

CASE NOTE

SQUARING FREE TRADE IN CULTURE WITH CHINESE CENSORSHIP: THE WTO APPELLATE BODY REPORT ON *CHINA — AUDIOVISUALS**

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I INTRODUCTION

This case note describes the background, context and most important findings of the December 2009 Appellate Body Report on *China — Audiovisuals*. The case is a landmark for three reasons: first, confirmation that the World Trade Organization defines ‘goods’ (as opposed to ‘services’) based on physical tangibility, a criterion that may, in the future, have to be adjusted (the Note compares this rather traditional WTO approach to alternative approaches in United States and European Union law); second, application of *GATT*¹ art XX to justify a breach outside the *GATT* itself (*in casu*, China’s *Accession Protocol*),² a fundamental finding that may open the door for *GATT* exceptions also under other WTO agreements such as the *SCM Agreement*³ or even the *TRIPS*

* Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R, AB-2009-3 (21 December 2009) (*‘China — Audiovisuals’*).

¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*‘General Agreement on Tariffs and Trade’*) (*‘GATT’*).

² *Protocol on the Accession of the People’s Republic of China*, WTO Doc WT/L/432 (Decision of 10 November 2001) annex 7 (*‘Reservations by WTO Members’*) (*‘Accession Protocol’*).

³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘Agreement on Subsidies and Countervailing Measures’*) (*‘SCM Agreement’*).

Agreement;⁴ third, the technological neutrality of services commitments under *GATS*⁵ (essentially, a *GATS* commitment covers all means of supplying a service, unless otherwise specified).

II BACKGROUND AND SUMMARY OF THE DISPUTE

China joined the WTO in December 2001. Eight years later, China has been a main party in only four WTO disputes that led to a panel report. In only one of these disputes, shortly after joining the WTO, China was complainant (*United States — Steel Safeguards*,⁶ lodged in March 2002 together with seven other co-complainants). China won this dispute. In the remaining three disputes, China was defendant with the US each time acting as complainant.⁷ In all three of these defensive cases, China was found to have violated WTO commitments. All three of these rulings came relatively recently: *China — Auto Parts* in 2008; *China — IP Rights* and *China — Audiovisuals* in 2009. If anything, recent trends indicate that China's honeymoon as a player in WTO dispute settlement is, indeed, over. At the end of May 2010, five Chinese complaints were pending⁸ and two separate disputes were ongoing against China (one with three co-complainants).⁹ More complaints against China, especially by the US, are in the pipeline.¹⁰

This is the context of *China — Audiovisuals*. It is an extremely complex and broad-based dispute filed by the US in April 2007 against a series of Chinese restrictions on the importation and distribution of certain 'cultural' or 'content' goods and services: (i) reading materials such as books, periodicals and electronic publications; (ii) audiovisual home entertainment products such as

⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Law*') ('*TRIPS Agreement*')

⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B ('*General Agreement on Trade in Services*') ('*GATS*').

⁶ Appellate Body Report, *US — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Docs WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, AB-2003-3 (10 November 2003) ('*US — Steel Safeguards*').

⁷ Appellate Body Report, *China — Measures Affecting Imports of Automobile Parts*, WTO Docs WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, AB-2008-10 (15 December 2008) ('*China — Auto Parts*'); Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009) ('*China — IP Rights*'); Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R. In *China — Auto Parts* the US was complainant with the European Communities and Canada.

⁸ *US — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO DS379; *US — Certain Measures Affecting Imports of Poultry from China*, WTO DS392; *EC — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO DS397; *US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO DS399; *European Union — Anti-Dumping Measure on Certain Footwear from China*, WTO DS405.

⁹ *China — Measures Related to the Exportation of Various Raw Materials*, WTO DS394, WTO DS395 and WTO DS398; *China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the EU*, WTO DS407.

¹⁰ See, eg, the critical US statement at China's 2010 trade policy review: Michael Punke, 'US Statement at the WTO Trade Policy Review of China', (Statement, 31 May 2010) <<http://geneva.usmission.gov/2010/05/31/tpr-china/>>.

DVDs; (iii) sound recordings; and (iv) films for theatrical release.¹¹ The dispute was filed simultaneously with *China — IP Rights*. Both cases concern problems faced by the US content industry trying to boost their exports of goods and services to China: first, obtaining the right to import and distribute within China on a non-discriminatory basis (*China — Audiovisuals*); second, the problem of protection and enforcement within China of intellectual property rights, in particular copyright, linked to these cultural goods and services (*China — IP Rights*). The market reality that binds the two disputes is this: cultural or content products are also copyright-dependent; even if one gains market access within China for the products in question (think of books, films, DVDs or CDs), in cases where the IP rights linked to these products are not enforced, such access at best facilitates piracy and illegal copying which, in turn, undermines sales of the original, IP protected products. Conversely, keeping legitimate products away from the Chinese consumer (through import and distribution restrictions), may ultimately benefit copyright pirates who operate in the Chinese market and usually have less problem putting their wares to market.

The core regulatory context that both disputes have in common is China's censorship or content review mechanism. China denies copyright protection to goods which do not pass its censorship regime (a denial that was found to violate the *TRIPS Agreement* in *China — IP Rights*).¹² Similarly, the justification offered by China for granting the right to import 'cultural goods' only to certain Chinese state-owned enterprises was that such restrictions were necessary to implement China's censorship regime.¹³ The panel and Appellate Body in *China — Audiovisuals* ultimately rejected this defence, finding that China could pursue its censorship regime and the 'public morals' it is allegedly protecting in a less trade-restrictive manner, for example, by letting the Chinese government itself do the censorship and then granting the right to import the approved goods to all companies, be they Chinese or foreign, on a non-discriminatory basis.¹⁴

The US win in *China — IP Rights* was limited and underlined the flexibility inherent in the *TRIPS Agreement*. The US challenged, first, China's denial of copyright to works, such as books, films or CDs, that have not, or not yet, passed China's censorship or content review system.¹⁵ This claim was upheld by the panel, which left China's censorship system untouched, but found that such a system offers no excuse to deny copyright, in particular to materials that have failed content review.¹⁶ Second, the US also contested China's methods of disposal of imported goods confiscated by Chinese customs authorities for IP infringement, including donation to social welfare bodies, buyback by the right holder and auction.¹⁷ This second claim was only very partially upheld insofar as China allowed for the auctioning off of confiscated goods after 'the simple removal of the trademark unlawfully affixed' in violation of art 46 (and hence art

¹¹ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [2.1]–[2.2].

¹² Panel Report, *China — IP Rights*, WTO Doc WT/DS362/R, [7.139], [7.181], [7.191].

¹³ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [4.109].

¹⁴ Ibid [7.906]; Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [332].

¹⁵ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, annex A-1 [57]–[76].

¹⁶ See generally, *ibid* [7.135], [7.180], [7.191].

¹⁷ *Ibid* annex A-1 [47]–[56].

59) of the *TRIPS Agreement*.¹⁸ Third, the US challenged the volume and value ‘thresholds’ China imposes (for example, a minimum of 500 pirated CDs or DVDs) before criminal procedures and penalties are triggered against wilful trademark counterfeiting or copyright piracy.¹⁹ The panel rejected this claim on the ground that the US had not demonstrated that the thresholds allow for counterfeiting or piracy ‘on a commercial scale’ as required in art 61 of the *TRIPS Agreement*.²⁰ The *China — IP Rights* panel report was not appealed and was adopted on 29 January 2009.

The US victory in *China — Audiovisuals*, in contrast, was much broader, even if, as discussed below, its commercial impact remains to be seen. Although the panel found that certain measures and products complained of fell outside its terms of reference, the Chinese measures it did examine were almost all (15 out of 17 measures)²¹ found to violate one or more of the following WTO commitments:

- (i) China’s commitment to grant the right to trade (in particular, import) to all enterprises in China including foreign-invested enterprises and individuals, under the *Accession Protocol*;²²
- (ii) *GATS* market access and national treatment obligations towards foreign (US) suppliers of distribution services operating within China; and
- (iii) *GATT* national treatment in respect of measures that affect the distribution of imported reading materials.²³

The panel report was circulated in August 2009. Most panel findings were not appealed, with China only contesting three elements. First, it appealed the panel’s finding that China’s trading rights commitments apply to Chinese measures concerning *films for theatrical release* and *unfinished audiovisual products*, on the ground that, according to China, these measures regulate ‘services’ and ‘content’, not ‘goods’.²⁴ Second, China appealed the panel’s analysis and conclusion under *GATT* art XX(a) (‘public morals’),²⁵ an exception that China had unsuccessfully invoked to justify violations of its *Accession Protocol*.²⁶ Third, China appealed the panel’s finding that ‘[s]ound recording distribution services’ in China’s *GATS Schedule of Specific Commitments*²⁷ cover the electronic distribution of sound recordings in non-physical form, notably over the internet.²⁸ The Appellate Body upheld all of the panel’s

¹⁸ Ibid [394].

¹⁹ Ibid annex A-1 [13]–[46].

²⁰ Ibid [7.669].

²¹ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [129]–[130].

²² In this respect, the US also filed an appeal against an intermediate finding by the panel that one of China’s restrictions (the so-called ‘State plan requirement’) can be seen as ‘necessary’ to protect public morals in China (even if the panel ultimately found that this was not the case): *ibid* [200], [204], [336]–[337].

²³ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [130].

²⁴ Ibid [14].

²⁵ Ibid.

²⁶ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [7.911].

²⁷ *The People’s Republic of China — Schedule of Specific Commitments*, WTO Doc GATS/SC/135 (14 February 2002) 21 (‘*GATS Schedule*’).

²⁸ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [14].

conclusions,²⁹ and confirmed that China had violated its *Accession Protocol* in a way that cannot be justified under *GATT* art XX(a).³⁰ The Appellate Body also confirmed the panel's findings of *GATS* violation.³¹ The panel's findings of violation under the *GATT* had not been appealed. Both the panel and the Appellate Body reports were adopted by the WTO Dispute Settlement Body on 19 January 2010.

This note addresses two aspects of the Appellate Body report. First, the Appellate Body's approach to, and definition of, what is a 'good' (that is, is a 'film' a 'good' or a 'service'?). Second, the extent to which *GATT* art XX exceptions can justify violations under WTO agreements or instruments other than the *GATT* itself. In this case, China was allowed to invoke 'public morals' under *GATT* art XX(a) to justify violations under its *Accession Protocol*. In future cases, the issue may well be whether a health or environmental regulation, anti-dumping duty, safeguard or subsidy that violates the *SPS Agreement*,³² *Safeguards Agreement*,³³ *TBT Agreement*,³⁴ *Anti-Dumping Agreement*³⁵ or *SCM Agreement* can be justified under *GATT* art XX (or XXIV) exceptions.

III IS A FILM A 'GOOD' OR A 'SERVICE'? THE TECHNOLOGICAL BIAS AND NEUTRALITY OF *GATT* AND *GATS*

When reflecting on how to promote free speech or a more open society in China, China's WTO obligations may not be the first instrument that springs to mind. Yet, in recent WTO disputes, China's public censorship of everything ranging from books to films and music to the internet has, at least indirectly, been challenged.³⁶ To use free trade principles in an attempt to limit censorship, one must find a way to translate restrictions on freedom of speech, opinions or ideas into restrictions on the free movement of goods or services. Put differently, the WTO as a trade organisation cares little about free movement of ideas as such; it does care a whole lot about free movement of goods and services that may incorporate, or act as a medium to propagate, those ideas. If prying open markets is a way to pry open minds, WTO trade obligations can be used to limit censorship. That said, no WTO member can complain about China's censorship regime head-on as, for example, a violation of human rights. What it can do, however, is challenge China's censorship as a restriction on the free movement

²⁹ Ibid [414]–[416].

³⁰ Ibid [415(e)].

³¹ Ibid [416(b)].

³² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures*') ('*SPS Agreement*').

³³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Safeguards*') ('*Safeguards Agreement*').

³⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

³⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Anti-Dumping Agreement*').

³⁶ See generally, Panel Report, *China — IP Rights*, WTO Doc WT/DS362/R; Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R.

of goods or services, in particular ‘cultural’ goods or services, and invoke market access or trading rights under the *GATT* or *GATS*, or complain that China’s censorship regime is not transparent or discriminates against imports as compared to domestic Chinese goods or service suppliers in violation of national treatment, a cornerstone of both the *GATT* and *GATS*.³⁷

Faced with such choice between *GATT* and *GATS* in the context of today’s sophisticated content industry that often has goods and services components (a newspaper is made of paper, but its content is a bundle of services that are by far the most important added value; moreover, newspapers can now also be read and traded online), a question that arises is whether a product is a ‘good’ or a ‘service’, and whether a particular measure is subject to the *GATT* as a restriction on trade in ‘goods’ or the *GATS* as a restriction on trade in ‘services’, or both. This classification may be rather academic in a legal system (such as the EU), where free movement of goods and free movement of services are by now subject to more or less the same commitments. In other situations, in contrast, the goods and the services regimes may impose radically different obligations. In such cases drawing the line between goods and services can make or break a dispute. This is the situation in the WTO, where the *GATT* is over sixty years old with a complete ban on all quantitative restrictions and discriminatory regulations unless justified under limited exceptions (in particular *GATT* art XX). The *GATS*, in contrast, is only fifteen years old and composed mainly of country-specific commitments carefully bound (or not bound, depending on the services sector in question) so that national treatment or market access obligations only exist if, and to the extent that, a particular member made a specific commitment for the particular sector in question. These obligations are subject to general exceptions, particularly in *GATS* art XIV which is similar to *GATT* art XX. A similarly divergent regulation of goods as opposed to services can be found in anti-dumping rules. Such rules permit the imposition of anti-dumping duties on imports of goods below fair or normal value.³⁸ In cases where an import is classified as a ‘service’ (instead of a ‘good’) no anti-dumping duties can be imposed. The distinction between goods and services in the anti-dumping context was at the centre of a recent US Supreme Court opinion, *United States v Eurodif*,³⁹ discussed below.

A Distinguishing ‘Good’ from ‘Service’ in the WTO after China — Audiovisuals

So how does the WTO proceed in its application of the *GATT* and/or the *GATS* in situations of doubt? Firstly, and most importantly, nowhere does the *GATT* define what a ‘good’ or ‘product’ is. The *GATS*, in turn, does not define the concept of a ‘service’ either. Instead, the GATT Secretariat issued an indicative list of service activities or sectors that most WTO members have used

³⁷ See Tomer Broude and Holger Hestermeyer, ‘The First Condition of Progress? — The Limits of International Trade Law as a Promoter of Freedom of Speech’ (Research Showcase Poster presented at the 103rd Annual Meeting of the American Society of International Law, 25–28 March 2009).

³⁸ See *GATT*, art VI; *Anti-Dumping Agreement*.

³⁹ *United States v Eurodif SA* (No 07-1059, 26 January 2009) (‘*Eurodif*’).

as a template when making *GATS* commitments.⁴⁰ *GATS* art I:1 does, however, state broadly that it applies to any measure by any WTO member ‘affecting trade in services’. Secondly, and largely as a consequence, in *EC — Bananas*⁴¹ the Appellate Body found that the *GATT* and the *GATS* are not mutually exclusive so that one and the same measure can be subject to both the *GATT* and the *GATS*.⁴² In *Canada — Periodicals*,⁴³ for example, the Appellate Body found that ‘a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having service attributes, but they combine to form a physical product — the periodical itself.’⁴⁴ In *US — Lumber CVDs Final*,⁴⁵ the Appellate Body found that standing timber even before it is harvested (that is, trees attached to the land but severable from it) is a ‘good’ even if they are not tradable as such.⁴⁶ The Appellate Body rejected Canada’s argument that ‘the term “goods” must be read as limited to “tradable items with an actual or potential tariff classification”’⁴⁷ but added that “[g]oods” in ... the *SCM Agreement* and “products” in ... the *GATT 1994* are different words that need not necessarily bear the same meanings in the different contexts in which they are used’.⁴⁸

That set the stage for a jurisprudence that focuses on the measure in question and whether it has an effect or impact on trade in ‘goods’ and/or ‘services’, with physical or material nature being a decisive criterion for something to be a ‘good’. *China — Audiovisuals* follows this line. In China, only certain state-approved entities may engage in the business of importing films into China. These entities enter into a licensing or distribution agreement with a foreign film producer or licensor and, after content review, import certain delivery materials including hard copy cinematographic films. In para 5.1 of its *Accession Protocol*, however, China committed to phase out state trading three years after its accession (with limited exceptions) and that, after three years, ‘all enterprises in China shall have the right to trade in all goods throughout the customs territory of China’. The *Accession Protocol* defines the right to trade as ‘the right to import and export goods’.⁴⁹ According to China, this right to trade in goods does not apply to measures pertaining to films for theatrical release since such measures ‘do not regulate the importation of goods but, rather, regulate the

⁴⁰ *Services Sectoral Classification List*, GATT Doc MTN.GNS/W/120 (10 July 1991).

⁴¹ Appellate Body Report, *EC — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (9 September 1997) (*‘EC — Bananas’*).

⁴² *Ibid* [221].

⁴³ Appellate Body Report, *Canada — Certain Measures concerning Periodicals*, WTO Doc WT/DS31/AB/R, AB-1997-2 (30 June 1997) (*‘Canada — Periodicals’*).

⁴⁴ *Ibid* 17.

⁴⁵ Appellate Body Report, *US — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS257/AB/R, AB-2003-6 (19 January 2004) (*‘US — Lumber CVDs Final’*).

⁴⁶ *Ibid* [67].

⁴⁷ *Ibid* [61] citing *SCM Agreement* art 1.1(a)(1)(iii).

⁴⁸ *Ibid* [63].

⁴⁹ *Accession Protocol*, WTO Doc WT/L/432, [5.1].

content of films and the services associated with the importation of such content'.⁵⁰ For China,

films for theatrical release are not goods because they are exploited through a series of services; because the commercial value of films for theatrical release lies in the revenue generated by these services; and because the delivery materials containing the content of films are mere accessories of such services and have no commercial value of their own.⁵¹

In response, the US argued that 'the vast majority of goods are commercially exploited through a series of associated services and that China's argument would transform virtually all goods into services'.⁵² The US added that '[a]rticles III:10 and IV of the GATT 1994, which deal with cinematographic films, confirm that films for theatrical release are goods'.⁵³ The US also referred to the international classification of products under the *Harmonized Commodity Description and Coding System*⁵⁴ of the World Customs Organization and China's WTO Schedule of Concession for goods, both of which contain a heading for 'cinematographic film' with embedded content.⁵⁵

In line with the abovementioned focus on measures (and their effect) rather than products as such (is a film a 'good' or a 'service?'), the Appellate Body focused on the Chinese regulation setting out the restriction, including a detailed analysis of the term '*dian ying*' used in that regulation and its English translation.⁵⁶ The Appellate Body concluded that

where the content of a film is carried by physical delivery materials, [the Chinese restriction] will *inevitably* regulate who may import goods for the plain reason that the content of a film is expressed through, and embedded in, a physical good.⁵⁷

For the Appellate Body, this effect on 'goods' (that is, the physical film reel that crosses the border) is '*inevitable*, rather than "*incidental*" and

the mere fact that the import transaction involving hard-copy cinematographic films may not be the 'essential feature' of the exploitation of the relevant film does not preclude the application of China's trading rights commitments to the *Film Regulation*.⁵⁸

The Appellate Body reached the same conclusion in respect of restrictions on unfinished audiovisual products or master copies to be used to publish and manufacture copies for sale in China.⁵⁹

Several lessons can be drawn from this ruling. First, the Appellate Body has confirmed that a given product can have both a goods and a services component,

⁵⁰ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [169].

⁵¹ *Ibid* [173].

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *International Convention on the Harmonized Commodity Description and Coding System*, opened for signature 14 June 1983, 1503 UNTS 167 (entered into force 1 January 1988).

⁵⁵ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [58].

⁵⁶ *Ibid* [183]–[190]. The term '*dian ying*' is translated as 'film': [183].

⁵⁷ *Ibid* [188].

⁵⁸ *Ibid* [196] citing Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [7.555].

⁵⁹ *Ibid* [204].

and that a given measure can be subject to both the *GATT* and the *GATS* where it affects both ‘goods’ and ‘services’. The two universes are not mutually exclusive. Crucially, the Appellate Body did *not* find that a film ‘is’ a good, but rather that it has a good’s ‘component’ or ‘includes’ a good, to the extent the film is carried on a film reel or other physical material and that, as a result, it is ‘inevitable’ that a regulation which affects such a film affects a good. This means that regulators, when enacting a rule, must be aware that the new rule may have to comply with both the *GATT* and *GATS*. This approach cumulates WTO obligations and may not make it easier to figure out which *GATT* or *GATS* discipline applies. The safest move may then be to comply with the strictest discipline, be it under the *GATT* or *GATS*. For complainants, including countries that want to challenge China’s censorship regime, this approach is positive news: they do not have to limit themselves to *GATT* or *GATS* claims; they can submit and prevail under both. For regulating countries such as China, the cumulative application of the *GATT* and *GATS* is, obviously, less appealing.

Second, as in *Canada — Periodicals*, the Appellate Body’s definition of a ‘good’ focuses on the tangible or material nature of the product — for instance, the film reel or hard copy films — irrespective of whether this tangible component represents only a minor fraction of the value or economic reality of the product. This, in turn, raises two questions. First, will the Appellate Body automatically find a ‘good’ whenever it sees tangible material? Is, for example, a paper lottery ticket automatically a ‘good’ — so that cross-border restrictions on lottery activities affect trade in ‘goods’ — or merely an element in the supply of (lottery) ‘services’, making the entire activity subject only to the *GATS*? What about coins or paper money in the context, for example, of allegations of currency undervaluation or subsidisation? Would the Appellate Body consider paper money to be a ‘good’ provided by the government (that is, a ‘financial contribution’) or rather as falling under the free movement of capital and, therefore, neither subject to the *GATT/SCM Agreement* nor *GATS* rules on free movement of ‘goods’ or ‘services’? What about paper carbon emission allowances or permits which, under EU law, companies can trade and must submit when emitting carbon dioxide?⁶⁰ Are these goods or services, or neither?⁶¹

The second question that arises from the Appellate Body’s focus on tangible material is this: does it suffice for a traded product to be intangible for that

⁶⁰ See, eg, *Council Directive 2009/29/EC of the European Parliament and Council* [2009] OJ L 140/63, art 5.

⁶¹ See Appellate Body Report, *US — Lumber CVDs Final*, WTO Doc WT/DS257/AB/R, [66]. The Appellate Body found that standing timber is a ‘good’ even if ‘specific trees’ are not ‘identified’ in stumpage contracts, with the Appellate Body stating:

[W]e do not see the relevance, for an assessment of whether trees are goods, of the fact that each individual tree within the specified area of land covered by a stumpage contract may not be identified at the time the contract is made ... We see no reason why disciplines on subsidies that regulate the provision of non-monetary resources should focus on identifiable physical objects and not on tangible, but fungible, input material.

product to be regarded only as a ‘service’?⁶² For example, if US film producers stopped physically shipping film reels or master copies to China for reproduction within China, and rather sent the material electronically over the internet, would that automatically imply that we can no longer talk of trade in ‘goods’ and trading rights and must examine the transaction exclusively under the *GATS* (say, as a cross-border supply of ‘entertainment services’)? If so, China would then no longer violate its *Accession Protocol* (as trading rights only apply in respect of ‘goods’) and the US would have to rely exclusively on, for example, Chinese *GATS* commitments in entertainment or distribution ‘services’ (which may well be below China’s commitments in the *GATT*). Should the mere method of delivery — tangible or over the internet — bring about this drastic change in legal regime? Should the law follow economic reality (in business terms little changes when sending the film on a reel or over the internet, assuming the quality is the same), or should the law stick to physics (tangible is *GATT*, intangible is *GATS*)? Making tangibility a necessary condition for something to be a ‘good’ may also mean that, for example, in the trade in energy context electricity cannot be classified as a ‘good’. Similarly, is a carbon emissions allowance a ‘good’ as long as it is traded in paper form? Does it become a ‘service’, or otherwise stop being a good, when traded and registered electronically? The same conclusion could then be drawn in respect of IP rights — which are intangible and arguably, on that basis, not a ‘good’ — even though they are now commonly protected as ‘assets’ or ‘investments’ under bilateral investment treaties, and the IP value (for example, the copyright) of a film is by far the most valuable component of the film. In contrast, if IP rights were to be seen as ‘goods’, major questions of *GATT–TRIPS* overlap would arise.

B *An Alternative Approach: Good versus Service in EU and US Law*

To weigh these questions, it is interesting to examine the alternative of creating mutually exclusive regimes for ‘goods’ and ‘services’. Indeed, another approach would have been for the Appellate Body to focus not on the measure but on the regulated product, and to apply the *GATT* (and only the *GATT*) where the product is found to be a ‘good’; and to apply the *GATS* (and only the *GATS*) where the product is found to be a ‘service’. This is the solution for example, in EU law, where if something is a ‘good’, it cannot at the same time be a ‘service’.⁶³ To define what is a ‘good’, the European Court of Justice (‘ECJ’) has referred to several criteria. In *Commission of the EC v Italy*,⁶⁴ an early case, the

⁶² See *ibid* [59], where the Appellate Body found that ‘the ordinary meaning of the term “goods” [in the SCM Agreement] ... includes items that are tangible and capable of being possessed’ (emphasis added). This could hint at the universe of goods being broader than just tangible products.

⁶³ *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993), art 57 defines ‘services’ as follows:

Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

⁶⁴ (C-7/68) [1968] ECR 423.

ECJ found that ‘goods ... can be valued in money and ... are capable, as such, of forming the subject of commercial transactions’.⁶⁵ On that basis, it found that works of art,⁶⁶ waste,⁶⁷ electricity⁶⁸ and natural gas⁶⁹ count as ‘goods’.

In other cases, the ECJ focused not on the monetary value or commercial exchangeability of the product, but rather on its tangible or material nature. In a ruling similar to *China — Audiovisuals*, the ECJ found that a French restriction on the distribution, under licence, of ‘cinematographic works in the form of recordings, in particular in the form of video-cassettes’ was a restriction on ‘goods’.⁷⁰ The Court added that

it is not possible to regard the process of production of video-cassettes as the provision of ‘services’ within the meaning of the Treaty since the services of a manufacturer of such products result directly in the manufacture of a material object which is, moreover, the subject of classification in the Common Customs Tariff (heading 37.07).⁷¹

In later cases, however, the Court stressed that not all material objects can be regarded as ‘goods’. It found, for example, that lotteries do not fall under ‘free movement of goods’ principles even where they involve large-scale sending and distribution to another EU Member State of material objects such as letters, promotional leaflets and lottery tickets.⁷² For the ECJ:

[T]hose activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.⁷³

For the ECJ, the economic activity of running a lottery is, therefore, a ‘service’. Focusing on overall economic realities rather than physics, the material, paper lottery ticket was regarded as only tangential or incidental to this service.

Similarly, in another case, the ECJ found that ‘anything which can be valued in money and which is capable, as such, of forming the subject of commercial transactions does not necessarily fall within the scope of application’ of EU rules on the free movement of goods.⁷⁴ Under EU law, means of payment (including coins and paper money) and operations relating to shares, bonds and other securities fall under provisions on the free movement of capital.⁷⁵ Interestingly,

⁶⁵ Ibid 428.

⁶⁶ *R v Thompson* (C-7/78) [1978] ECR 2247.

⁶⁷ *Commission of the EC v Belgium* (C-2/90) [1992] ECR I-4431.

⁶⁸ *Almelo v Energiebedrijf Ijsselmij* (C-393/92) [1994] ECR I-1477.

⁶⁹ *Commission of the EC v France* (C-159/94) [1997] ECR I-5815.

⁷⁰ *Cinéthèque SA v Fédération Nationale des Cinémas Français* (Joined Cases C-60/84 and C-61/84) [1985] ECR 2605, 2623.

⁷¹ Ibid. In *Dynamic Median Vertriebs GmbH v Avides Media AG* (C-244/06) [2008] ECR I-505 the ECJ confirmed that Japanese cartoons in DVD or video cassette format sold over the internet and subsequently shipped in hard copy are ‘goods’.

⁷² *Her Majesty’s Customs and Excise Commissioners v Schindler* (C-275/92) [1994] ECR I-1039 (‘Schindler’).

⁷³ Ibid I-1088.

⁷⁴ *Jägerskiöld v Gustafsson* (C-97/98) [1999] ECR I-7319, I-7374 (‘Jägerskiöld’).

⁷⁵ *Ministerio Fiscal v Bordessa* (Joined Cases C-358/93 and C-416/93) [1995] ECR I-361, I-365.

especially in the context of carbon allowances discussed above, the Court also found that fishing rights and angling permits are not goods but constitute the provision of a service.⁷⁶

Yet another way to draw the line between goods and services is offered by the US Supreme Court in *Eurodif*. In *Eurodif*, the question was whether ‘feed uranium’ plus a cash payment, sent from the US to France in return for ‘low enriched uranium’ (‘LEU’) sent back from France, is a sale of ‘goods’ (that is, of LEU) or a supply of ‘services’ (that is, uranium enrichment services). The Court found that this transaction was reasonably described as a sale of ‘goods’ — French imports of LEU subject to anti-dumping duties — on the grounds that (i) ownership over the raw material (feed uranium) could be considered as transferred; (ii) the raw material was fungible; and (iii) it underwent a substantial transformation (from feed uranium to LEU).⁷⁷ The Court contrasted this sale of goods transaction to the following traditional services transaction:

A customer who comes to a laundry with cash and dirty shirts is clearly purchasing cleaning services, not clean shirts. ... [W]ithout any transfer of ownership [of the shirt], the salient feature of the transaction is the cleaning of the shirt, a service.⁷⁸

This ruling goes to the US argument made in *China — Audiovisuals* that ‘the vast majority of goods are commercially exploited through a series of associated services and that China’s argument would transform virtually all goods into services’.⁷⁹ The US Supreme Court realised that almost all ‘goods’ are produced with the use of ‘services’. Yet, that does not necessarily make them a ‘service’ carved out from US anti-dumping rules. Indications that a transaction is a ‘service’ (rather than a good) are:

- (i) that the raw materials or inputs used to perform the transaction (for example, the shirts to be cleaned) remained in ownership of the buyer of the final product (clean shirts);
- (ii) that these raw materials or inputs are unique and not fungible (when dry-cleaning my shirt, I do not want just any shirt in return; I want my own shirt back); and
- (iii) no substantial transformation occurred when comparing the input and the delivered product (my shirt remains a shirt even if it is now clean).

The Supreme Court was careful, however, not to offer any hard and fast rules, in particular, a rule focused only on continued ownership of inputs. It realised that such a rule could be abused by simply restructuring contractual obligations

⁷⁶ *Jägerskiöld* (C-97/98) [1999] ECR I-7319, I-7344:

The activity consisting of making fishing waters available to third parties, for consideration and upon certain conditions, so that they can fish there constitutes a provision of services ... The fact that those rights or those permits are set down in documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods.

⁷⁷ *Eurodif* (No 07-1059, 26 January 2009).

⁷⁸ *Ibid* slip op 12, 14.

⁷⁹ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [173].

whereby ownership would never change hands, if only to avoid US anti-dumping rules:

[C]ontracts for imported pasta would be replaced by separate contracts for wheat and wheat processing services, sweater imports would give way to separate contracts for wool and knitting services, and antidumping duties would primarily chastise the uncreative.⁸⁰

The above criteria are not particularly helpful to tackle the question of films in *China — Audiovisuals*. In any event, they would seem to confirm the Appellate Body's conclusion that a film reel is a 'good'. Even if the Chinese were to send a blank film reel to the US for it to be 'serviced' there (continued ownership of the raw material or input under (i) above), there is little doubt that (ii) the film reel is a fungible product, and (iii) when it comes back with a film on it, the film reel is substantially transformed. As a result, under these criteria we could classify the transaction as a sale of goods. The criteria are more to the point when it comes, for example, to the question of whether drilling oil in a foreign country is a 'goods' or 'services' transaction subject to either the *GATT* or the *GATS*. If the company engaged in the oil exploitation is not the owner of the land or oil in the ground (so that there is no transfer of ownership over inputs which are unique, namely a specific plot of land), and the oil is simply pumped up (without substantial transformation), a good argument can be made that the transaction is a 'service'.⁸¹

Returning to *China — Audiovisuals*, after finding that films are 'goods' as long as they come on a tangible medium such as a film reel, the Appellate Body was asked to decide on the importance of tangibility a second time. When interpreting the phrase '[s]ound recording distribution services' in China's *GATS Schedule*, the Appellate Body found that this includes not only distribution of tangible products (such as CDs) as China had argued, but also distribution of intangibles over the internet, as submitted by the US.⁸² It did so based on a textual and contextual interpretation of the words in this phrase, rather than with reference to broader criteria of 'services' or 'goods' definitions. Crucially, the Appellate Body confirmed its evolutionary approach to treaty interpretation, finding that the terms in China's *GATS Schedule* 'are sufficiently generic that what they apply to may change over time',⁸³ and that limiting their meaning to 'the time the Schedule was concluded' would mean that 'very similar or identically worded commitments could be given different meanings ... depending on the date of their adoption', which would 'undermine the predictability, security, and clarity of GATS'.⁸⁴

⁸⁰ *Eurodif* (No 07-1059, 26 January 2009) slip op 16.

⁸¹ As the WTO Secretariat has pointed out in *Energy Services: Background Note by the Secretariat*, WTO Doc S/C/W/52 (9 September 1998) [9], 'it seems generally accepted that the production of primary and secondary energy do not constitute services ... but result in goods ... as the production service is incorporated in the value of the good produced'. At the same time, 'it seems equally accepted that if the good or energy is produced by a company that does not own the raw material from which the good is made (eg, the land or the oil that sits in the ground), then the company can be deemed to perform a service.'

⁸² Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [412].

⁸³ *Ibid* [396].

⁸⁴ *Ibid* [397].

As a result, it is interesting to point out that the Appellate Body interpreted *services* commitments in a technologically neutral way (distribution covers both old-style physical delivery and new-style delivery over the internet, unless otherwise specified), but limited *goods* commitments and the right to import goods to restrictions affecting material or tangible products (thereby, as noted earlier, apparently excluding films traded intangibly over the internet). In other words, method of delivery (tangible or over the internet) matters for goods, but not for services. In this sense, *GATS* is technologically neutral, *GATT* technologically biased.

IV CAN *GATT* EXCEPTIONS ON ‘PUBLIC MORALS’ JUSTIFY CHINESE CENSORSHIP AND VIOLATIONS UNDER CHINA’S *ACCESSION PROTOCOL*?

A *Conflict Avoidance or Double Standard? Chinese Censorship was Simply ‘Assumed’ to Protect ‘Public Morals’*

Interestingly enough, in *China — Audiovisuals*, China did not invoke any *GATS* or *GATT* exception to justify the abovementioned *GATS* and *GATT* violations found by the panel (but not appealed). In particular, although it could have done so, China did not invoke ‘public morals’ so as to justify some of these violations with reference to its censorship regime. In contrast, China did invoke *GATT* art XX(a) (‘public morals’) to justify certain (but not all) restrictions on trading rights found to be in violation of China’s *Accession Protocol*.⁸⁵

Similarly avoiding a head-on collision at the WTO over whether China’s censorship regime genuinely relates to ‘public morals’, the US, in turn, did not contest that the dissemination of materials containing the types of content listed as prohibited by China could have a negative impact on ‘public morals’ in China. This list nonetheless bans content that, for example, ‘injures the national glory’, ‘undermines the solidarity of the nationalities’, ‘propagates evil cults or superstition’, ‘destroys social stability’ and ‘jeopardizes social morality or fine cultural traditions of the nationalities’.⁸⁶

The panel merely recalled that in *US — Gambling*⁸⁷ the term ‘public morals’ was found to denote ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’⁸⁸ and that ‘the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’.⁸⁹ Given the absence of US protest on the matter, the panel simply ‘assumed that each of the types of prohibited content listed in China’s measures could, if it were brought into China, have a negative impact on “public morals” in China within the

⁸⁵ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [4.112].

⁸⁶ *Ibid* [7.760].

⁸⁷ Appellate Body Report, *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) (*US — Gambling*).

⁸⁸ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [5.11].

⁸⁹ *Ibid* [7.759], referring to Panel Report, *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) (*US — Gambling*) [6.461].

meaning of Article XX(a)'.⁹⁰ Put more bluntly, on the panel's view, if the US can worry about online gambling for 'public morals' reasons in *US — Gambling* (protection of minors, prevention of gambling addiction and so on) then China can be considered to pursue 'public morals' when censoring the content industry. The fact that China may thereby be violating basic principles of freedom of speech was not even mentioned. This approach — for which, after all, the US is as much to blame as the panel and Appellate Body themselves — should temper the hope of those who believe that the WTO can nudge China toward a more open society. An alternative approach would have been to narrowly interpret the 'public morals' excuse and to condition that excuse on compliance with basic and universally accepted principles of free speech (the way, for example, the International Court of Justice in *Oil Platforms*⁹¹ narrowly interpreted a national security exception to exclude measures that violate basic rules on the use of force).⁹²

Most strikingly, however, while gingerly accepting the panel's assumption that all of the content censored by China is harmful to 'public morals', a few pages earlier the Appellate Body itself had lambasted the same panel for relying on 'an assumption *arguendo*' when the panel had simply 'assumed', without making a legal finding on the matter, that *GATT* art XX(a) was available as a legal defence to justify a *Protocol* violation in the first place.⁹³ For the Appellate Body, such an assumption 'may not always provide a solid foundation upon which to rest legal conclusions' and would 'detract from a clear enunciation of the relevant WTO law and create difficulties for implementation'.⁹⁴ Indeed, now that the Appellate Body has found that China's trading rights restrictions are not necessary to protect 'public morals' because, as explained below, there are less trade-restrictive alternatives (for example, the government rather than importers could do the censorship), what if China now implements such alternatives but still restricts trading rights? Given that the Appellate Body merely 'assumed' that 'public morals' are at issue, nothing guarantees China that such less

⁹⁰ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [7.763].

⁹¹ (*Islamic Republic of Iran v United States of America*) (*Judgment*) [2003] ICJ Rep 161.

⁹² *Ibid.* Similarly, the 'necessity' defence under customary international law pursuant to art 25.2(a) of the International Law Commission's ('ILC') *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in ILC, *Report of the International Law Commission on the Work of Its 53rd Session*, UN Doc A/56/10 (2001) 'may not be invoked by a State as a ground for precluding wrongfulness if ... the international obligation in question excludes the possibility of invoking necessity'. The ILC's commentary on art 25 (at para 19) provides the following examples:

[C]ertain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

This is not to say that freedom of speech is an absolute right without exceptions, only to point out that 'public morals' justifications can and ought to be circumscribed with reference to core principles of free speech.

⁹³ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [213].

⁹⁴ *Ibid.*

trade-restrictive alternatives would actually comply with art XX(a). This is so because we do not even know for sure that all of China's censorship actually protects 'public morals': both the panel and the Appellate Body merely 'assumed' that it does, without making a legal finding in this respect.

The fact that China contested the panel's first assumption (of art XX(a) being available as a defence) and the US did not contest the second assumption (of China's censorship protecting 'public morals') would not seem to justify the Appellate Body's differential treatment. As the Appellate Body itself stated:

[P]anels and the Appellate Body are not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters.⁹⁵

Something of a double standard was, therefore, at play, even if no doubt one can understand that panels and the Appellate Body want to avoid further conflict and do all they can not to have to rule on what is inside and outside a WTO member's public morals. Ultimately, however, like the panel, the Appellate Body rejected China's 'public morals' defence, but merely did so on the ground that China's 'public morals' objective could be pursued by 'less trade restrictive alternatives'.⁹⁶ One such alternative was 'having the Chinese government assume sole responsibility for conducting content review'⁹⁷ and thereafter extending trading rights to all commercial entities, including foreign-invested companies based in China. Let us consider what the Appellate Body is really saying here. It is, in essence, calling on China to nationalise its until now decentralised censorship regime. Rather than have a select group of state enterprises do both the content review and the importing, the suggestion is to have the Chinese government itself do all the censorship and then give the right to import to all companies, including foreign-invested companies within China.

Would that open Chinese markets? Not really, at least not for material that is censored (material that does pass China's censorship could, however, be imported and distributed more effectively now that private companies can also engage in importation and distribution). If the censorship continues as before — and, as China itself pointed out, may be significantly complicated and delayed when 'nationalised' as suggested by the Appellate Body — how is it that the US content industry will gain better access to China?⁹⁸ Obtaining the right to

⁹⁵ Ibid.

⁹⁶ Ibid [332].

⁹⁷ Ibid [335].

⁹⁸ Panel Report, *China — Audiovisuals*, WTO Doc WT/DS363/R, [7.889]:

China stated that requiring the government to be solely responsible for conducting the content review may adversely affect the efficiency of the content review and trade flows. China points in this respect to the large quantities of reading materials imported into China, the time constraints for newspapers and periodicals and the numerous customs entry points through which reading materials are being imported.

trade or act as an importer does not mean anything if the goods and services you want to import remain blocked by the government. To thus de-link the question of censorship (*what can come in*) from the question of who can bring in approved material (*who can import*) may solve the technical–legal question of whether there are restrictions on trading rights (*who can import*). It does not open the Chinese market (*what can come in*). It may even make market access harder (more centralisation, more red tape and delays). The panel may be right that the alternative of nationalisation represents ‘no restriction of the right to import’,⁹⁹ but it surely maintains, if not increases, the restrictions on *what* can be imported and *when*. What may change with US companies getting the right to import and distribute US films is that those companies may make more money and collect rents linked to prevailing import and domestic screening quotas. In other words, although this particular aspect of *China — Audiovisuals* may be a legal win for the US Government, it is not a win for freedom of speech. It may facilitate importation and distribution of material that passes Chinese censorship, but leaves China’s substantive content review intact and may even make it worse.

B *Now that GATT Exceptions Can Justify Protocol Violations, Can They Justify Breach under All WTO Agreements?*

Important issues are raised by the finding of the Appellate Body that a *GATT* exception can, in principle, justify a violation of China’s *Accession Protocol*. *GATT* art XX is entitled ‘General Exceptions’ and states that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement’ of certain measures, including those ‘necessary to protect public morals’. Paragraph 5.1 of China’s *Accession Protocol*, in turn, explicitly states that the right to trade that China committed to is ‘[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’. For *GATT* art XX to justify a Protocol breach raises two hurdles. First, given that art XX explicitly refers back to ‘nothing in this Agreement’ (that is, the *GATT*) how can art XX justify breaches outside the *GATT*? Second, and related, given that the Appellate Body had not made any prior finding of violation under the *GATT* (say, a ‘national treatment’ violation under *GATT* art III) how could China even rely on, or the panel turn to, *GATT* art XX exceptions?

The Appellate Body skilfully jumped over both hurdles. It found that China’s obligation to grant the ‘right to trade’ under the *Accession Protocol* may not impair China’s ‘right to regulate trade’ in the sense of both: (i) measures that other WTO agreements ‘affirmatively recognise’, provided they ‘satisfy prescribed disciplines and meet specified conditions’ (think of WTO-consistent import licensing, *TBT* or *SPS Agreement* measures); and (ii) regulatory action that derogates from WTO obligations but ‘may be justified under an applicable exception’.¹⁰⁰ For the Appellate Body, the fact that the US had not made a claim of violation under the *GATT* to begin with (it only claimed a violation of the

⁹⁹ Ibid [7.887].

¹⁰⁰ Appellate Body Report, *China — Audiovisuals*, WTO Doc WT/DS363/AB/R, [223].

Accession Protocol) should not ‘deny China access to a defence’.¹⁰¹ What matters, according to the Appellate Body, is the existence of a ‘clearly discernable, objective link’ or relationship between: (i) the restriction on *who* may trade (breach of the right to trade); and (ii) China’s regulation of *what* may be traded (China’s right to regulate trade).¹⁰² Since the regulation of trade or *what* can be traded (here, content review) may restrict *who* may import or trade (here, only selected state enterprises), China’s breach of the right to trade under the *Accession Protocol* could, in this dispute, be justified by China’s right to regulate trade pursuant to *GATT* art XX(a).

This approach raises a fundamental question of WTO law. Must the right to regulate trade as a possible defence be explicitly provided for in the violated provision that needs justification? Put differently, would China have been able to rely on *GATT* art XX(a) even if para 5.1 of China’s *Accession Protocol* had not stated that the right to trade is ‘[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’? The Appellate Body’s close textual analysis of this phrase and its context in China’s *Accession Protocol* may lead some to conclude that without this savings clause, *GATT* art XX(a) would not have been available. On the other hand, one could argue that adding this savings clause was not strictly necessary in the first place and that all WTO obligations must be interpreted in the context of a WTO Member’s background or default ‘right to regulate trade consistent with the WTO Agreement’. In this direction, the Appellate Body saw ‘the “right to regulate”, in the abstract, as an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the *WTO Agreement*’.¹⁰³ On this view, even without the savings clause in the *Accession Protocol*, China could have relied on its ‘inherent power’ to regulate trade and, as a result, have justified its breach with reference to *GATT* art XX(a). If so, what matters is not an explicit savings clause or reference back to *GATT* art XX, nor the fact that the text of art XX itself is limited to ‘this Agreement’ (that is, the *GATT*), but that the trade restriction or WTO violation in question may, as a *regulatory* or *factual* matter, result from, and be justified by, a *GATT* art XX type regulation to protect ‘public morals’, health or the environment. This relates to what the Appellate Body referred to as the ‘clearly discernable, objective link’ between, on the one hand, the breach and, on the other hand, a legitimate regulation of trade (consistent with specific WTO rules or exceptions).¹⁰⁴

That this question is of the utmost importance for WTO law is illustrated by the following examples. Can an environmental subsidy inconsistent with the *SCM Agreement* (be it as a prohibited or actionable subsidy) on this ground be justified under *GATT* art XX(g) as a measure ‘relating to the conservation of

¹⁰¹ Ibid [229].

¹⁰² Ibid [230]. The Appellate Body added that the link must be ‘established through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated’.

¹⁰³ Ibid [222].

¹⁰⁴ Ibid [230].

exhaustible natural resources’? Similarly, can a health or safety restriction inconsistent with the *SPS* or *TBT Agreements* on this ground be excused as a ‘public morals’ measure in line with *GATT* art XX(a)?¹⁰⁵ Can an anti-dumping duty inconsistent with the *Anti-Dumping Agreement* be justified under *GATT* art XX(d) as a measure ‘necessary to ensure compliance with laws or regulations which are not inconsistent with’ the *GATT*?¹⁰⁶ Can a safeguard that carves out regional partners in violation of the *Safeguards Agreement* be justified under *GATT* art XXIV allowing for preferential agreements?¹⁰⁷ Finally, can a measure in violation of the *TRIPS Agreement* be excused as the exercise of the right to regulate so as to protect health in line with *GATT* art XX(b)?

The reasoning in *China — Audiovisuals* may support such a general, fallback right to regulate. Although these other WTO agreements do not include a general ‘without prejudice clause’ as set out in China’s *Accession Protocol*, there is a clear, legal relationship between these other agreements and *GATT* provisions (for example, between *GATT* arts VI and XVI and the *SCM* and *Anti-Dumping Agreements*; *GATT* art XIX and the *Safeguards Agreement*; *GATT* arts XX(b) and (g) and the *SPS* and *TBT Agreements*; and *GATT* art XX(d) and the *TRIPS Agreement*). Moreover, as a *regulatory* or *factual* matter, there may also be a ‘discernable, objective link’ between the trade restriction or breach and the exception invoked, in that the breach sufficiently relates to, or results from, a legitimate exercise of the right to regulate consistent with other WTO rules or exceptions (the way Chinese censorship on *what* can be traded may impose restrictions on *who* can trade).

Such an approach would certainly harness the regulatory autonomy of WTO members. At the same time, it risks a considerable reduction of WTO obligations. It would also create tension with the Appellate Body’s approach of

¹⁰⁵ See Panel Report, *EC — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Docs WT/DS291/R, WT/DS292/R, WT/DS/293/R (29 September 2006). The panel found that a single measure can be considered and justified under different agreements so that even if it violates the *SPS Agreement* as a health measure, it can still be justified under *GATT* art XX(a) as a public morals measure.

¹⁰⁶ In Appellate Body Report, *United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WTO Doc WT/DS345/AB/R, AB-2008-4 (16 July 2008) [310], the Appellate Body ‘assumed *arguendo*’, without deciding the matter, that a measure in violation of the *AD Agreement* can be justified under *GATT* art XX(d).

¹⁰⁷ Although the Appellate Body has condemned members for having investigated all imports and then applying a safeguard only on imports from outside, for example, the *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1983) or the South American *Mercado Comun del Sur*, it has so far not decided the question of whether investigating and applying a safeguard only against third countries, in violation of the *Safeguards Agreement* art 2, could be justified under *GATT* art XXIV: see, eg, Appellate Body Report, *US — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Doc WT/DS202/AB/R, AB-2001-9 (15 February 2002) [198]–[199].

Note, on a related point, that the Appellate Body has found that the ‘unforeseen development’ condition in *GATT* art XIX:1(a), though not incorporated into the *Safeguards Agreement*, continues to apply for safeguard measures to be WTO consistent: see Appellate Body Report on *Argentina — Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, AB-1997-7 (14 December 1999) [83]: ‘Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures’.

applying WTO agreements and obligations cumulatively,¹⁰⁸ as well as with the principle that, in the event of conflict, the *GATT* (including *GATT* art XX) must give way to more specialised WTO agreements on trade in goods such as obligations in the *SCM*, *AD*, *SPS* or *TBT Agreements*.¹⁰⁹ Finally, allowing *GATT* art XX to be invoked to justify any WTO violation could well mean that any WTO dispute will ultimately be decided on whether the measure is ‘necessary’ to pursue an art XX objective and non-discriminatory under the chapeau of art XX. This would confer considerable power and discretion on the Appellate Body in its ‘weighing and balancing exercise’¹¹⁰ under art XX, as well as highlight the limited list of objectives that can be pursued under art XX. The latter, in turn, may lead to the claim that a WTO member’s sovereign fallback ‘right to regulate’ extends beyond the exhaustive list of objectives mentioned in *GATT* art XX, a provision written in 1947 essentially with quantitative border restrictions in mind.

V CONCLUSION

No head-on collision occurred in *China — Audiovisuals* between, on the one hand, free trade in cultural goods and services and, on the other hand, China’s

¹⁰⁸ See, eg, Appellate Body Report, *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) (*‘EC — Asbestos’*) [80] where it states that:

[A]lthough the *TBT Agreement* is intended to ‘further the objectives of GATT 1994’, it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994* (emphasis added).

But see Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, WTO Doc WT/DS22/AB/R, AB-1996-4 (21 February 1997) [14] where it states that:

The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. *This does not mean, however, that the other goods agreements in Annex 1A, such as the SCM Agreement, supersede the GATT 1994* (emphasis added).

¹⁰⁹ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*‘General Interpretative Note to Annex 1A’*): ‘In the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A to the [WTO] Agreement ... the provision of the other agreement shall prevail to the extent of the conflict.’ The question remains, of course, when there is such a ‘conflict’ and when exactly this *lex specialis* rule is triggered.

¹¹⁰ See, eg, Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Docs WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000) [161]–[166]. See also Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [172].

copyright regime. All parties involved went to great pains to avoid such a clash: China, by only invoking the *GATT* ‘public morals’ exception for *Accession Protocol* violations (not for *GATT* or *GATS* violations); the US, by not contesting that all of the content prohibited by China harms ‘public morals’; and, finally, the panel and Appellate Body by simply assuming that Chinese censorship does, indeed, promote ‘public morals’, without making a definitive finding on the matter.

The Appellate Body did, however, clarify crucial questions of how to distinguish between goods and services when it comes to today’s ‘culture’ or copyright-related industry. For the application of WTO rules on trade in ‘goods’, the Appellate Body focused on whether Chinese restrictions have an *effect* or *impact* on a material or physical product, even if this tangible product was only a minor element in the economic value of the transaction (for example, a physical film reel when it comes to films). This implies a technological bias requiring a physical product before WTO rules on trade in ‘goods’ can be applied (not, for example, when a film is transferred over the internet). When it comes to services, in contrast, the Appellate Body approached the *GATS* in a technologically neutral fashion, covering under ‘distribution services’ both the physical transfer of CDs and distribution of music over the internet. It remains to be seen whether tangibility or material nature is a *sufficient* condition for something to be a ‘good’ (the ECJ in *Schindler*¹¹¹ found the contrary in respect of, for example, lottery tickets, fishing permits and paper money) and whether it is, conversely, a *necessary* condition (can intangible assets, such as IP, electricity or films over the internet never be ‘goods’?).

In addition, the Appellate Body found that, even assuming that China’s censorship regime promotes ‘public morals’, China’s approach of limiting the right to import cultural goods to certain state-owned enterprises is not ‘necessary’ to protect ‘public morals’ since less trade-restrictive alternatives are available, for example, by letting the Chinese government itself do the censorship and then granting the right to import approved goods to all companies, including US companies established in China. This may facilitate importation and distribution of material that passes China’s censorship. It does not restrict such censorship. Whether such opening-up of who can import without touching on what can be imported will effectively enhance US market access into China remains to be seen. Reminiscent of the panel ruling in *China — IP Rights* finding that China should also protect the copyright of censored material implying that such copyright might be a form of ‘private censorship’ buttressing China’s ‘public censorship’, the Appellate Body’s call in *China — Audiovisuals* for China to ‘nationalise’ its censorship regime may even make things worse.

This ought, however, not to dishearten those who believe that the WTO can play a role in opening up China’s society. With the right litigation strategies, translating restrictions on freedom of speech, opinions or ideas into restrictions on the free movement of goods or services, including openly contesting that some content censored by China has little, if anything, to do with ‘public morals’, the WTO can contribute in this respect. As always, the hopes and fears

¹¹¹ (C-275/92) [1994] ECR I-1039.

often associated with the WTO may not be exaggerated. Yet, to the extent that prying open markets can pry open minds, here is an area where free trade and free speech can be mutually reinforcing.

Finally, in an important systemic move, the Appellate Body confirmed a general 'right to regulate' (for example, pursuant to *GATT* art XX) and found that the right to regulate *what* can be traded can, in principle, excuse violations or restrictions on *who* can trade or import. The exact scope of this 'right to regulate' and whether it must be explicitly referred to in the text of WTO obligations remains unclear. It is sure to animate many WTO disputes ahead.

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