] Korea tended to agree that the main characteristics of motion pictures for theatrical release are somewhat closer to services, but was not persuaded that motion pictures as goods can be separate from the associated services.[105]

In considering the issue, the Panel found relevant heading 3706 of the Harmonized Commodity Description and Coding System (HS),[106] China's Schedule of Concessions,[107] and China's charging customs duties on the importation of exposed and developed cinematographic film. The Panel also found instructive the explanatory note accompanying heading 3706 of the HS.[108] In the light of these elements, the Panel concluded that '*films for theatrical release*', *i.e.*, hard-copy

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[100] In more details, China argued that, though it is undeniable that there is a '*tangible*' good involved, the essential nature of a film being distributed for a theatrical release, means that the '*tangible good*' itself, becomes merely the '*vehicle*' to transport essentially a bundle of intellectual property rights.
[101] Panel Report, *China--Publications and Audiovisual Products*, ¶ 4.493-4.502.
[102] *Id*., ¶¶ 4.301, 7.503-7.510.
[103] *China--Publications and Audiovisual Products*, Third Party Oral Arguments by the European Communities, at 3 (July 23, 2008).
[104] Panel Report, *China--Publications and Audiovisual Products*, ¶ 5.2-5.5.
[105] *Id*., ¶ 5.57.
[106] The Harmonized Commodity Description and Coding System (HS) of tariff nomenclature is an internationally standardized system of names and numbers for classifying traded products developed and maintained by the World Customs Organization (WCO) (formerly the *Customs Co-operation Council*). Heading 3706 defines as a separate good 'cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track'.
[107] China's Schedule of Concession contains a heading with the same number and coverage with heading of 3706 of HS.
[108] The explanatory note shows that a physical carrier containing content is treated as a good. Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.525.

cinematographic films in any tangible form are goods for the purpose of China's trading rights commitments.[109]

The U.S. also claimed that some measures regulating '*unfinished audiovisual products*'[110] are inconsistent with China's trading rights commitments, because they inject qualifying criteria and government discretion into a process that China has committed to be '*non-discretionary*'.[111] China held that these products are not goods and the challenged measures regulate the importation of '*audiovisual products used for publication*' as the licensing of the right to make copies of an audiovisual content instead of as the importation of goods.[112] The Panel employed the same reasoning methodology, [113] and concluded that the '*audiovisual products intended for publication*' - tangible master copies - are goods for the purpose of China's trading rights commitments.[114] China challenged these findings on appeal. The Appellate Body supported the Panel's analytical approaches and upheld its conclusions.[115]

V.3 The Overlap of GATT and GATS When Applying to Cultural Products

The WTO Agreement contains no indication regarding the general relationship between GATT and GATS. The jurisprudence developed from dispute settlement practice reveals that classifying a item into good or service does not mean that it is only subject to GATT or GATS.

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[109] *Id*, ¶ 7.527.
[110] The concept of '*unfinished audiovisual products*' refers to master copies with audiovisual content that are to be published in China via copyright licencing agreements.
[111] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.612.
[112] *Id*, ¶¶ 7.615-7.616.
[113] *Id*, ¶¶ 7.640-7.642.
[114] *Id*, ¶ 7.642.
[115] Appellate Body Report, *China--Publications and Audiovisual Products*, ¶¶ 174, 203.

In *Canada--Periodicals*, one legal issue involves the treatment of services (*advertising*) when combined with goods (*periodicals*). The Panel decided that GATT Article III (*national treatment*) applies to the Excise Tax, which affects trade in periodicals. Though Canada held '*it is necessary to interpret the scope of application of each so as to avoid overlap*', the Panel referred to Article II:2 of the WTO Agreement,[116] and found that Members cannot choose only those parts of the agreements that suit their interests.[117] The Appellate Body ruled that the tax affects both service and goods, and the absence of Canada's commitments under the GATS could not overrule its GATT obligations.[118] The similar issue was also raised in *EC-Bananas III*.[119] The Appellate Body more fully explained its view on the subject.[120]

In the present case, China maintained that since the challenged measures regulate services, China's trading rights commitments do not apply to them.[121] The Panel invoked the opinion of the Appellate Body in *EC--Banana III*, and concluded that the mere fact that the measures may regulate a service would not remove them from the scope of China's trading rights commitments.[122] By the same token,

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[116] The WTO Agreement, Article II:2 (*stating that 'The agreements and associated legal instruments included in Annex 1, 2, and 3 are integral parts of this Agreement, binding on all members'*).
[117] *See* Keith Acheson & Christopher Maule, *supra* note 89, at 195..
[118] Appellate Body Report, *Canada--Periodicals*, at 17-19.
[119] *European Communities--Regime for the Importation, Sale and Distribution of Bananas* [hereinafter *EC--Bananas III*], WT/DS27. Request for consultations received on Feb. 5, 1996, Panel Report circulated on May 22, 1997, Appellate Body Report circulated on Sep. 9, 1997.
[120] It wrote: *Given the specific scope of the two agreements, they may or may not overlap, depending on the measures at issue. Certain measures could be found to fall exclusively within the scope of GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT and GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under the GATT or the GATS…. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.* Appellate Body Report, *EC--Bananas III*, ¶ 221.
[121] Panel Report, *China--Publications and Audiovisual Products*, ¶¶ 7.618-7.620.
[122] *Id*., ¶¶ 7.527, 7.541-7.542.

China's trading rights commitments are applicable, *mutatis mutandis*, to '*audiovisual products used for publication*'. The Panel thus found that the challenged measures should be examined both under the GATS and under China's Accession Protocol.[123]

The Appellate Body shared the view that China's arguments are premised on an artificial dichotomy between films as mere content and physical carrier on which content may be embedded. Note that the Appellate Body reiterated here that a measure can regulate both goods and services and there is no clear distinction between '*content*' and '*goods*'. The Appellate Body did not consider that content and goods, and the regulation thereof, are mutually exclusive.[124]

Thus far, regarding the Members' obligations under different WTO agreements, all findings made by the WTO tribunals have coherently indicated that the involved WTO agreements co-exist and that one obligation does not override the other. *China--Pulications and Audiovisual Products* is not an exception in this regard. However, this leaves open the possibility that the exercise of a right under one agreement becomes the negation of a right under the other. To remain in the field of culture, a Member's limitations on film distribution, though in full conformity with the GATS, might be vulnerable to a GATT challenge. Furthermore, the defendant cannot hide behind that part of the agreement providing the desired protection, since GATT and GATS must be considered as part of the whole WTO

[123] *Id*., ¶¶ 7.642-7.652.
[124] Appellate Body Report, *China--Publications and Audiovisual Products*, ¶¶ 193-195.

agreements.[125] Consequently, to the extent that other services are combined with goods, the GATS may not provide the protection for services that some Members expected. The WTO Members, including China, should bear this in mind when they make future commitments involving cultural products.

VI. HOW MUCH DOES CULTURAL ELEMENT COUNT FOR IN DECIDING THE 'LIKENESS' OF CULTURAL PRODUCTS?

The '*likeness*' of imported and domestic products for the purpose of trade regulation is crucial to determining the competitive relationships that exsit among them with enormous economic consequence. This section pinpoints how much cultural elements could count for in judging the '*likeness*' among cultural products, taking '*like products*' in GATT Article III as an illustration,[126] to reveal the treatment of culture under the WTO.

VI.1 GATT/WTO's General Jurisprudence on 'Like Products'

GATT Article III (*National Treatment on Internal Taxation and Regulation*) challenges national legislative sovereignty by calling into question the legality of domestic taxation and regulations which fail to grant foreign products with national

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[125] *See* Keith Acheson & Christopher Maule, *supra* note 89, at 82.

[126] The term '*like products*' appears in several different GATT provisions and other WTO agreements. For example, Professor Jackson lists 10 provisions containing '*like products*' in GATT: I:1, II:2(a), III:2, III:4, VI:1(a,b), IX:1, XI:2(c), XIII:1, XVI:4. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 259 (1969).

As noted widely, the meaning of '*like products*' is likely to vary from one GATT provision to another because the term is employed to serve a variety of different purposes, with the result that individual precedents often differ due to their different contexts. For more research on '*like products*' in GATT, *see e.g*., Robert E. Hudec, *"Like Products": The Differences in Meaning in GATT Article I and III*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros Mavroidis *eds*., 2000); Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test*, 32 INT'L L. 619 (1998); Gerald C. Berg, *An Economic Interpretation of "like Products"*, 30 JOURNAL OF WORLD TRADE 195 (1996); Rex J. Zedalis, *The Theory of GATT "like" Product Common Language Cases*, 27 VANDER. J. TRANSNAT'L L. 33 (1994).

treatment as required.[127] Other than the general policy stated in Article III:1,[128] Article III has two pivotal provisions: Article III:2 dealing with internal taxation[129] and Article III:4 dealing with internal regulations.[130] One of the key issues under GATT Article III is whether domestic products and imported products are '*like products*'. More relevantly, how has the interpretation of '*likeness*' worked to shape WTO's attitudes towards culture? How likely may WTO tribunals distinguish products from each other based on their cultural content?

Notwithstanding the term's powerful scope, GATT Article III has been functioning without a clear definition of '*like products*' since its inception.[131] This has generated a number of disputes and made it especially relevant to examine pertinent cases. For most purposes, a meaningful comparison of '*like products*'

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[127] *See* James H. Snelson, *Can GATT Article III Recover From Its Head-On Collision With United States--Taxes on Automobiles*? 5 MINN. J. GLOBAL TRADE 467, 467 (1996) (*explaining the similarity between the GATT and the Dormant Commerce Clause doctrine of the U.S. Constitution*).

[128] GATT Article III:1 reads:

Parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, precessing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic regulation.

[129] GATT Article III:2 reads:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

Ad Article III:2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed products and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

[130] GATT Article III:4 reads:

The Products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

[131] *See* William J. Snape III & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process"*, 27 CORNELL INT'L L. J. 777, 792 (1994).

definitions requires specifying the criteria by which '*likeness*' to be measured.[132] In this regard, although far from uniform in their application, the Panels construing '*like products*' have relied on a set of factors to determine whether imported and domestic products are sufficiently '*like*' in order to secure national treatment.

Based upon an announcement made by a GATT Working Party in 1970,[133] the WTO tribunals have confirmed that the analysis of '*like products*' should be done on a case-by-case basis.[134] The approach for determining '*likeness*' consists of four general criteria:[135] (*i*) the properties, nature and quality of the products; (*ii*) the end-uses of the products; (*iii*) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behavior—in respect of the products; and (*iv*) the tariff classification of the products.[136] This can be referred to as '*traditional creteria*' for establishing '*likeness*' of products involved. In addition, the WTO jurisprudence also supports the view that when the origin is the sole criterion distinguishing products, it is sufficient for the purpose of satisfying the '*like products*' requirement for a complainant to demonstrate that there can or will be

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[132] *See* Robert E. Hudec, *"Like Products": The Differences in Meaning in GATT Article I and III*, *supra* note 124, at 103.

[133] GATT, *Report of the Working Party: Border Tax Adjustments*, ¶ 18, L/3464 (Dec. 2, 1970). *See also* Panel Report, *Canada--Periodicals*, ¶ 3.73.

There have been only a few GATT legal rulings on the meaning of '*like products*', and a significant number of those have been seriously questioned. Perhaps for this reason, most GATT/WTO rulings on '*like products*' issue start their analysis by quoting from the above Working Party Report. On the whole, the principal legal value of the quotation seems to be its legitimization of the case-by-case approach. *See* Robert E. Hudec, *"Like Products": The Differences in Meaning in GATT Article I and III*, *supra* note 124, at 111-12.

[134] Appellate Body Report, *EC--Asbestos*, ¶ 102.

[135] Appellate Body Report, *Japan--Taxes on Alcoholic Beverages*, ¶ 113, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Nov. 1, 1996); Panel Report, *United States--Standards for Reformulated and Conventional Gasoline*, ¶ 6.8, WT/DS/2/R (May 20, 1996) (*where the approach set forth in the Border Tax Adjustment case was adopted in a dispute concerning GATT Article III:4*).

[136] The fourth criterion, '*tariff classification*', was not mentioned by the Working Party on *Border Tax Adjustments*, but was included in the subsequent cases (*e.g.*, Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, ¶ 114).

domestic and imported products that are '*like*'.[137] This is referred to as '*alternative route*' for establishing '*likeness*' of products involved.

VI.2 'Like Products' Analysis in China--Publications and Audiovisual Products

In the case, the U.S. challenged three sets of Chinese measures concerning reading materials, sound recordings, and films for theatrical release as violoating GATT Article III:4. According to the above jurisprudence, the U.S. can establish that the imported and domestic products are '*like*' either via 'traditional criteria' or via 'alternative route'.

VI.2.1 Reading Materials

The U.S. argued that two of China's measures, specifically, the *Imported Publications Subscription Rule*[138] and the *Publication (Sub-)Distribution Rule*[139] are inconsisitent with GATT Article III:4, because they afford '*less favorable treatment*' than that is accorded to '*like*' domestic products by significantly restricting the distributors, distribution channels,[140] and the consumers available to imported reading materials.[141]

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[137] *See* Panel Report, *Indonesia--Certain Measures Affecting the Automobile Industry*, ¶ 14.113, WT/DS54/R, WT/DS55R, WT/DS64R (July 23, 1998); Panel Report, *Argentina--Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, ¶ 11.168-11.170, WT/DS155/R (Feb. 16, 2001); Panel Report, *Canada--Certain Measures Affecting the Automobile Industry*, ¶ 10.74, WT/DS139R, WT/DS142R (June 19, 2000); Panel Report, *India--Measures Affecting the Automotive Sector*, ¶ 7.714-7.716, WT/DS146/R, WT/DS175/R (Apr. 5, 2002).

[138] *Measures for Administration of Subscription of Imported Publications by Subscribers*, Order of the General Administration of Press and Publication, No. 27, 2004, effective as of Jan. 1, 2005.

[139] *Measures for Administration of Foreign-Invested Book, Periodical and Newspaper Distribution Enterprises*, jointly promulgated by the GAPP in December 2002 and MOFTEC (Ministry of Foreign Trade and Economic Cooperation, the precedessor of MOFCOM, the Ministry of Commerce) in March 2003, effective as of May 1, 2003.

[140] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.1499.

[141] *Id.*, ¶ 7.1474.

The Panel noted that other than its mere assertion that the imported and domestic products share the same physical characteristics and commercial uses, the U.S. had not provided any evidence to demonstrate that imported reading materials are '*like*' domestic reading materials. The Panel therefore concluded that the U.S. failed to establish the '*likeness*' between imported and domestic reading materials via 'traditional criteria'.[142]

Turning to whether the U.S. had established '*likeness*' via 'alternative route', the Panel found that the subscription requirements contained the *Imported Publications Subscription Rule* only apply to imported newspaper and periodicals. This constitutes a distinction in treatment between imported and domestic products exclusively based on their origin. China did not dispute that domestic newspapers and periodicals are not likewise regulated. Nor did China dispute that there will, or can, be domestic and imported newspapers and periodicals that are the same except for origin. Therefore, the Panel concluded that with regard to newspapers and periodicals, the '*like products*' requirement in Article III:4 is satisfied.[143] For books, the situation is somewhat different, however. Not all imported books require subscription, but only those with prohibited content. Given there is a factor other than the origin of books as the basis of differential treatment, the Panel found that the U.S. had not established that imported books are '*like*' domestic books via '*alternative route*'.[144]

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[142] *Id.*, ¶ 7.1481.
[143] *Id.*, ¶¶ 7.1487-7.1491.
[144] The Panel notes that as imported books without prohibited content are treated in the same way as domestic books, the difference in treatment between imported books in the '*limited*' category and domestic books is not exclusively based on the foreign origin of the imported books, but rather is based on whether the imported book

With regard to *Publication (Sub-) Distribution Rule*, the Panel found that the challenged measure creates a difference in treatment between domestic and imported reading materials exclusively based on the origin of reading materials. Likewise, China did not dispute that there will, or can, be domestic and imported reading materials that are the same, except for origin. Therefore, the Panel concluded that with respect to the inconsistency of the *Publications (Sub-) Distribution Rule* with GATT Article III:4, the '*like products*' requirement is satisfied.[145]

VI.2.2 Sound Recordings Intended for Electronic Distribution

The U.S. maintained that all sound recordings, whether domestic or imported, are fundamentally the same in all relevant aspects: they can contain the same kinds of music, can appeal to the same audience or target markets, and can be equally suitable for distribution digitally. The U.S. further argued that China's measures impose a more onerous content-review regime on imported sound recordings than that for '*like*' domestic recordings.[146] The only criterion for determining whether a sound recording intended for electronic distribution must go through the onerous content review process is the product's national origin.[147]

China argued that the distribution of sound recording imported in hard copy, but intended for so-called '*electronic distribution*', does not refer to distribution in the sense of GATT Article III:4 insofar as it does not involve the distribution of

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contains prohibited content. *Id.*, ¶¶ 7.1492-1498.
[145] *Id.*, ¶¶ 7.1501-7.1506.
[146] *Id.*, ¶ 7.1553.
[147] *Id.*, ¶¶ 7.1546-7.1547.

physical goods. Thus, it cannot be scrutinized under the rules governing trade in goods.[148] However, China failed to present any argumentation on whether imported and domestic hard-copy sound recordings are '*like*' within the meaning of Article III:4.[149]

The Panel held that the U.S. had not established that imported and domestic hard-copy sound recordings are '*like*' based on the traditional '*like products*' criteria due to lack of further elaboration.[150] In determining whether the U.S. had established '*like products*' via 'alternative route', the Panel limited its analysis to the *Internet Culture Rule*[151] and the *Network Music Opinions*,[152] which were properly identified in the U.S. panel request. Given it is unclear from the argumentation presented by the parties as to whether the challenged measures apply to hard-copy sound recordings intended for electronic distribution, the Panel defered its analysis and proceeded on the assumption that challenged measures could apply to imported hard-copy sound recordings. The Panel finally found that the U.S. had not demonstrated that the challenged measures affect the distribution of imported hard-copy sound recordings, which renders it unnecessary to return to the previous '*likeness*' analysis.[153]

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[148] *Id*., ¶ 7.1548.
[149] *Id*., ¶ 7.1556.
[150] *Id*., ¶ 7.1560.
[151] *Interim Provisions on the Administration of Internet Culture*, promulgated by the Ministry of Culture on Mar. 3, 2003, effective as of July 1, 2003.
[152] *Several Opinions of the Ministry of Culture on Development and Administration of Network Music*, promulgated by the Ministry of Culture and came into effect on Dec. 11, 2006.
[153] Panel Report, *China--Publications and Audiovisual Products*,, ¶¶ 7.1652-7.1653.

Note here the Panel reversed its order of analysis. This methodology does not accord with general logic and may be viewed as the Panel's exercise of judicial avoidance. For more discussions, *see* Alberto Alvarez-Jiménez, *The WTO Appellate Body's Exercise of Judicial Economy*, 12 J. INT'L ECON. L. 393, 407-409 (2009).

In the present case, the Panel might not want to first address the issue whether the challgend measures apply to hard-copy sound recordings because it is hard to draw a conclusion from both parties' argumentation and

This case also involves the issue regarding '*like service suppliers*' under GATS Article XVII:1.[154] The Panel noted that the challenged measures contain prohibitions on the right to establish and supply the services at issue exclusively on the basis of origin. In the meantime, there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects. The '*like service suppliers*' requirement is thus met.[155] From the Panel's reasoning logic here, it seems safe to conclude that the 'alternative route' for establishing '*likeness*' among goods involved can also be applied to establish the '*likeness*' among services and services providers. Nevertheless, due to the fundamental differences between goods and services, the 'traditional criteria' for establishing the '*likeness*' of goods involved may not be directly transplanted to establish the '*likeness*' among services and service providers involved.

VI.3 Commentary and Additional Thoughts on 'Like Products' Issue

National treatment is presented as one of the key issues in *China-Publications and Audiovisual Products*. The Panel's findings in this regard were not appealed. Accordingly, China is obliged to follow the Panel's recommendation and accord foreign newspaper and periodicals national treatment. The authors view this as a big loss for China, which might have been avoided if China seized the chance to defend its measures. The authors attempt to offer further analysis as follows.

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evidence. While in the meantime, the Panel realized that this is an essentail question that could not be avoided. Therefore, the Panel changed the order of analysis which still allows it to finally adjudicate the dispute but avoid a plausible issue first. Because the Panel's findings on this issue were not appealed by the Parties, there has no chance to learn the attitude of the Appellate Body towards the strategy here.

[154] Panel Report, *China--Publications and Audiovisual Products*, ¶ 7.1283.

[155] *Id*., ¶¶ 7.1284-7.1285.

In the case, the U.S. held that the imported and domestic reading materials share the same physical charateristics and commercial uses and therefore are '*like products*'. In the same vein, sound recordings, whether domestic or imported, are fundamentally the same in all relevant aspects. Against these arguments, except merely pointing out that there are no domestic publications which contain prohibited content in China, China provided no argumentation on whether the imported and domestic products at issue are '*like*'.[157] Nor did China argue that the products involved are not '*like*' within the meaning of GATT Article III:4, which discharges the WTO tribunals from fully examining this issue. In fact, notwithstanding the China's failure to present argumentation, the Panel found that only the measures affecting newspaper and periodicals violate China's national treatment obligations.

One might point out that the similar question -- whether domestic periodicals and imported split-runs are '*like*' products was ever presented and discussed in *Canada--Periodicals*. The tribunals in that case gave affirmative answers to this inquiry and did not factor cultural content into its deciding the '*likeness*' issue. The case findings and conclusions in *Canada--Periodicals* may be speculated as one of the reasons that prevented China from submitting that imported reading materials, sound recordings, and films are not '*like*' in this case. Yet, it should be highlighted that the situations in these two cases are somewhat different.

First note that in *Canada--Periodicals*, the Appellate Body reversed the Panel's finding that the imported split-runs and domestic periodcials are '*like*'

[157] *Id.*, ¶¶ 7.1475-7.1478, 7.1553-7.1556.

products and concluded that they are '*directly competitive or substitutable*' products within the meaning of GATT Article III:2. In *China--Publications and Audiovisual Products*, the U.S.'s claims concern GATT Article III:4, under which China has no obligations to extend national treatment to '*directly competitive or substitutable*' products.[158] It follows that if China had argued on and succeeded in the issue of non-'*direct competitiveness or substitutability*' among products at issue, a likely outcome is that China dispenses with its national treatment obligations in this regard. Then the core question here is what argument can be available for China to defend its measures.

Canada--Periodicals only concerns the '*likeness*' between Canadian domestic periodicals and imported American split-runs. The Appellate Body's finding that they are '*directly competitive or substituable*' could make some sense since these two kinds of products contain roughly the same editorial content with only different advertisement targeting different markets and audiences. *China--Publications and Audiovisual Products* concerns more general cultural products, including books, newspapers, periodicals, sound recordings, and films. Neither Parties to this dispute nor the Panel touched upon the issue whether this generality of cultural product concerned has some bearings on deciding '*likeness*'.

The authors are of the view that this issue should not be ignored in any sense. Applying the decisions of *Canada--Periodicals* to the scenario in this case, it seems undisputable that *Sports Illustrated* directly imported from the U.S. and *Sports Illustrated* regional edition (in English) in China (assuming there is such an edition,

[158] *Compare supra* notes 127 & 128.

or split-runs) are '*directly competitive or substituable products*'. Assuming the regional edition of *Sports Illustrated* is in Chinese (translation organized by a Chinese publisher with copyright authorization), can one still suggest that *Sport Illustrated* imported from the U.S. and its regional edition in Chinese are '*directly competitive or substituable'* products? Then, how about the '*direct competitiveness or substitutability*' between *Sports Illustrated* imported from the U.S. and *Sports World* (a local Chinese magazine) which share the same coverage: sports? A even further question is, can one argue that *Sports Illustrated* imported from the U.S. and *Fiction Monthly* (a Chinese magazine which has utterly different coverage) are '*directly competitive or substituable'* products?

The above different scenarios not only present the question regarding the '*likeness*' between the products with different origins, but also with different languages. Does linguistic element count for in deciding '*likeness*' or '*direct competitiveness or substitutability*' among cultural products? In *Canada--Periodicals*, due to the same language shared by the U.S. and Canada (with the region of Quebec as an exception), this issue was not on the table. Nevertheless, language, as a key component of culture, should not be neglected in judging '*likeness*' or '*direct competitiveness or substitutability*' of cultural products.

An undeniable fact is that in China, due to the less popularity of English learning and low educational quality in past decades, most Chinese people are currently not able to read or are not used to reading materials in English. As a consequence, it is very controversial that *Sports Illustrated* imported from the U.S. and *Sports Illustrated* regional edition in Chinese are '*like' or* '*directly competitive*

or substituable' products even if they share the same coverage or editorial content. Among the four 'traditional criteria' of establishing '*likeness*' (also applicable to the establishment of '*direct competitiveness or substitutability*'), at least two, "*the end-uses of the products*" and "'*consumers' perceptions and behavior*" may be used to distinguish imported and domestic products. Even one can argue that they are '*like products*' thanks to their same content, can one argue that *Sports Illustrated* imported from the U.S. and locally produced *Sports World* are '*like*' merely because of their similar coverage despite the different languages? It is even more fragile to maintain that *Sports Illustrated* imported from the U.S. and locally produced *Fiction Monthly* are '*like*' merely because they are both magazines. The same logic can be employed to explore whether imported and domesic sound recording are '*like*' or '*directly competitive or substituable*' products.

This might help explain why the U.S. failed to provide further elaboration on the '*likeness*' between imported and domestic reading materials and sound recording based on the 'traditional criteria'. The fact is, even China did not argue on this issue, the Panel still found that the U.S. failed to establish '*likeness*' based on 'traditional criteria'. However, when the Panel examined whether the U.S. had established '*likeness*' via 'alternative route', it made a finding in favor of the U.S..

This outcome, which appears to greatly expand China's national treatment obligations, might have been avoided if China argued that the imported and domestic products at issue are not '*like*' or '*directly competitive or substituable*' based upon the elements contained in 'traditional criteria'. With respect to whether the U.S. can establish the '*likeness*' between imported and domestic products

involved via ‘alternative route’, China should have further argued that there will not, or can not, be ‘*like*’ products within the meaning of GATT Article III(4), or ‘*like*’ service suppliers within the meaning of GATS Article XVII, because other than the origin, the different treatment is also based upon such other elements as languages, contents, *etc*.. Whether these arguments, embedded with cultural elements, can be endorsed by the WTO tribunals remains a question mark. Nevertheless, considering that both the WTO tribunals in this case clearly recognize that China enjoys the freedom of defining the high level protection of public morals in its territory, it is not unfounded to expect that these arguments, if properly advanced, will at least lead the WTO tribunals to the relevant discussions.

In accordance with the tribunals’ decisions, China is not only obliged to grant national treatment to newspaper and periodicals which have regional editions in China, but also to all imported products in these kinds. This is a big challenge for China to grapple with taking into account the substantial gap between its current regulation and required change.

VII. CONCLUDING REMAKRS: LOOKING BEYOND THE CASE

There has been no surge of cases involving cultural products thus far in the WTO. *China--Publications and Audiovisual Products* serves as an opportune focal point for discussing complex issues arising from the ‘specificity’ of cultural products and the ‘generality’ of trade obligations in the WTO. In dealing with the emerging task to reconcile cultural protection and free trade, several observations may now flow from studying this case:

First, at the domestic level, the Members should design and maintain compatible cultural policy measures with its WTO obligations. In this sense, China could have learned important lessons from the case. As in most trade talks, it was China's trade ministers (then MOFTEC, the precedessor of MOFCOM)[160] that led national delegations in negotiating China's accession terms to the WTO, while expertise and authority over cultural issues reside in other government agencies, with other officials and different agendas. The lack of apt coordination in decision-making among these agencies has resulted not only China's neglect of its trade obligations in formulating domestic policies but also its failure to use extra caution on cultural products in trade negotiation. In order to balance market opening with cultural policies, China needs to look critically at ways in which it maintains domestic measures, particularly those concerning content review mechanism.

One footnote worthwhile to add here is that China has recently incorporated strenthening the competitiveness of cultural industries into its national strategy, as well as adopting an array of incentive measures in this area.[161] This indicates that China's recognition of the far-reaching significance of enhancing cultural influence in an effort to upgrade its soft strength. The newly-formulated measures, instead of emphasing the protection of domestic industries, put more emphasis on fostering

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[160] In March 1993, the Ministry of Foreign Economic Relations and Trade was renamed to the Ministry of Foreign Trade and Economic Co-operation (MOFTEC). In the spring of 2003, the MOFTEC went through a reorganization and was renamed Ministry of Commerce (MOFCOM).

[161] *See e.g.*, *State Council Executive Meeting Discussed and Adopted the "Planning the Revitalization of the Culture Industry"*, http://info.e-to-china.com/investment_guide/58557.html; People's Daily Commentator: *To Promote the Revitalization of Cultural Industries*, http://info.e-to-china.com/investment_guide/62081.html; Chen Yuxin & Li Huizi, *Chinese cultural industry maintains growth via government-supported loans*, http://chinasecret.org/index.php/chinese-cultural-industry-maintains-growth-via-government-supported-loans/; *China draws plan to promote cultural industry*, http://www.cipnews.com.cn/showArticle.asp?Articleid=12860; *Chinese elements promote cultural industry "going global"*, http://chinasecret.org/index.php/chinese-elements-promote-cultural-industry-going-global/ (last visited Apr. 25, 2010).

domestic cultural innovation capacity, boosting exportation of cultural products, elevating its cultural image, and more relevantly, are trying to be more compatible with China's trade obligations in the WTO.

In this case, China also failed to come up with sustainable arguments in defending its measures against the U.S.'s claims on national treatment obligations under GATT Article III:4, and perhaps, more concrete arguments on the relationship between the UNESCO instruments and WTO agreements. To this end, China may gradually enhance its capacities in understanding, employing trade rules, and improve litigation skills along with its ever-increasing exposure to the WTO dispute settlement.

Second, the WTO tribunals hearing this case display a desirable flexibility in dealing with highly sensitive issues as well as their creativitiy in fashioning answers to balancing interests involved. However, the tribunals have not subscribed to a clear-cut notion as to whether cultural products should be treated differently. The dispute settlement involving cultural products does not seem satisfactory for advocates of cultural protection. As this case reveals, the *UNESCO Convention* is not in a position to act as counterbalance with WTO agreements. Practical difficulties clearly lie in invoking UNESCO instruments to defend cultural measures under the current regime. Though the WTO law may theoretically provides its Members with a limited degree of freedom to pursuing its cultural policy, such as invoking '*public morals exception'*, the Members have to subject their domestic measures to the strict scrutiny of trade rules. Furthermore, the distinction and overlap between cultural goods and services and different applicable disciplines

adds another layer of difficulty in identifying a definite treatment of such products. There exists another mission on how to build a workable framework for establishing '*likeness*' taking into consideration cultural elements of products involved.

Third, a better trade regime does not necessarily contradict cultural goals and *vice versa*. The importance that international community has been gradually placing on culture, as well as the recognized demand of protecting culture in international trade, calls for a synergy between culture and trade. *China--Publications and Audiovisual Products*, notwithstanding entangled with censorship and ideology related issues, still highlights the necessity for improving the current situation.

The details on how to proceed in practice is beyond the purview of this comment. In any rate, the case demonstrates that it is essential to design functional channels through which the UNESCO instruments can be connected with the WTO regime so that the tribunals are able to give necessary space to cultural concerns when they adjudicate.[163] A more detailed classification system is needed especially for audiovisual services. In this respect, greater attention should be paid to the modes of supply of cultural products by electronic and other newly technology-induced means. Moreover, there also should be an appropriate role of cultural elements in judging '*likeness*' among cultural products to mitigate the emerging crisis of cultural representation.

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[163] Note in this respect, many commentators already put forward various suggestions. *See e.g.*, Christoph Beat Graber, *supra* note 39; Michael Hahn, *supra* note 51; Tania Voon, *supra* note 95; Mira Burri-Nenova, *Trade and Culture in International Law: Paths to (Re)conciliation*, 44 JOURNAL OF WORLD TRADE 49 (2010); Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products*, 40 INT'L L. & POL'S 351 (2008); Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 INT'L & COMP. L. Q. 635 (2006).

Though *China--Publications and Audiovisual Products* may indicate that there is still a long way to go in putting some of these suggestions into place for tribunals' consideration in reality, the suggestions themselves offer valuable reference for the potential reform in future.

To conclude, *China--Publications and Audiovisual Products* is not in a position to form a solid basis for predicting future direction. However, the 'specificity' of cultural products and the 'generality' of trade obligations are not mutually exclusive. The very nature of the tension between culture and trade begs for a compromise or an operational middle route, instead of a blanket exemption of cultural products from trade disciplines or a complete disregard of the 'specificity' of cultural products in the most powerful trade regime. In order to render the WTO system more desirable both to trade proponents and cultural advocates, developing a sustainable jurisprudence on the interface of trade and culture is more than needed.