

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set forth in this Report, the Panel concludes as follows:

1. China's terms of reference objections

- (a) Measures China alleges are outside the Panel's terms of reference
 - (i) The *Film Distribution and Exhibition Rule* is outside the Panel's terms of reference with respect to the US claim that it is inconsistent with China's trading rights commitments in its Accession Protocol, because China did not receive adequate notice that it was a specific measure at issue, with respect to this claim, as required by Article 6.2 of the DSU.
 - (ii) The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are outside the Panel's terms of reference with respect to the US claim that China's measures are inconsistent with Article III:4 of the GATT 1994 because the panel request did not adequately notify China that these were specific measures at issue, with respect to this claim, as required by Article 6.2 of the DSU.
- (b) Certain requirements China alleges are outside the Panel's terms of reference
 - (i) The so-called "pre-establishment legal compliance" requirement, the approval process to engage in distribution of reading materials and audiovisual products and the "decision making criteria" that the MOC would apply in the approval of Chinese-foreign contractual joint ventures for the distribution of reading materials and audiovisual products are not within the Panel's terms of reference. When read as a whole, including the listing of the specific requirements that are the subject of its complaint, the US panel request did not notify China that these requirements were "specific measures at issue" within the meaning of Article 6.2 of the DSU.
- (c) The US claim with respect to reading materials under Article III:4 of the GATT 1994
 - (i) The US claim that China's measures on reading materials are inconsistent with Article III:4 of the GATT 1994 is within the Panel's terms of reference, despite the lack of consultations.
 - (ii) The United States, through its description of its claim in the panel request, excluded electronic publications from its claim under Article III:4 of the GATT 1994. Therefore, the Panel's findings as to whether China's measures are inconsistent with Article III:4 of the GATT 1994 will relate only to whether books, newspapers, and periodicals are treated no less favourably than like domestic products.
 - (iii) The requirements set forth in Articles 3 and 4 of the *Imported Publications Subscription Rule*, that newspapers and periodicals, as well as books in the limited category may only be sold through subscription, are within the Panel's terms of reference as they are adequately identified in the US panel request.
 - (iv) The requirements on purchasers of imported newspapers and periodicals, as well as books in the limited category, embodied in Articles 5 through 8 of the

Imported Publications Subscription Rule, are not within the Panel's terms of reference as they were not adequately identified as specific measures at issue within the meaning of Article 6.2 of the DSU.

- (d) 'Measures' China argues the Panel should not examine
 - (i) The *Several Opinions* is attributable to China and establishes rules or norms intended to have general and prospective application. It is therefore a "measure" within the meaning of Article 3.3 of the DSU and is a proper subject of these dispute settlement proceedings.
 - (ii) The *Importation Procedure* and the *Sub-Distribution Procedure* are attributable to China, but they do not establish rules or norms intended to have general and prospective application. Therefore, they are not "measures" within the meaning of Article 3.3 of the DSU. As such, they are not a proper subject of these dispute settlement proceedings.

2. China's commitments on trading rights in its Accession Protocol

- (a) Measures relating to all the products
 - (i) Article X.2 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.
 - (ii) Article X.3 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.
 - (iii) The Panel has exercised judicial economy in respect of the US claims that Articles X.2 and X.3 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, are inconsistent with paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises.
 - (iv) In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Articles X.2 and X.3, of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with either paragraph 5.2 or 84(b).
 - (v) Article 4 of the *Several Opinions* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.
 - (vi) The Panel has exercised judicial economy in respect of the US claims that the *Several Opinions* is inconsistent with paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises.
 - (vii) In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Article 4 of the *Several*

Opinions results in China acting inconsistently with either paragraph 5.2 or 84(b). Consequently, no inconsistency with paragraph 1.2 has been established either.

(b) Reading materials

- (i) The United States has not established that Article 43 of the *Publications Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
- (ii) In respect of three requirements contained in Article 42 of the *Publications Regulation*, Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2, except for audiovisual products.
- (iii) In relation to five other requirements contained in Article 42 of the *Publications Regulation*, the United States has not established that Article 42 results in China acting inconsistently with paragraph 5.1, or paragraphs 83(d) or 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.
- (iv) The United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with paragraph 5.2 as well as paragraph 84(b) (discrimination) in respect of foreign individuals and foreign enterprises not registered in China. Consequently, no inconsistency with paragraph 1.2 has been established either.
- (v) To the extent that Article 42 of the *Publications Regulation* affects foreign-invested enterprises, the Panel has exercised judicial economy in respect of one US claim based on paragraph 5.2 or paragraph 84(b) (discrimination).
- (vi) In respect of an another US claim based on paragraph 5.2 or paragraph 84(b) (discrimination), the United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with the aforementioned paragraphs. Consequently, no inconsistency with paragraph 1.2 has been established either.
- (vii) The United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.
- (viii) Article 41 of the *Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
- (ix) The Panel did not rule on the US claims in respect of the *Importation Procedure*.
- (x) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.

- (xi) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 5.2 or paragraph 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xii) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xiii) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xiv) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xv) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with the second sentence of paragraph 84(b) (requirements for obtaining trading rights). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xvi) The United States has not established that Articles 52 to 55 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (xvii) The United States has not established that Articles 52 to 55 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.
- (c) Films for theatrical release
- (i) The United States has not established that Article 5 of the *Film Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
 - (ii) Article 30 of the *Film Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (iii) Article 30 of the *Film Regulation* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.
 - (iv) The United States has not established any inconsistency of the *Film Regulation* with paragraph 5.2.

- (v) The United States has not established that Article 3 of the *Film Enterprise Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
 - (vi) Article 16 of the *Film Enterprise Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (vii) Article 16 of the *Film Enterprise Rule* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.
 - (viii) The United States has not established any inconsistency of the *Film Enterprise Rule* with paragraph 5.2.
 - (ix) The Panel did not rule on the US claims in respect of the *Film Distribution and Exhibition Rule*.
- (d) Audiovisual products
- (i) Article 5 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (ii) Article 27 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (iii) The United States has not established that Article 28 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
 - (iv) The United States has not established any inconsistency of the *2001 Audiovisual Products Regulation* with paragraph 5.1, 83(d), 84(a) or 5.2. Consequently, no inconsistency with paragraph 1.2 has been established either.
 - (v) Article 7 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (vi) Article 8 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.
 - (vii) The United States has not established that Article 9 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
 - (viii) The United States has not established that Article 10 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.
 - (ix) The United States has not established any inconsistency of the *Audiovisual Products Importation Rule* with paragraph 5.1, 83(d), 84(a) or 5.2.

Consequently, no inconsistency with paragraph 1.2 has been established either.

- (x) Article 21 of the *Audiovisual (Sub-) Distribution Rule* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence paragraph 1.2.
- (xi) The United States has not established any inconsistency of the *Audiovisual (Sub-) Distribution Rule* with paragraph 5.2 or 84(b). Consequently, no inconsistency with paragraph 1.2 has been established either.

8.2 The Panel's findings of inconsistency in respect of the *Catalogue of Prohibited Foreign Investment Industries*, the *Foreign Investment Regulation*, the *Several Opinions*, the *Publications Regulation*, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, insofar as the latter two measures concern finished audiovisual products, and the *Audiovisual (Sub-) Distribution Rule* are subject to the Panel's findings on China's Article XX(a) defence. The Panel's findings with respect to China's defence are detailed below.

- (a) China's Article XX(a) defence with respect to the measures identified in paragraph 8.2 and concerning reading materials (including electronic publications) and finished audiovisual products
 - (i) China has not demonstrated that any of the relevant measures are "necessary" to protect public morals, within the meaning of Article XX(a). As a result, China has not established that these measures are justified under Article XX(a).
 - (ii) Because China has in any event not established that the measures at issue satisfy the requirements of Article XX(a), the Panel did not determine whether Article XX(a) is available as a direct defence for breaches of China's trading rights commitments as set out in the Accession Protocol.

3. China's national treatment and market access commitments under the GATS

- (a) Distribution of reading materials
 - (i) Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation* are together inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the wholesale of imported reading materials subject to subscription.
 - (ii) Article 2 of the *Publications (Sub-)Distribution Rule*, in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the wholesale of imported reading materials subject to sales through the market.
 - (iii) Where master distribution involves wholesale or retail services, Article X:2 of the *Catalogue of Prohibited Foreign Investment Industries* of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article 4 of the *Several Opinions* is also inconsistent with Article XVII.

- (iv) Article 62 of the *1997 Electronic Publications Regulation* is inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the master wholesale or wholesale of electronic publications.
 - (v) To the extent that it is applied to the wholesale of electronic publications, the *Publications (Sub-)Distribution Rule*, together with the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS.
 - (vi) The Panel did not find that the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS in respect of the master wholesale of electronic publications, as the United States has not established that this measure prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale of any electronic publications as claimed.
 - (vii) The requirements concerning registered capital and operating term for foreign-invested wholesalers, including service suppliers of other Members, respectively contained in paragraphs 4 and 5 of Article 7 of the *Publications Sub-Distribution Rule* are inconsistent with China's national treatment commitments under Article XVII of the GATS.
- (b) Electronic Distribution of Sound Recordings
- (i) The *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), each is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article X:7 of the Catalogue of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with Article XVII of the GATS.
 - (ii) The Panel did not find that the *Internet Culture Rule* is inconsistent with Article XVII of the GATS, as the United States has not established that this measure, as implemented, imposes the alleged prohibition on the electronic distribution of sound recordings by service suppliers of other Members.
- (c) Distribution of AVHE products
- (i) Article 8.4. of the *Audiovisual (Sub-)Distribution Rule* is inconsistent with China's market access commitments under Article XVI of the GATS as it contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, which falls within the scope of Article XVI:2(f). For the same reasons, Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, is inconsistent with China's market access commitments under Article XVI.
 - (ii) The Panel did not find that Article 1 of the *Several Opinions* is inconsistent with Article XVI of the GATS, as the United States has not established that this measure imposes a limitation that falls within the scope of Article XVI:2(f), as claimed by the United States.

- (iii) Article 1 of the *Several Opinions* and the operating term requirement provided for by Article 8.5 of the *Audiovisual (Sub-)Distribution Rule* each is inconsistent with China's national treatment commitments under Article XVII of the GATS.
- (iv) The Panel has exercised judicial economy with respect to the US claim under Article XVII of the GATS regarding Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*, and Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment of the *Catalogue* in conjunction with the *Foreign Investment Regulation*, because the Panel found the same measures to be inconsistent with Article XVI of the GATS.

4. China's national treatment obligations under Article III:4 of the GATT 1994

- (a) Reading materials
 - (i) Articles 3 and 4 of the *Imported Publications Subscription Rule*, as they are applied to newspapers and periodicals, are inconsistent with China's obligations under Article III:4 of the GATT 1994.
 - (ii) The United States has not established that Articles 3 and 4 of the *Imported Publications Subscription Rule*, as they are applied to books in the limited category, are inconsistent with China's obligations under Article III:4 of the GATT 1994.
 - (iii) Article 2 of the *Publications (Sub-)Distribution Rule*, read in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's obligations under Article III:4 of the GATT 1994.
- (b) Sound recordings intended for electronic distribution
 - (i) The United States has not established that Article 16 of the *Internet Culture Rule* is inconsistent with China's obligations under Article III:4 of the GATT 1994.
 - (ii) The United States has not established that Article 9 and Appendix 2 of the *Network Music Opinions* are inconsistent with Article III:4 of the GATT 1994.
- (c) Films for theatrical release
 - (i) The United States has not established that the alleged discriminatory "duopoly" for film distribution within China is a measure taken by another Member which could be subject to challenge under the Dispute Settlement Understanding. Therefore, the United States has not established that the *Film Regulation*, *Film Distribution and Exhibition Rule*, and *Film Enterprise Rule*, taken together, are inconsistent with Article III:4 of the GATT 1994.

5. China's national treatment commitments under paragraphs 5.1 and 1.2 of the Accession Protocol

(a) Reading materials

- (i) The Panel exercised judicial economy in respect of, the United States' claims that the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule* are inconsistent with China's obligations under Paragraphs 5.1 and 1.2 of its Accession Protocol.

(b) Sound recordings intended for electronic distribution and films for theatrical release

- (i) The Panel found that the US has not established the necessary pre-requisite for an inconsistency with paragraphs 5.1 and 1.2 with respect to the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the *Internet Culture Rule*, the *Network Music Opinions*, the *Film Regulation*, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule*.

6. Nullification and impairment

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that China has acted inconsistently with certain provisions of its Accession Protocol, the GATS, and the GATT 1994, it has nullified or impaired benefits accruing to the United States under those agreements.

7. Recommendations

8.4 Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with provisions of its Accession Protocol, the GATS, and the GATT 1994 set out above, we recommend that the Dispute Settlement Body request China to bring the relevant measures into conformity with its obligations under those agreements.
