CHINA –MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS

(WT/DS363)

ANSWERS OF THE UNITED STATES OF AMERICA
TO THE SECOND SET OF QUESTIONS BY THE PANEL TO THE PARTIES

October 9, 2008

TABLE OF REPORTS

Short Form	Full Citation
Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
India – Patent Protection (US) (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Korea – Dairy Safeguard (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
Mexico – HFCS (Article 21.5) (AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Soft Drinks (Panel)	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by the Appellate Body Report, WT/DS308/AB/R
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005
US – German Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002

US – Oil Country Tubular Goods Sunset Review (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R

PRELIMINARY ISSUES

Questions to the United States

142. With respect to the Several Opinions, the Importation Procedure and the Sub-Distribution Procedure, please explain how these documents fit within the criteria for constituting a measure within the meaning of Article 3.3 of DSU. In your answer, please address the Appellate Body report in *US – Corrosion Resistant Steel Sunset Review*, paras. 81-82 and the Appellate Body report in *US – Oil Country Tubular Goods Sunset Review*, para. 187.

1. The Several Opinions, the Importation Procedure and the Sub-Distribution Procedure are "measures" within the meaning of Article 3.3 of the DSU.[1] On their face, these measures establish norms for both public and private sector entities, and impose legally binding requirements. Moreover, the United States has introduced evidence demonstrating that they are the types of binding legal instruments that are widely used and fully recognized in the Chinese legal regime.[2] China has not challenged the fact that these measures are identified in the U.S. panel request and are included in the Panel's terms of reference.

2. The Several Opinions were issued jointly by the five national-level agencies responsible for the products at issue and were approved by the highest organ of the executive branch – the State Council. The Several Opinions are a "other regulatory document", which is a type of legal instrument that the Supreme People's Court of China has confirmed is binding on the agencies that issue them.[3] In their preamble, the Several Opinions require these national-level agencies and their regional counterparts to "implement them earnestly". The substance of the measure imposes obligations and prohibitions on private sector actors that must be adhered to under penalty of law.[4] Moreover, Article 13 of this measures requires – through the use of the term "shall" – three Chinese agencies to issue additional measures to further implement the Several Opinions within their particular jurisdictional competence.

3. In response, China erroneously contends that the Several Opinions are "internal guidelines", relying exclusively on the Law on Legislation to support its position, even though

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[1] U.S. First Oral Statement, paras. 91-94; U.S. Answers to the First Set of Panel Questions, paras. 12-17; U.S. Second Written Submission, paras. 217-221; and U.S. Second Oral Statement, para. 84.

[2] U.S. Answers to the First Set of Panel Questions, paras. 12-17.

[3] *Minute of Meeting on Issues Related to the Application of Legal Norms in the Hearings of Administrative Cases*, Supreme People's Court, 2004, p. 2-3 (Exhibit US-62). *See* U.S. Answers to the First Set of Panel Questions, paras. 12-14.

[4] Several Opinions, Article 11 (providing that "licences shall be issued only after strict examination" and that "[i]n regard to a foreign-invested enterprise whose license has been revoked, the administrative department for industry and commerce shall order it to carry out cancellation or alteration of its registration". In addition, if foreign-invested enterprises have "violated regulations, they shall be given administrative punishment in accordance with the law . . . .") (Exhibit US-6).

this Law does not address the legal status of "other regulatory documents".[5] China is silent, however, regarding the evidence supplied by the United States – *i.e.* from the Supreme People's Court and the Administrative Licensing Law – that does demonstrate the legal force of "other regulatory documents".[6]

4. Regarding the "please implement them earnestly" language in the notice issued by the five agencies in conjunction with the Several Opinions, China asserts without explanation that this preambular phrase applies only to the Article 13 requirement that the agencies issue implementing measures. Nothing in the notice limits this obligation to Article 13. Furthermore, even if China's assertion were correct, a requirement to issue implementing measures is nonetheless binding, confirming that these measures are more than mere internal guidelines that the agencies are free to ignore.

5. The Importation Procedure and the Sub-Distribution Procedure are also measures within the meaning of Article 3.3 of the DSU. They bind the General Administration of Press and Publication (GAPP) and were issued pursuant to its administrative law obligations under the Administrative Licensing Law.[7] These measures implement the provisions of the Management Regulation and the Foreign-Invested Sub-Distribution Rule, respectively. For example, the Management Regulation is a broad measure addressing the publishing, printing, reproduction, import and distribution of reading materials.[8] The Importation Procedure elaborates on a specific aspect of the Management Regulation – *i.e.*, the requirements on GAPP and importers concerning licensing procedures for the importation of reading materials. Similarly, the Foreign-Invested Sub-Distribution Rule is a general measure, a sub-set of which is implemented by the Sub-Distribution Procedure.

6. China argues that the Importation Procedure and the Sub-Distribution Procedure are not measures on the basis that they only summarize the legal requirements of other measures and have no binding effect.[9] However, China has provided no support for its assertions and no response to U.S. arguments regarding the additional requirements imposed by, and the binding nature of, these legal instruments. The fact that these specific measures share some similar provisions with the more general measures they implement is certainly not atypical for Chinese measures and does not deprive these instruments of their status as measures subject to challenge. The obligations contained in these two measures are binding on GAPP and on applicants seeking to import reading materials into China.

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[5] China's First Written Submission, fns. 49 and 147; and China's Answers to the First Set of Panel Questions, Question 37.

[6] U.S. Answers to the First Set of Panel Questions, paras. 12-14.

[7] U.S. Answers to the First Set of Panel Questions, paras. 12-17.

[8] Management Regulation, Article 2 (Exhibit US-7).

[9] China's First Written Submission, fns. 49 and 125; and China's Answers to the First Set of Panel Questions, Questions 38 and 39.

7. The Appellate Body reports in *US – Corrosion Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Review* support the view that the Several Opinions, the Importation Procedure and the Sub-Distribution Procedure are measures. In those reports, the Appellate Body indicated that "acts [or instruments] setting forth rules or norms that are intended to have general and prospective application" could be measures subject to WTO dispute settlement.[10] The United States has previously expressed some reservations regarding this analysis, particularly with respect to the breadth of the Appellate Body's discussion and the importance of tailoring statements of this nature to the facts and claims at issue in a particular dispute,[11] and the United States has noted that the Appellate Body was not attempting to provide a comprehensive definition of the term "measure". Despite the U.S. concerns, and to the extent the Appellate Body's approach is useful, the three documents fall squarely within the scope of the term "measure" as described by the Appellate Body within the context of those disputes.

8. All of these measures are acts or instruments setting forth rules or norms that are intended to have general and prospective application. First, they constitute acts or instruments since they were issued by government agencies as formal written documents that are made available to the public. Second, they set forth rules or norms, since they require their issuing agencies to act in a certain way and create expectations among public and private actors. Third, they are intended to be generally applicable; they govern *inter alia*: (1) the publication, production, distribution, and importation of the products at issue by all foreign-invested enterprises (Several Opinions); (2) the licensing procedures for all importers of reading materials (Importation Procedure); and (3) the licensing procedures for all foreign-invested sub-distributors of books, newspapers and periodicals (Sub-Distribution Procedure). Finally, these measures are intended to have prospective application; they apply after their issuance to the products and activities covered therein. On previous occasions, China has expressed views regarding what constitutes a measure that is consistent with the approach outlined above.[12]

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[10] *US – Corrosion Resistant Steel Sunset Review*, paras. 81-82; and *US – Oil Country Tubular Goods Sunset Review*, para. 187.

[11] *See* U.S. Statement regarding the adoption of the Panel and Appellate Body reports in *US – Corrosion Resistant Steel Sunset Review* at the meeting of the Dispute Settlement Body held on 9 January 2004, WT/DSB/M/162, para. 21 (stating in pertinent part "[t]he United States also wished to comment on the Appellate Body's discussion of what might constitute a measure. While there was much in this analysis with which the United States agreed, it considered that the discussion had gone beyond the task with which the Appellate Body was presented. WTO dispute settlement, like other forms of dispute resolution, operated most effectively when it concerned itself with the particular dispute before it. Broad statements made out of the context of the facts and claims in that dispute should be avoided, in particular because such statements might turn out to be inapplicable or inappropriate in the context of other disputes. Further, in specific respects, broad conclusions of the Appellate Body in this Report were not supported by the materials it cited.") Moreover, it is easy to identify examples that fit within the terms used by the Appellate Body, but that would clearly not be "measures". Indeed, "measure" is not a defined term under the DSU, and it would be an error to read the Appellate Body reports as attempting to provide an authoritative interpretation of that term.

[12] *US – Zeroing (EC) (Panel)*, para. 5.17 (stating, "China contends that whether a measure can be

(continued...)

9. Finally, it is noteworthy that China has failed in its two most recent submissions to the Panel, subsequent to the evidence provided by the United States demonstrating the status of these measures,[13] to offer any grounds for rejecting the inclusion of these three measures in the Panel's terms of reference.[14] This is consistent with the fact that China never demonstrated a basis for its earlier objections. Instead, China simply observes that "it is not necessary to rule on" these measures.[15] The United States disagrees fundamentally and respectfully requests the Panel to make findings with respect to these measures.

143. Please respond to China's argument in para. 13 of its second written submission that, with respect to the "discriminatory requirements" and "different distribution opportunities", the US Panel Request was not "sufficient to present the problem clearly" as required by Article 6.2 DSU.

10. China's argument in paragraph 13 of its second written submission is fundamentally flawed because it is based on a misreading of the requirements of Article 6.2 of the DSU. Article 6.2 provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

As confirmed by the Appellate Body, Article 6.2 contains four requirements for panel requests: (1) that they be in writing; (2) that they indicate whether consultations were held; (3) that they identify the specific measures at issue; and (4) that they provide a brief summary of the legal basis of the complaint *sufficient to present the problem clearly*.[16] The third and fourth

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[12](...continued)
challenged for the purpose of WTO dispute settlement is governed by the substance of the measure at issue, not its form. According to China, any kind of measures taken by a Member, no matter whether legislative or executive, may be the subject of dispute settlement under the DSU or other applicable covered agreements, as long as another Member considers that benefits accruing to it under the covered agreements are being impaired by such 'measures'"). *See also US – Zeroing (Japan) (Panel)*, para. 5.18.

[13] U.S. Answers to the First Set of Panel Questions, paras. 12-17.

[14] China's Second Written Submission, paras. 8-26; and China's Second Oral Statement, paras. 12-20.

[15] China's Answers to the First Set of Panel Questions, Question 39.

[16] *See Korea – Dairy Safeguard (AB)*, para. 120; *US – German Steel (AB)*, para. 125; and *Guatemala – Cement I (AB)*, para. 69.

requirements address respectively the measures and the claims[17] at issue, which together form the matter before a panel.[18]

11. Paragraph 13 of China's second written submission and the Panel's question both address Article 6.2's fourth requirement concerning: (i) *claims*; (ii) in a *panel request*. In order to respond to China's argument and the Panel's question, it is necessary to clarify the nature of China's procedural objections with respect to, first, "discriminatory requirements" and, second, "different distribution opportunities".

12. First, China's objection regarding "discriminatory requirements" relates to the inclusion of certain *measures* – and not *claims* – in the Panel's terms of reference, and therefore implicates Article 6.2's third requirement rather than its fourth. In its first written submission, China requested a finding that the following three *measures* challenged by the United States are outside of the Panel's terms of reference: pre-establishment legal compliance; approval process; and decision-making criteria.[19] These three aspects of measures are some, but not all, of the aspects challenged by the United States under the heading of "discriminatory requirements". The United States has demonstrated that all of these measures are included in the U.S. panel request and are part of the Panel's terms of reference.[20] Given that China's objection regarding "discriminatory requirements" concerned measures rather than claims, China's argument that the U.S. panel request is not "sufficient to present the problem clearly" is inapposite. Article 6.2's fourth requirement regarding claims does not apply to its third requirement regarding measures. Moreover, the U.S. panel request expressly identifies and describes its claims under Article XVII of the GATS (regarding reading materials)[21] and under Articles XVI and XVII (regarding AVHE products)[22] with respect to the "discriminatory requirements" at issue.

13. Second, China misapplies the fourth requirement of Article 6.2 in objecting to the inclusion of the U.S. GATT Article III:4 claim regarding "different distribution opportunities" in the Panel's terms of reference. China's first written submission argues that this U.S. claim is not properly before the Panel because it was not included in the U.S. *consultation request*.[23] However, the fourth requirement of Article 6.2 concerns only whether the U.S. *panel request* provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In fact, the U.S. *panel request* explicitly identifies and describes the U.S. Article III:4

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[17] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 162 (explaining that the "legal basis of the complaint" found in Article 6.2 of the DSU refers to the claims made by the complaining party.).

[18] *US – German Steel (AB)*; para. 125.

[19] China's First Written Submission, paras. 237-250.

[20] U.S. First Oral Statement, paras. 95-97; and U.S. Second Oral Statement, paras. 77-80.

[21] U.S. Panel Request, Section II.A.

[22] U.S. Panel Request, Section II.B.

[23] China's First Written Submission, paras. 523-528.

claim regarding "different distribution opportunities" in sufficient detail to satisfy the fourth requirement of Article 6.2.[24] Furthermore, in its previous submissions and in its answer to Panel question 146 below, the United States has addressed China's arguments regarding the U.S. consultation request and has shown that the U.S. Article III:4 claim is properly before the Panel and that China's objections are without merit.[25]

144. With reference to paras. 194 and 195 of the US second written submission as well as the US response to Panel Question 126 and the Request for Establishment of a Panel, please respond to China's arguments in paras. 206-211 of its second written submission. In your response please address (a) China's contentions with respect to the Panel's terms of reference; and (b) whether the United States has abandoned its claim that the Chinese measures affect the distribution of sound recordings intended for electronic distribution.

14. First, China's contentions with respect to the Panel's terms of reference are wholly without merit.

15. Article 6.2 of the DSU requires a party requesting establishment of a panel to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consistent with this requirement, in the context of the U.S. claim under the GATT 1994 related to sound recordings intended for electronic distribution, the U.S. panel request identified all of the relevant measures and the relevant WTO obligation that these measures breached – *i.e.*, Article III:4.[26] Thus, the United States has satisfied the requirement in Article 6.2 of the DSU.

16. China contends that the United States is asserting a "new claim" by challenging the relevant measures' effects on the use *and* distribution of the imported product.[27] China is mistaken. The U.S. *claim* is that the relevant measures accord less favorable treatment to imported products in contravention of Article III:4. Whether the relevant measures affect the use or distribution of the imported product – or both – are *arguments* in support of the claim, not separate claims. Thus, the U.S. claim itself has not changed.

17. Second, the United States has not abandoned its argument that the Chinese measures affect the distribution of sound recordings intended for electronic distribution. As set forth in more detail in response to Question 250, the relevant measures affect the distribution of the imported hard-copy sound recording by imposing more disadvantageous distribution

[24] U.S. Panel Request, Section II.A, para. 5.

[25] U.S. First Oral Statement, paras. 98-100; U.S. Answers to the First Set of Panel Question, paras. 197-201; and U.S. Second Oral Statement, paras. 81-83.

[26] WT/DS363/5 (11 October 2007).

[27] China's Second Written Submission, para. 211.

opportunities on such imported products as compared to the domestic like products. To reiterate, whether a measure challenged under Article III:4 affects the internal sale, offering for sale, purchase, transportation, distribution or use of the imported product are different arguments in support of a claim under Article III:4, or put another way, they are different aspects of the same claim. Accordingly, by arguing that the relevant measure affects the use of the imported product, the United States is not changing its claim, but simply highlighting another argument in support of the claim.

145. *The US notes in paras. 69-72 of its second oral statement, that its Panel Request identified China's measures that provide for "discriminatory content review" which result in "distribution opportunities for sound recordings imported into China in physical form that are less favourable than the distribution opportunities for sound recordings produced in China". Since China argues in para. 19 of its second written submission, that "it is unreasonable to expect the responding party to establish which measures may have such alleged affect" would these references in the US Panel Request comply with the requirement in Article 6.2 to identify the measures challenged?

18. The Panel's question addresses one of the three U.S. rebuttals to China's objection to the inclusion of the Audiovisual Regulation and the Audiovisual Import Rule in the Panel's terms of reference, *i.e.*, the U.S. argument that these two measures are included in the U.S. panel request because they are covered by the panel request's narrative outlining the relevant measures and claim.[28]

19. Section IV of the U.S. panel request, which addresses our claims under the GATT 1994 regarding sound recordings intended for digital distribution, states in relevant part:

> China appears to require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review by the Chinese Government prior to such distribution in China. However, domestically produced sound recordings appear not to be subject to this requirement, but can instead be digitally distributed immediately.[29]

20. This narrative describes the *measure* at issue in concrete terms. Accordingly, it provides China with adequate notice that its content review regime for imported hard-copy sound recordings is a measure being challenged by the United States. This is what Article 6.2 requires. The Audiovisual Regulation and the Audiovisual Import Rule are two legal instruments that carry out China's content review regime for these products.

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[28] U.S. First Oral Statement, paras. 104-107; U.S. Answer to the First Set of Panel Questions, paras. 240-242; and U.S. Second Oral Statement, paras., 68-72.

[29] U.S. Panel Request, Section IV, para. 2.

21. The text quoted by the Panel in its question goes on to describe the U.S. *claim* under Article III:4 of the GATT 1994. While China may disagree with the U.S. claim that its content review regime accords these imported products less favourable treatment than that accorded to domestic products, the U.S. panel request identified the measure at issue and provided China with sufficient information regarding the measure at issue that the Audiovisual Regulation and the Audiovisual Import Rule carry out.

22. China's argument in paragraph 19 of its second written submission seems to suggest that the U.S. panel request's description of the *measure* at issue required China to figure out on its own how that measure was WTO-inconsistent. However, the U.S. description of the measure in the panel request was not framed in terms of the WTO-inconsistent effect of the measure, and therefore China did not have to form a view on whether or not it agreed with the text quoted in the Panel's question in order to understand the measure at issue.

146. In response to China's arguments about the lack of consultations on its Article III:4 GATT 1994 claim with respect to reading materials the United States relies on the reasoning of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* (in particular, para. 138). Please answer the following questions with respect to the Appellate Body report in that case:

(a) What is the purpose behind the Appellate Body's reasoning that there does not need to be exact identity between the legal basis cited in a Consultations Request and in a Panel Request (e.g. to avoid having multiple Consultations Requests, to allow the complaining party to expand its complaint, to ensure that consultations provide some value to the Parties)?

23. In its report in *Mexico – Rice*, the Appellate Body stated that Articles 4.4 and 6.2 of the DSU do not require that ". . . the claims made at the time of the panel request must be identical to those indicated in the request for consultations."[30] The Appellate Body explained that the dispute settlement mechanism allows complaining parties a "measure of flexibility" in formulating their panel requests because these documents are prepared after consultations, which play a "critical role" in establishing the parameters of the dispute.[31] In other words, the exchange of information during consultations provides a valuable opportunity to clarify or adjust the understanding of what is in dispute.[32]

[30] *Mexico – Rice (AB)*, para. 136.

[31] *Mexico – Rice (AB)*, para. 136-137.

[32] *Mexico – Rice (AB)*, para. 137-138 (citing *Mexico – HFCS 21.5 (AB)*, para. 54; and *India – Patent Protection (AB)*, para. 94.).

24. Thus, at least one of the purposes behind the Appellate Body's reasoning that there does not need to be a precise and exact identity between the claims included in a consultation request and a panel request seems to be an interest in reinforcing the value of the process that allows panel requests to be "shaped by" and result from a "natural evolution of" the consultation process.[33] The clearer understanding derived from the exchange of information during consultations has many benefits: for example, it can reduce or eliminate misunderstandings between parties, and it can clarify the issues requiring resolution and therefore assist in their resolution. Quite logically, then, for the overall benefit of the dispute settlement process, differences can exist between a consultation request and a later, better informed panel request.

25. The U.S. claim under Article III:4 of the GATT 1994 regarding "different distribution opportunities" for imported reading materials resulted precisely from the sort of exchange of information identified by the Appellate Body in *Mexico – Rice* as well as in *Mexico – HFCS 21.5*[34] and *India – Patent Protection*.[35] As explained below, the United States revised the list of WTO provisions with which the challenged measures are inconsistent to include Article III:4, so as to incorporate information obtained during consultations regarding China's discriminatory treatment of imported reading materials.

26. The Article III:4 claim regarding imported reading materials evolved directly out of the U.S. claims regarding the discriminatory treatment of distributors of reading materials. These two closely related claims involve the same measures, the same products, the same distributors and the same distribution channels. Therefore, the addition of this claim left the essence of the U.S. complaint undisturbed – *i.e.*, China's reading material distribution regime disadvantageous other WTO Members, both in terms of their reading material distributors and the reading materials themselves.

(b) Did the US obtain a better understanding of the operation of the challenged measures (Imported Publications Subscription Rule and Foreign-Invested Sub-Distribution Rule) during consultations? If so, how?

27. Yes, the United States obtained a better understanding of the operation of the challenged measures during consultations. During consultations, the United States and China discussed the Chinese distribution regime for reading materials at length. Without compromising the confidentiality of these consultations, the discussions regarding the various measures making up that regime, including the Imported Publications Subscription Rule and the Foreign-Invested

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[33] *Mexico – Rice (AB)*, para. 138. The Appellate Body report did not cite to any textual reference to "evolve" or "evolution". Article 6.2 does not provide that the "legal basis of the complaint" needs to bear any particular relationship to the legal basis for the complaint" under Article 4.4; nor does Article 4.7 specify any particular limit for the legal basis of the complaint in any request for the establishment of a panel.

[34] Para. 54.

[35] Para. 94.

Sub-Distribution Rule, confirmed U.S. concerns regarding the discriminatory treatment of foreign-invested distributors of reading materials, but also raised concerns regarding the discriminatory treatment of imported reading materials *vis-à-vis* domestic reading materials.

28. For example, as it became clear that foreign-invested enterprises are only permitted to distribute domestic books, newspapers and periodicals and may not participate in subscription sales of imported reading materials, questions arose regarding the treatment of imported reading materials *vis-à-vis* domestic reading materials. Thus, the concerns that led to the U.S. Article III:4 claim arose in part from the exchange of information on our concerns regarding the distributors of reading materials.

(c) Did the United States reformulate its complaint to take into account "new information"? If so, what new information did the United States learn about the challenged measures that led it to include Article III:4 as a legal basis ?

29. As explained in answer to question 146(b), the consultation process involved a useful exchange of information regarding the operation of the Imported Publications Subscription Rule and the Foreign-Invested Sub-Distribution Rule, as well as their relation to other measures that also carry out China's distribution regime for reading materials. Some of this information provided insights regarding the anticipated national treatment concerns related to foreign distributors, but at the same time certain details in this information revealed related national treatment concerns regarding the reading materials the foreign distributors could and could not distribute. As a consequence of reflecting on the information that we gleaned from consultations regarding the comparative treatment of imported versus domestic reading materials accorded by the measures at issue, the United States included an Article III:4 claim in its panel request. It derives directly from the facts and concerns that had generated the U.S. national treatment claim regarding foreign-invested distributors.

Question to Both Parties

150. *The Panel has preliminarily identified a variety of provisions where the Parties have provided differing translations of provisions of China's measures or dispute the meaning of particular terms which are material to resolving the dispute. These provisions are provided to the Parties, in Annex A to the Panel's Questions. Please confirm to the Panel your representations at the second substantive meeting that:

(a) The Parties will attempt to bilaterally agree on a single translation of the provisions of China's measures and provide the agreed upon translations by 9 October 2008.

(b) Also by 9 October 2008, the Parties will inform the Panel as to any provisions they cannot agree upon.

(c) Additionally, the Parties will provide the Panel, on that date, a joint suggestion as to the procedures that could be used to arrive at a single definitive translation of these provisions, should the Panel subsequently consider that this is necessary for the purpose of disposing of the claims put before the Panel.

30. The United States refers the Panel to the letter that is being submitted jointly by the United States and China on October 9, 2008 addressing the translation issues identified in the Panel's question.

TRADING RIGHTS

Questions to the United States

151. *With reference to the table in the US reply to Panel Question 1, does the term "foreign enterprises" in the last column refer to foreign enterprises not invested or registered in China, foreign-invested enterprises in China, or both?

31. The term "foreign enterprises" in the last column of the table refers to both types of enterprises addressed in the Panel's question. The measures at issue deny both types of enterprises the right to import the products at issue and are inconsistent with China's trading rights commitments.

152. With reference to para. 255 of the US first written submission, please clarify your claim in relation to Article 42. Is it about criteria or state-owned enterprises?

32. Paragraph 255 of the U.S. first written submission describes three ways in which Article 42 of the Management Regulation is inconsistent with China's trading rights commitments. First, the U.S. claim concerns both the state-owned enterprises requirement and the criteria contained in Article 42. Article 42 not only reserves the right to import reading materials, AVHE products and sound recordings to Chinese wholly state-owned enterprises, it further reserves this right to a sub-set of those enterprises that satisfy certain criteria. Both of these requirements result in depriving foreign importers and privately-held enterprises in China of the right to import these products, making Article 42 inconsistent with China's trading rights commitment – contained in paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report – to allow all enterprises in China and all foreign enterprises and individuals the right to import these goods.

33. Second, Article 42 discriminates against foreign enterprises and individuals by according them less favorable treatment relative to wholly state-owned enterprises with respect to the importation of reading materials, AVHE products and sound recordings. Foreign enterprises and individuals are discriminated against because they are not wholly state-owned enterprises.

Foreign enterprises are subject to further discrimination as a result of China's determination that foreign importers can never fulfill the criteria contained in Article 42.[36] Both types of discriminatory treatment are inconsistent with China's trading rights commitments contained in paragraph 5.2 of the Accession Protocol and paragraph 84(b) of the Working Party Report.

34. Third, Article 42 grants trading rights in a discretionary way. In order to import reading materials, AVHE products and sound recordings into China, applicants must satisfy the "State plan for the total number, structure, and distribution" for importers of these products in China. GAPP has complete discretion in formulating this plan as well as in determining whether particular applicants satisfy the plan. The fact that this plan is not available in written form further illustrates the discretionary nature of Article 42.[37] This discretion is inconsistent with China's trading rights commitments, such as those contained in paragraph 84(b) of the Working Party Report.

153. What is the US claim in relation to Art. 8 of the Electronic Publications Regulation?

35. Article 8 of the Electronic Publications Regulation mandates a licensing requirement for, *inter alia*, the importation of electronic publications. The United States is claiming that this requirement is inconsistent with China's trading rights commitments for the three reasons provided in response to question 152 above – *i.e.*, that China does not allow all enterprises in China and all foreign enterprises and individuals to import electronic publications and that China grants trading rights in a discriminatory and discretionary way.[38] Articles 50 and 51 of the Electronic Publications Regulation provide that applicants cannot import electronic publications unless they satisfy the "State plan for total number, structure and deployment" of electronic publication importers. Moreover, Article 42 of the Management Regulation and Article 4 of the Imported Cultural Products Measure confirm that importers of electronic publications must be Chinese wholly state-owned enterprises. Thus, only Chinese wholly state-owned enterprises that satisfy certain discretionary and discriminatory criteria are permitted to obtain a license to engage in the importation of electronic publications.

154. With reference to para. 259 of the US first written submission, please answer the following questions:

(a) Do multiple layers of decision-making breach Protocol commitments? Why and how?

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[36] China's Answers to the First Set of Panel Questions, Question 46(b).

[37] China's Answers to the First Set of Panel Questions, Question 44.

[38] U.S. First Written Submission, paras. 44-46 and 259.

36. Paragraph 259 of the U.S. first submission explains that multiple decision-makers within GAPP determine whether to approve applicants to import electronic publications on the basis of a discretionary "State plan for total number, structure and deployment" for such importation.[39] While these multiple opaque layers facilitate the trading rights violation described in this paragraph, it is the arbitrary nature of this regime that gives rise to the violation. Thus, while China committed to provide all foreign importers and privately-held enterprises in China the right to import electronic publications, China subjects those intended beneficiaries of its accession commitments to a discriminatory and discretionary decision-making system that is onerous as well as opaque, and that results unerringly in the denial of their trading rights.

(b) What does the United States mean by "structuring these activities", and why and how does this breach Protocol commitments?

37. Paragraph 259 of the U.S. first submission provides in relevant part, "[b]y conditioning trading rights on Chinese Government plans for the *structuring of these activities* and on successfully obtaining Chinese Government approvals, the Electronic Publications Regulation is inconsistent with China's trading rights commitments."[40] The phrase "structuring these activities" refers to the "State plan for total number, *structure* and deployment" of electronic publications importation in China. This State plan discriminates against foreign importers and privately-held importers in China because these importers are held by GAPP to be categorically incapable of satisfying this plan.[41] Likewise, the State plan for importation activities involving electronic publications is discretionary because it is formulated and applied according to the unknown preferences of GAPP. Thus, by conditioning trading rights on GAPP's plan for the structuring of these importation activities, the Electronic Publications Regulation is inconsistent with China's trading rights commitments.

155. With reference to the US claim in relation to Article 5 of the Audiovisual Regulation, does this claim relate to finished or unfinished AVHE?

38. Article 5 relates to both finished and unfinished AVHE products and sound recordings. Article 5 states that "[t]he state institutes a system of licensing in regard to the publishing, production, reproduction, import, wholesale, retail and rental of audiovisual products. No entity or individual may engage in the publishing, production, reproduction, import, wholesale, retail and rental of audiovisual products without necessary permit. Permits and approval documents issued in compliance with these Regulations may not be rented out or lent out, sold or assigned in

[39] Electronic Publications Regulation, paras. 50-55.

[40] Emphasis added.

[41] China's Answers to the First Set of Panel Questions, Questions 46(a) and (b).

any other form."[42] This provision, unlike certain other provisions of the Audiovisual Regulation, does not distinguish between finished and unfinished AVHE products and sound recordings. The fact that this provision falls in Chapter I of the measure, which is entitled "General Principles," also reinforces the conclusion that it was intended to apply to the full range of AVHE products and sound recordings covered by the measure – *i.e.*, both finished and unfinished AVHE products and sound recordings.

156. Do Art. 42 of the Management Regulation and Art. 51 of the Electronic Publications Regulation apply to foreign individuals and foreign enterprises not invested or registered in China?

39. Yes. Article 42 of the Management Regulation and Article 51 of the Electronic Publications Regulation establish criteria for *all* applicants seeking to import reading materials into China. Note that China has confirmed in its replies to the first set of Panel questions that these criteria can only be satisfied by certain Chinese wholly state-owned enterprises and that only these enterprises are permitted to import reading materials into China.[43] Thus, these two provisions apply to foreign individuals and foreign enterprises not invested or registered in China (as well as those invested or registered in China) and thereby exclude them from the business of importing these products into China. As a result of these provisions, foreign individuals and foreign enterprises not invested or registered in China (as well as those invested or registered in China) are denied the right to import reading materials in contravention of China's trading rights commitments.

157. With reference to para. 261 of the US first written submission, what is the basis for the assertion that only state-owned enterprises may be approved to import unfinished audiovisual products? Does the Management Regulation apply to unfinished AVHE?

40. With respect to unfinished AVHE products, as the United States set forth in its first written submission, the Audiovisual Regulation provides that importers of unfinished AVHE products must be approved by the Chinese Government.[44]

41. In addition, Article 42 of the Management Regulation provides that only a "wholly State-owned enterprise" may establish a publication import entity.[45] Article 41 of the Management Regulation provides that "[t]he business of importing publications shall be operated by

[42] Exhibit US-16.

[43] China's Answers to the First Set of Panel Questions, Questions 46(a) and (b).

[44] U.S. First Written Submission, para. 261, citing Audiovisual Regulation, Articles 8-9 and 27 (Exhibit US-16).

[45] Exhibit US-7.

publication import entities established in compliance with these Regulations . . . ."[46] "Publications," in turn, is defined broadly to encompass AVHE products. Specifically, Article 2 of the Management Regulation defines publications to include "audiovisual products," which includes both finished AVHE products and audiovisual productions for "publication"; *i.e.,* unfinished AVHE products.[47] Moreover, "publishing activities" includes the "publishing, printing or reproduction, import, and distribution of publications."[48] Thus, under the Management Regulation only Chinese wholly state-owned enterprises may establish a publication import entity, for the import of unfinished AVHE products.[49]

158. Please comment on para. 35 of China's second written submission where China addresses the meaning of Chinese terms used in its measures governing films for theatrical release.

42. The United States considers that China's discussion of the meaning of Chinese terms does not alter the analysis of the U.S. trading rights claim related to films for theatrical release. China's discussion of the meaning of these Chinese terms arises in the context of China's contention that the relevant measures govern motion pictures, rather than cinematographic film, and thus the measures are not related to goods. As the United States has set forth previously, this argument amounts to an attempt to separate the content contained on a good from the good itself and there is no basis for such an approach.[50]

43. In addition, China contends that the relevant measures regulate *dian ying* (*i.e.*, what China says means "motion pictures"), rather than *dian ying jiao pin*, which China says refers to "film used to project motion pictures." However, with respect to *dian ying*, that term can be translated as "film" or "motion picture."[51] Thus, China's contention that its measures do not relate to films is not supported by the ordinary meaning of this term, which can refer to film and to motion picture.

44. Moreover, even China does not always translate *dian ying* as "motion picture," and sometimes translates it as "film." For example, in Article 16 of the Provisional Film Rule[52] China translates *dian ying* as "films" even though China elsewhere argues at length that that term

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[46] Management Regulation, Article 41 (Exhibit US-7).

[47] Exhibit US-7.

[48] Exhibit US-7.

[49] *See also* Imported Cultural Products Measure, Article 4 (Exhibit US-10)("[t]he business of importing cultural products such as . . . audiovisual products shall be carried out by state-owned cultural units designated or licensed by" the relevant government authority").

[50] U.S. Second Written Submission, paras. 13-14.

[51] *See New Century Chinese English Dictionary*, p. 372 (Exhibit US-103).

[52] Exhibit CN-13 (China refers to this measure as the Interim Provisions on the Qualification Access for Operating Film Enterprises. The corresponding U.S. exhibit is Exhibit US-22).

only refers to "motion pictures" rather than "films." In addition, in Articles 31 and 32 of the Film Regulation, China translate the Chinese term, *dian ying pian*, as "films".[53] China also translates the term *Ying Pian* as "films" in the same provision,[54] while the Contemporary Chinese Dictionary defines *Ying Pian* as either (1) the film for projecting motion pictures (cinematographic films); or (2) the motion picture as projected." This contradicts China's assertion that the measures regulate only "motion pictures" and not "films."

45. Thus, even China does not consistently translate *dian ying* as "motion picture," and, in fact, often translates that term as "film." Finally, China's measures also use a term, *Ying Pian*, that can refer to either cinematographic film or motion picture. Accordingly, China's analysis of the relevant Chinese terms is erroneous and fails to support its argument that the relevant measures relate to what they term "motion pictures," as distinct from "films."

159. With reference to para. 84(b) of the Working Party Report and the US reply to Panel Question 50(a) and (b), please answer the following questions:

(a) Are requirements relating to minimum capital and prior experience requirements relating to the goods being traded rather than to who is conducting the trading? If yes, why?

46. The requirements relating to minimum capital and prior experience referred to in paragraph 84(b) of the Working Party Report are not requirements relating to goods being traded. Paragraph 84(b) illustrates the distinction between China's "right to regulate trade" that pertains to goods and the strict limitations on any "right to regulate the right to trade" pertaining to traders. Paragraph 84(b) provides in pertinent part:

> The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that *requirements relating to minimum capital and prior experience would not apply*.[55]

Thus, paragraph 84(b) discusses both WTO-consistent measures that apply to goods pursuant to the "right to regulate trade" clause in paragraph 5.1 of the Protocol – *e.g.*, those concerning import licensing, TBT and SPS – and other measures that would apply to the traders of goods – *e.g.*, minimum capital and prior experience – that China committed not to apply.

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[53] Exhibit CN-11 (China refers to this measure as Regulations on the Administration of Films. The United States refers to this measure as the Film Regulation (Exhibit US-20)).

[54] Exhibit CN-13 (China refers to this measure as the Interim Provisions on the Qualification Access for Operating Film Enterprises. The corresponding U.S. exhibit is Exhibit US-22).

[55] Emphasis added.

(b) Please explain your view that requirements related to "importing and exporting, such as those concerning import licensing, TBT and SPS" relate to the goods being traded rather than to who is conducting the trading.

47. The function of this clause was to "emphasize" a point, which suggests that it was understood to be separate from the trading rights commitments discussed in this paragraph of the Working Party Report. In particular, it emphasized that traders with trading rights did not have the right to import/export goods whose importation China could properly restrict or prohibit (*e.g.*, SPS-consistent requirements such as those that permit a Member to keep out goods that pose certain risks, or TBT-consistent requirements relating to compliance with technical regulations. Likewise, a trader could not use its trading rights to import goods without obtaining a license where one was required, *e.g.*, to administer a WTO-consistent quota (for instance, a tariff rate quota bound in a Member's GATT schedule). In other words, the point of this clause was to emphasize that it does not matter "who is conducting the trading": WTO-consistent requirements applicable to "what is being traded" are not eliminated by the trading rights commitment.

48. By contrast, unlike import licensing, TBT and SPS requirements which apply to goods, the challenged measures here prohibit foreign importers and privately-held importers in China from importing the products at issue exclusively on the basis of national origin and Chinese Government ownership of the trader. In other words, China's trading rights restrictions bear no relationship to the products at issue or to the ability of these importers to import them.

160. *In its reply to Panel Question 50(a) the United States said that "the opening clause of paragraph 5.1 does not permit China to restrict the right to trade (except with respect to the goods listed in Annexes 2A and 2B ...) ... While China cannot restrict the right to trade..."). Also, at para. 17 of the US second oral statement, the United States said that "the 'right to regulate trade' clause applies to measures addressing the goods being traded rather than the traders of those goods". In this connection, please answer the following questions:

(a) Is the United States' arguing, or is a possible consequence of the US argument, that paras. 1.2, 5.1 and 5.2 of the Protocol would prevent China from ever restricting the right to trade?

49. No, the United States is not making such an argument, nor does the United States believe that that would be the consequence of its position. The United States has recognized that the regulation of traded goods may have incidental effects on individual traders' trading rights.

50. The United States has stated that China's Accession Protocol explicitly permits China to restrict the right to trade by reserving that right to state trading enterprises and designated trading

enterprises with respect to goods listed in Annexes 2A and 2B of that Protocol.[56] However, reading materials, AVHE products, sound recordings and films for theatrical release are not listed in either Annex. Thus, China is not permitted to reserve the right to import these products to state trading enterprises and designated trading enterprises. Yet, this is precisely what the measures at issue accomplish. While the Accession Protocol provides for an explicit mechanism to restrict the right to trade, China chose not to apply this mechanism to the products at issue. Therefore, the United States is arguing that China cannot now restrict the right to trade categorically for all foreign enterprises and individuals and privately-held enterprises in China with respect to products not listed in either Annex 2A or Annex 2B.[57]

51. Moreover, honoring China's commitment to provide the right to trade does not prejudice China's right to regulate trade. As explained in the U.S. reply to Panel questions 59 and 160(b), China can require traders to comply with WTO-consistent measures that are directed at regulating goods being traded. While it is not possible to identify the universe of all such measures, the Working Party Report identifies import licensing, TBT and SPS requirements as being captured by the "right to regulate trade" clause found in paragraph 5.1 of the Accession Protocol. Importers must comply with such WTO-consistent requirements on goods, including incidental requirements regarding the good being imported. However, China's measures do not fit this paradigm. Rather, they categorically prohibit entire classes of importers on the basis of national origin, a standard that excludes importers that would have all the qualifications needed to meet the requirements related to the products at issue.

(b) More particularly, could China not, e.g., (i) limit the right to import fissile materials into China to those who could demonstrate to the authorities the capability to safeguard those materials (ii) limit the right to import certain pharmaceutical products to hospitals or doctors, or (iii) limit exports of arms or dual-use goods to, e.g., individuals resident, or enterprises established, in China?

52. We understand that each of the Panel's three examples is meant to address goods whose importation/exportation is that are regulated because they are dangerous. Importing and exporting such goods requires proper handling and involves limitations on how they are moved across borders.

53. A requirement that all importers of dangerous products have all of the qualifications necessary to handle them, however, is entirely dissimilar to China's prohibition on importers that are not Chinese state owned. In other words, possessing necessary qualifications is profoundly different than state-ownership as a condition for importation. While the "capability to safeguard"

[56] U.S. Oral Statement, paras. 29-31; U.S. Answers to the First Set of Panel Questions, paras. 57-59 and 70; U.S. Second Written Submission, paras. 41 and 42; and U.S. Second Oral Statement, paras. 16-22.

[57] U.S. Answers to the First Set of Panel Questions, paras. 57-59.

described in the Panel's question is tied directly to the products listed therein, China's state-ownership requirement imposed on importers of reading materials, AVHE products, sound recordings and films for theatrical release is wholly unrelated to these goods.

54. Regarding fissile materials, limiting importers of fissile materials to those with a demonstrated capacity to handle such products is fundamentally different from denying all foreign importers and all privately-held enterprises in China the right to trade because they are not wholly state-owned enterprises. Fissile materials involve national security issues not at issue in this dispute. Decisions regarding who may handle fissile materials involve issues fundamentally different from decisions regarding who may handle reading materials, AVHE products, sound recordings and films for theatrical release. China's measures at issue in this dispute, however, categorically deny all importers except for state trading enterprises the right to import the products, without any review of the qualifications of individual importers.

55. As for the importation of pharmaceutical products by hospitals and doctors, limiting imports of certain such products to those with the demonstrated capacity to properly handle them would not contravene the right to trade. We note, however, that the class of those with the qualifications to handle medicines safely might – depending on the product[58] – include not just hospitals and doctors, but could also include other entities such as chemists, pharmacists and companies, whether domestic or foreign, that have the skills or training needed to handle medicines safely.

56. On exports of arms or dual-use goods, we understand the Panel to be inquiring about who in China can export such goods and whether China can place limitations on such exporters. First of all, as mentioned above, national security issues are not present in this dispute. Second, it can be anticipated that at least some of these products can be extremely dangerous and pose risks for importing and exporting. For example, arms must be secured correctly or disassembled to prevent accidents. Certain incidental limitations on how these products cross China's borders may be required. Again, however, the limitations would need to be related to objective and fair determinations of what qualifications are necessary for safety and security, not blanket restrictions on entire classes of importers.

(i) If you think that these examples would not amount to restrictions relating to who may import (regulation of traders) as opposed to restrictions on the goods that may be imported, please explain why.

[58] As mentioned above, the United States assumes that the Panel's question relates to dangerous pharmaceutical products. The United States would have more difficulty seeing how such a restriction on, for example, who could import an over-the-counter pain reliever would be consistent with China's trading rights obligations.

(ii) If you think that these examples are regulations of who may import and that they restrict the right to trade, please explain why and how they restrict the right to trade.

(iii) If you think that these examples are regulations of who may import, but that they do not restrict the right to trade, please explain why. Are some limitations of the right to trade permissible under paras. 1.2, 5.1 and 5.2? How is the Panel to draw a line between permissible limitation and impermissible ones? What Protocol/Working Party Report provision would be the basis for such a distinction?

57. With respect to questions 160(b)(i)-(iii), it is important to recall that the Panel need not draw a single and definitive line that distinguishes between all possible permissible and impermissible limitations on the right to trade under China's Accession Protocol commitments (including those Working Party Report commitments that have been incorporated into the Accession Protocol). In the present dispute, all that is required is to determine whether China's measures constitute an impermissible restriction on the right to trade that is not justified by the "right to regulate trade" clause in China's Accession Protocol. The Panel can reach the conclusion that whatever the "right to regulate" clause might or might not include, it does not include these measures; and the Panel can reach that conclusion without having to demarcate, or attempting to demarcate, the precise line between the permissible and the impermissible.

58. That said, the three examples provided by the Panel relate to the intrinsic qualities of particular goods and the qualifications required to move them across borders safely. Whether a particular importer possesses the requisite qualifications that is tied directly to the risks associated with the transport of the good in question would be a case-by-case inquiry involving individual importers. Thus, the right to trade would not be compromised because *all importers* would be permitted to develop those qualifications. However, where *individual importers* do not meet the qualifications or fail during the importation process to satisfy requirements tied to the risks associated with the importation of a particular good, restrictions may be imposed on such individual importers.

59. Imposing restrictions on individual importers based on their capability to import/export particular goods that entail risks inherent to the importation process is fundamentally different from a blanket prohibition on all importers that are not Chinese wholly state-owned enterprises. To import fissile materials or medicines, or to export arms and dual-use goods, importers/exporters must demonstrate the capability to handle the risks associated with these goods that arise during the importation process, particularly given the national security concerns involved. However, traders cannot be denied the opportunity to make such a demonstration on the merits.

60. China's measures, however, prohibit every foreign importer and every non-state-owned importer from importing the products at issue regardless of whether any such individual importers have the capability to import these products. Where China designates importers of these products, there is no opportunity for applicants to even apply. Even where there is an application process, only Chinese wholly state-owned enterprises are accepted. Such measures impose insurmountable barriers that eviscerate the right to trade across the board, and they do not qualify as mere incidental effects of the legitimate regulation of trade.

61. Moreover, the basis on which foreign enterprises and individuals and privately held enterprises in China are prohibited from trading – *i.e.*, national origin and Chinese Government ownership – bears no relation to the risks associated with the *importation* of these products. While China requires content review, its agencies conduct that review and they do so independent of importation. Thus, the ability to conduct content review is not a basis on which to deny all foreign enterprises and individuals and privately-held enterprises in China the right to import the products at issue. Instead, one alternative to China's current WTO-inconsistent regime is to allow all individual importers – regardless of national origin or Chinese Government ownership – to develop such expertise.

62. Finally, the United States highlights the fact that the "right to regulate trade" clause China asserts as a defense and China's explicit rights to create trading rights exceptions are both found in the opening sentence of paragraph 5.1 of the Accession Protocol. China is arguing that "the right to regulate trade" provides an open ended right to ban any and all trading rights, despite the fact that this language is found in the same sentence with a separate, clear grant of trading rights exceptions coupled with a specific mechanism (Annexes 2A and 2B) for ensuring that these exceptions are transparent and controlled. China's argument, if credited, would eliminate the need for the specific trading rights exceptions granted to China in the opening sentence of paragraph 5.1, rending Annexe 2A and 2B redundant.

63. A reading that gives meaning to all provisions in this first sentence of paragraph 5.1 leads to the conclusion that China cannot restrict the right to trade in goods that China failed to list in Annexes 2A and 2B. Moreover, China cannot use the "right to regulate trade" clause to amend these Annexes.[59]

(c) Could Members other than China maintain such restrictions as are identified in (b) above consistently with their WTO obligations? Please identify relevant WTO provisions.

[59] *See* U.S. Answers to the Second Set of Panel Questions, Question 160(a) (explaining, "honoring China's commitment to provide the right to trade does not prejudice China's right to regulate trade.")

64. The United States notes that it has not pursued, in this dispute, any claim with respect to trading rights other than claims under the trading rights provisions of the Accession Protocol. Moreover, much would depend on the specific nature of the restrictions involved.

161. Please comment on China's reply to Panel Question 50(f).

65. China asserts without any elaboration that the opening clause of paragraph 5.2 of the Accession Protocol – "Except as otherwise provided for in this Protocol" – refers to the "right to regulate trade" clause found in the opening sentence of paragraph 5.1 of that Protocol. China has provided no basis for its assertion that the "right to regulate trade" clause authorizes discrimination among traders on the basis of their nationality. While the Working Party Report does contemplate WTO-consistent requirements on goods being traded (including with respect to import licensing, TBT and SPS requirements) nationality-based discrimination is nowhere mentioned (let alone "provided for"). China's interpretation, therefore, should be rejected.

66. In its reply to question 50(f), the United States explained that the opening clause of paragraph 5.2 refers to the exception contained in Annexes 2A and 2B. These Annexes reserve the right to trade to state trading enterprises and designated trading enterprises with respect to certain goods, and exclude foreign importers from trading in these goods. For circumstances covered by these Annexes, then, foreign importers are treated less favorably than at least some enterprises in China with respect to the right to trade – and thus the Annexes "provide for" discrimination on the basis of nationality. The United States respectfully submits that this interpretation of the opening clause of paragraph 5.2 is the correct one. The opening clause of paragraph 5.2 is the express articulation of this consequence of Annexes 2A and 2B.

162. *With reference to para. 259 of the US first written submission, please explain why the existence of qualifying criteria gives rise to a breach of the commitment that the right to trade would be granted in a "non-discretionary" way.

67. Paragraph 259 of the U.S. first written submission addresses the Electronic Publications Regulation, which subjects applicant importers to the State plan for total number, structure and deployment. These conditions are completely discretionary, because there are no criteria governing the State plan. Indeed, as China has explained, no written version of the State plan exists.[60] The Electronic Publications Regulation, therefore, imposes criteria that qualify the right to import electronic publications in a discretionary way, which is inconsistent with China's trading rights commitments.

68. The United States notes as well that the conditions contained in the Electronic Publications Regulation also run afoul of the second sentence of paragraph 84(b) of China's

[60] China's Answers to the First Set of Panel Questions, para. 44.

Working Party Report, which makes clear that any requirements for obtaining trading rights must be for customs and fiscal purposes only and are not to constitute a barrier to trade.

163. With reference to para. 41 of China's second written submission, is China correct in saying that cinematographic film is always in hard-copy format and always refers to a tangible material?

69. With respect to the U.S. trading rights claim related to films for theatrical release, the product that is the subject of the U.S. claim is cinematographic film in a tangible, hard-copy format regardless of whether cinematographic film is always tangible and in hard-copy. The meaning of China's statement to which the Panel refers in its question is not clear. However, we note that China makes this statement in the context of China's contentions that motion pictures are distinct from cinematographic film and that they are not goods subject to China's trading rights claim.[61] For the reasons the United States has explained, China's arguments in this regard are without merit.[62]

164. With respect to the US argument in para. 21 of its second written submission that, pursuant to the Appellate Body ruling in EC – Bananas III, it seems that this Panel should differentiate between the aspects of the measures that regulate or affect goods and those aspects that apply to services, please explain how the aspects of the challenged measures the United States has cited regulate or affect unfinished AVHE and exposed and developed cinematographic film as goods such that they would be subject to disciplines on goods, including para. 5.1 of the Protocol.

70. As set forth in more detail below, by imposing restrictions on who may import unfinished AVHE products and films for theatrical release, the relevant measures affect these items as goods such that they are subject to China's trading rights commitments.[63]

71. As set forth in the U.S. first written submission, the United States challenges numerous Chinese measures that prohibit any foreign-invested enterprise from importing any of the Products, including unfinished AVHE products and films for theatrical release.[64] In addition, other measures require enterprises importing unfinished audiovisual products to be approved by

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[61] *See* China's Second Written Submission, paras. 39-40. *See also*, U.S. Answer to Question 158.

[62] U.S. First Oral Statement, paras. 9-18; U.S. Second Written Submission, paras. 12-29; U.S. Second Oral Statement, paras. 4-13.

[63] *See Report of the Working Party on the Accession of China*, Part IV (Exhibit US-3) (providing that the Members "welcomed China's commitment to progressively liberalize the availability and scope of the right to trade so that within three years after accession all enterprises would have the right to import and export all *goods* (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China") (emphasis added).

[64] U.S. First Written Submission, paras. 18-41.

the Ministry of Culture.[65] Finally, another set of measures requires entities importing films for theatrical release to be designated.[66]

72. With respect to AVHE products, Article 2 of the Audiovisual Import Rule defines "[a]udiovisual products" as referring to "audio tapes, video tapes, records, and audio and video CDs which have recorded contents (*see commercial names and HS codes in Attachment A*)."[67] The fact that these products have corresponding tariff codes, makes clear that this measure treats these items as goods. Article 3 of the Audiovisual Import Rule makes clear that unfinished AVHE products are also covered by the measure, as it states that: "These Rules apply to all finished audiovisual products imported from abroad and imported audiovisual products used in publishing, information network transmission, and other purposes"[68] – *i.e.*, unfinished products. Finally, as the United States has demonstrated, China treats these products as goods upon importation, since they are classified in heading 8524 of China's tariff schedule.[69] China also concedes that it treats such products as goods when it states that it charges customs duties on imports of "hard-copy audiovisual products (including sound recordings) intended for publication."[70]

73. With respect to films, the relevant measures impose restrictions on who may import films for theatrical release, and thus run afoul of China's commitments regarding the right to trade in goods. Indeed, for purposes of importation, China's tariff schedule classifies exposed and developed cinematographic film in heading 3706 of the Harmonized System.[71] Moreover, as with unfinished AVHE products, China concedes that exposed and developed cinematographic film is a good because it charges customs duties on such items.[72]

165. *In its reply to Panel Question 21 and para. 25 of the US second oral statement, the United States identified the alternatives that domestic Chinese entities other than importing entities, or China's government, could conduct content review. Is it necessary or appropriate for the Panel to consider these alternatives given that the United States has not challenged as WTO-inconsistent Chinese requirements that provide that content review must be conducted by importing entities? If so, why?

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[65] U.S. First Written Submission, paras. 47-56.

[66] U.S. First Written Submission, paras. 61-67.

[67] Exhibit US-17 (emphasis added).

[68] Exhibit US-17 (emphasis added).

[69] U.S. First Oral Statement, para. 20; U.S. Answers to the First Set of Panel Questions, paras. 55-56.

[70] China's Answers to the First Set of Panel Questions, Question 132.

[71] U.S. First Oral Statement, para. 12.

[72] China's Answers to the First Set of Panel Questions, Question 132.

74. The United States, as part of its rebuttal to China's Article XX defense, has challenged China's claim that it is necessary for China to give the exclusive right to import to certain state-owned enterprises and have them undertake content review. The United States submits that it is fully appropriate for the Panel to consider the alternative approaches offered by the United States.

75. At the outset, the United States reiterates that is not taking a position on whether Article XX applies to China's trading rights commitments. As China has failed to meet the requirements of this Article, it is not necessary to determine whether this Article applies.

76. The United States understands the Panel's question to be about the relationship between the measures at issue in the U.S. trading rights claim and the U.S. proposals for reasonably available WTO-consistent alternatives. The United States is challenging China's measures that deny foreign importers and privately held importers in China the right to import the Products into China. Therefore, the measure at issue is not, as China suggests, a requirement that content review be conducted by importers.

77. However, this does not prevent the Panel from addressing the U.S. proposed alternatives, because China has asserted an Article XX defense to its trading rights ban. Under that defense, China contends that its prohibition on trading rights is justified because importation, state-owned enterprises, and content review somehow are inextricably linked. In rebutting China's arguments under Article XX(a), the United States has demonstrated that China's measures are not necessary, because there is no such inextricable linkage. The United States has provided arguments that there is no link between content review and importation and that China itself disassociates these unrelated activities.[73]

78. Moreover, the United States has proposed three reasonably available WTO-consistent alternatives that demonstrate that the measures at issue are not necessary to achieve China's stated objective and that the linkage between China's import restrictions and protecting public morals does not exist, much less the supposed linkage among importation, state-owned enterprises, and content review.[74] As the U.S. proposals make clear, the United States does not agree that content review must be conducted by import entities, although an acceptable content review system could involve import entities conducting content review, but without a state-ownership requirement. The Panel should consider the reasonably available WTO-consistent alternatives identified by the United States to rebut China's defense.

166. With reference to paras. 123-124 of China's second written submission, please comment on China's argument that allowing foreign-invested importing enterprises in

[73] U.S. First Oral Statement, paras. 32-35; U.S. Answers to the First Set of Panel Questions, paras. 62 and 93-94; U.S. Second Written Submission, paras. 43-49; and U.S. Second Oral Statement, paras. 23-37.

[74] U.S. Answer to the First Set of Panel Questions, para. 62; U.S. Second Written Statement, para. 49; and U.S. Second Oral Statement, paras. 23-37.

China to conduct the content review would increase the risk of inappropriate content being disseminated in China and jeopardize the consistency of conduct review.

79. China's arguments regarding the dissemination of prohibited content and the consistency of content review are unsupported and contrary to the facts. First, China provides no explanation regarding why foreign importers pose a greater risk to the dissemination of prohibited content in China than any other importers. Were foreign importers to conduct content review they could hire experts with the requisite qualifications and experience necessary to perform such review.

80. Furthermore, by hiring additional review staff, foreign importers would greatly reduce the pressure and work load of the current corps of reviewers. For example, CNPIEC (one of the largest importers of reading materials in China) imports on average over 100,000 reading materials titles annually and accounts for 60 percent of the reading materials importation market, but employs only 13 full-time and 60 part-time content reviewers.[75] Thus, allowing foreign importers to increase the overall number of qualified content reviewers would advance, rather than detract from, the objective of preventing the dissemination of prohibited content in China.

81. Second, China has failed to demonstrated that allowing foreign importers to conduct content review would jeopardize the consistency of the content review process. Indeed, China's regime for the content review of domestic reading materials confirms that the consistency of that review is not undermined by a larger number of reviewers than are currently devoted to imported reading materials. In 2007, there were 806 domestic book and electronic publication publishers in China conducting "in-house" review,[76] compared with only 42 state-owned reading material importers.[77] Furthermore, the individuals conducting content review for foreign importers would all apply the same content review standards, to ensure that consistency is maintained. As long as all reviewers have the necessary qualifications, the national origin of their employers is of no consequence to the quality or consistency of content review.

167. With reference to para. 56 of the US second written submission and para. 39 of the US first oral statement, please explain the relevance to an Article XX *chapeau* analysis of the treatment of domestic Chinese producers.

82. In paragraph 56 of the U.S. second written submission and paragraph 39 of the U.S. first oral statement, the United States rebuts China's assertion under its own Article XX *chapeau*

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[75] *Report on Operation of Imported Publications of China National Publications Import and Export Group in 2006*, Section 1, para. 1 and Section 2(4), para. 4 (Exhibit CN-26).

[76] "Bulletin of Statistics," General Administration of Press and Publication webpage, (excerpt), available at: http://www.gapp.gov.cn/cms/cms/website/zhrmghgxwcbzsww/layout3/xxml33.jsp?channelId=1392&siteId=21&infoId=459130 (Exhibit US-98).

[77] *See* Wang Yumei, "Fourteen (Foreign Publications) Retailers Enter Chinese Mainland Market and Increasing Number of Book, Newspaper and Magazine Retailers," page 2 (Exhibit US-13).

analysis that "domestic publications of cultural goods are also confronted with comparable limitations."[78] As the United States has shown, China's content review regimes for imported and domestic products are substantially different.[79] Thus, the objective of the U.S. argument was to establish an accurate picture of China's content review regime for the record and to demonstrate that China's statement is factually incorrect. The United States also reiterated in its second oral statement that China cannot satisfy the requirements of the *chapeau* by merely repeating its arguments regarding why its measures are "necessary" under Article XX(a).[80]

Questions to Both Parties

197. *With reference to para. 84(b) of the Working Party Report, please answer the following questions:

(a) Does the term "foreign enterprises" in para. 84(b) of the Working Party Report encompass foreign enterprises invested or registered in China? In your reply, please take into account the reference to "enterprises in China" in para. 84(a).

83. The term "foreign enterprises" in paragraph 84(b) of the Working Party Report includes foreign enterprises invested or registered in China. First, the plain meaning of "foreign enterprise" includes foreign enterprises invested or registered in China. Second, the use of the term "foreign enterprises" in paragraph 84(b) must be read in the context of paragraph 5.2 of the Accession Protocol, as both provisions address the extent of China's national treatment obligation with respect to the right to trade. Paragraph 5.2 of the Accession Protocol provides that China's national treatment obligation applies to "foreign enterprises," and, by using the word "including", it makes clear that this term means foreign enterprises invested or registered in China as well as foreign enterprises not invested or registered in China. Therefore, the same term used in paragraph 84(b) of the Working Party Report should have the same meaning.

84. While this interpretation means that there may be some overlap between the terms "foreign enterprises" and "enterprises in China" in paragraph 84(a) of the Working Party Report, that does not appear to affect any of the rights or obligations set forth in the Accession Protocol or Working Party Report. The alternative of interpreting paragraph 84(b) of the Working Party Report as implementing China's national treatment obligation only to foreign enterprises not invested or registered in China would potentially limit the national treatment obligation that China took on in paragraph 5.2 of the Accession Protocol.

[78] China's First Written Submission, para. 231.

[79] U.S. First Oral Statement, paras. 38-39; and U.S. Second Written Submission, paras. 56-57.

[80] U.S. Second Oral Statement, para. 38.

(b) Is the commitment that rights will be granted to foreign enterprises and individuals in a non-discretionary and non-discriminatory way substantively different from the obligation in para. 5.2 of the Protocol that foreign enterprises and individuals "shall be accorded" treatment "no less favourable" than that accorded to enterprises in China? If so, why and how?

85. Paragraph 84(b) of the Working Party Report provides that foreign enterprises and foreign individuals shall be granted trading rights in a non-discriminatory and non-discretionary way. This concerns discrimination: (1) between foreign enterprises and foreign individuals; and (2) between foreign enterprises and individuals on the one hand and enterprises in China on the other hand.[81] In addition, China is not permitted to grant trading rights to any of these actors in a discretionary manner.

86. Paragraph 5.2 of the Accession Protocol is more narrow in scope. Whereas paragraph 84(b) addresses both discrimination between foreign enterprises and individuals as well as between foreign enterprises/foreign individuals and enterprises in China, paragraph 5.2 states that foreign enterprises and individuals shall be provided treatment no less favourable than that accorded to enterprises in China. Moreover, paragraph 5.2 on its face does not include a separate prohibition on granting trading rights in a discretionary way.

(c) Para. 84(a) distinguishes between the three-year transition period (first sentence) and the period thereafter (second and following sentences). Does para. 84(b) set forth commitments that apply during or after the three-year transition period?

87. Paragraph 84(b) sets forth commitments that apply after the three-year transition period included in paragraph 84(a). Where China's Accession Protocol and Working Party Report provide for a transition period, they does so explicitly. Likewise, commitments that are described without a transition period are not time limited and are currently applicable.

(d) The third sentence of para. 84(b) refers to "foreign enterprises and individuals with trading rights". Please explain why the phrase "with trading rights" was included. Does that phrase indicate that WTO-consistent requirements relating to importing and exporting may not restrict trading rights of foreign enterprises or individuals?

88. The phrase "foreign enterprises and individual with trading rights" in the third sentence of paragraph 84(b) reflects the fact that China may apply customs or fiscal requirements to potential

[81] U.S. Answers to the First Set of Panel Questions, para. 83.

traders before granting them trading rights. Under the second sentence of paragraph 84(b), were China to apply such requirements, entities that have not yet complied with these requirements would not yet have trading rights. The third sentence of paragraph 84(b) therefore includes the phrase "with trading rights" in recognition of the fact that – where China has imposed fiscal or customs requirements – some enterprise or individuals may not yet have trading rights.

198. With reference to para. 84(a) of the Working Party Report, please answer the following questions:

(a) Does the commitment set forth in para. 84(a) mean that within three years after accession China is to permit all foreign enterprises and individuals to export and import all goods, regardless of the treatment it accords to enterprises in China? In your reply, please take into account para. 5.2 of the Protocol.

89. Paragraph 84(a) provides in relevant part:

> At that time [*i.e.*, within three years of accession], China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China.

According to the plain meaning of this text, within three years of China's accession, all enterprises in China, all foreign enterprises and all foreign individuals are to have the right to trade all goods, except for those listed in Annex 2A. As articulated in paragraph 84(a), the right to trade for these categories of importers and exporters is an absolute right. In other words, each category of trading rights recipients has the right to import and export all non-Annex 2A products, independent of the treatment accorded to any other categories.

90. Paragraph 5.2 of the Accession Protocol addresses the relative, rather than the absolute, nature the right to trade. Paragraph 5.2 addresses, among other things, concerns about discrimination or arbitrariness prejudicing foreigners in actions taken regarding the right to trade. Given the prevalence of state-owned domestic Chinese enterprises, paragraph 5.2 ensures that the trading right possessed by foreign importers is no less favorable than the trading right possessed by domestic Chinese enterprises, particularly those that are owned by the State. Thus, while paragraph 84(a) grants the right to trade to all three categories of traders, paragraphs 5.2 and 84(b) guarantee that the value of that right for foreign traders is not rendered worthless as the result of preferential treatment accorded to domestic Chinese enterprises, state-owned or otherwise.

(b) The first sentence says that China will eliminate its system of examination and approval of trading rights within three years after accession. How does this relate to para. 84(b) where it is stated that "any requirements for obtaining trading rights would be for customs and fiscal purposes only"? Are such requirements approval requirements? In replying to this question, please take into account para. 83(b).

91. Paragraph 84(a) of the Working Party Report states in part that China will ". . . eliminate *its* system of examination and approval of trading rights within three years after accession."[82] Thus, China agreed to remove its particular examination and approval system by December 11, 2004. Paragraph 84(b) provides in pertinent part, ". . . any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade." Thus, China cannot replace its examination and approval process with any successor process that requires anything more than customs- and fiscal-related requirements. In particular, China's commitments ensure that any successor trading rights regime would have to be neutral with respect to national origin and Chinese Government ownership.

92. Thus, for example, China could require importers to have a tax number in order to import the products at issue into China. A tax number could be used by China's authorities to monitor the payment of tariffs or to contact the importer if an issue arises with regard to the importation of a particular shipment of goods. These would qualify as normal background business regulations, not trading rights approval requirements. By contrast, a requirement that importers must be wholly State-owned is not for customs and fiscal purposes, is far more draconian than the capital requirements and other restrictions China agreed to eliminate as part of its WTO commitments to liberalize trading rights, and is therefore contrary to China's trading rights commitments.

93. Paragraph 83 of the Working Party Report provides for the progressive granting of trading rights and concomitant removal of trading rights restrictions. In paragraph 83(b) of the Working Party Report, China committed to reduce minimum capital requirements in stages during the three year transition period and to eliminate its examination and approval system at the end of the transition period. Therefore, paragraph 83(b) requires China to dismantle its trading rights restrictions with respect to wholly Chinese-invested enterprises within three years of accession. Paragraph 83(c) provides that China shall grant trading rights with respect to various types of foreign-invested enterprises also in stages over the three year period, and paragraph 83(d) provides that all enterprises in China shall have the right to trade within three years after accession. Thus, as with paragraph 84(a), paragraph 83 (including paragraph 83(b)) commits China to remove trading rights restrictions. In contrast, paragraph 84(b) addresses normal background business regulations, not trading rights approval requirements.

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[82] Emphasis added.

199. With reference to para. 221 of the Appellate Body Report in *EC – Bananas III* (reproduced, e.g., at para. 21 of the US second written submission), please answer the following questions:

(a) Do the relevant Chinese measures governing the importation of film for theatrical release involve a service relating to a particular good or a good relating to a particular service? If the latter, how, if at all, would this affect what the Appellate Body said at para. 221?

94. By undertaking trading rights commitments, China committed that "within three years after accession all enterprises would have the right to import and export all *goods* . . . ."[83] Thus, the United States submits that the relevant question for purposes of the U.S. trading rights claim is whether the relevant measures regulate who may or may not import a good. The United States has shown that the measures do, in fact, regulate who may, or may not, import items that qualify as "goods".[84] One of the arguments advanced by China to support its position that the relevant measures are not subject to China's trading rights commitments is that the measures govern services, rather than goods.[85] However, the Appellate Body's guidance in *EC – Bananas III* makes clear that even if China were correct that the relevant measures regulate services, that would not establish that the measures are exempt from the goods disciplines. Instead, where such measures regulate both goods and services, the measures may be subject to both goods and services disciplines. China has simply failed to rebut the U.S. argument that the relevant measures also regulate goods.

95. The United States submits that, for purposes of its trading rights claim, whether the measures regulate a good related to a service or a service related to a good should not affect the Panel's analysis. The relevant measures are inconsistent with China's trading rights commitments because the measures restrict who may import certain goods, *i.e.*, films for theatrical release. Because these measures regulate *goods*, China's assertion that the measures regulate services fails to exempt the measures from China's trading rights commitments.

96. As the Appellate Body in *EC – Bananas III* stated, "the same measure could be scrutinized under both . . ." the GATT 1994 and the GATS. "However, . . . the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how

[83] Working Party Report, para. 80 (Exhibit US-3) (emphasis added).

[84] U.S. First Oral Statement, paras. 9-18; U.S. Second Written Submission, paras. 11-29; U.S. Second Oral Statement, paras. 4-13.

[85] China's First Written Submission, paras. 91-97; China's First Oral Statement, paras. 13-26; China's Answers to the First Set of Panel Questions, Questions 28, 29, 33, 34.

the measure affects the supply of the service or the service suppliers involved."[86] As the United States set forth in its second written submission, the relevant Chinese measures refer to the importation of the good separate from and in addition to the provision of services using that good.[87] In contrast to the United States, China fails to provide any textual analysis of its measures to support its assertion that the measures merely regulate services. Instead, China only proffers a lone example of one provision of one of the relevant measures that relates to services and does not address any of the other provisions of that measure or any other measures that the United States challenges as they relate to goods.[88] Moreover, China concedes that films – and indeed motion pictures, as China refers to them – are goods because they are subject to customs clearance.[89]

97. In short, the fact that the relevant Chinese measures regulate films for theatrical release as goods contradicts China's assertion that these measures merely relate to services. Even if the relevant measures also regulate services, this does not change the fact that they regulate goods and are therefore subject to China's trading rights commitments.

(b) Is there an inconsistency between the fourth sentence of the paragraph in question ("[i]n all such cases ... could be scrutinized") and its last sentence ("can only be determined on a case-by-case basis")? If not, why not?

98. There is no inconsistency between the two sentences identified in the Panel's question. The fourth sentence of the paragraph states that in cases where a measure regulates services and goods, "the measure in question *could* be scrutinized under both the GATT 1994 and the GATS."[90] Thus, this sentence provides that in a dispute such a measure may be, but is not necessarily to be, scrutinized under both the GATT 1994 and the GATS. Whether a measure is scrutinized under both agreements would depend, in part, on whether the complaining party raises a claim under both.

99. The last sentence provides that in order to determine whether the measure is scrutinized under both should be determined on a case-by-case basis. The United States considers that this sentence provides that each measure should be analyzed in the context of a particular dispute to determine whether providing a solution to that dispute would be facilitated by examining claims under either or both agreements.[91]

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[86] *EC – Bananas III (AB)*, para. 221.

[87] U.S. Second Written Submission, paras. 22-24.

[88] China's First Written Submission, para. 91.

[89] China's First Written Submission, para. 95.

[90] *EC – Bananas III (AB)*, para. 221 (emphasis added).

[91] *See Canada – Periodicals (AB)*, p. 17-20 (The United States raised claims under the GATT 1994 and

(continued...)

100. In the case of the measures subject to the U.S. trading rights claims related to films for theatrical release, the United States has shown that particular provisions of the relevant measures restrict who may import the relevant good. Consequently, these measures regulate goods and are subject to China's trading rights commitments.

200. *For purposes of determining whether a measure is "necessary" within the meaning of Article XX of the GATT 1994, does the contribution to the realization of the objective pursued by a measure at issue need to be direct, or can it be indirect, i.e., via other requirements? Or to put it differently, does the measure at issue need to produce the desired effect by itself? To put this in context, there would appear to be two relevant requirements, an alleged restriction of the right to import and a requirement that importers conduct content review.

101. Regarding the first question, the terms "direct" and "indirect" are not terms found in the relevant provisions of the GATT 1994. The United States thus is not in a position to comment on those terms in the abstract.

102. As for the second part of the Panel's question, the United States agrees that a measure may be "necessary" within the meaning of Article XX even if it does not achieve the desired result all by itself. In this dispute, however, the United States has shown that the two issues discussed in the Panel's question – the restriction on trading rights and the purported requirement that importers conduct content review – are not necessary to protect public morals. Restricting trading rights is not necessary in the first place as there is no nexus between importation and content review. Likewise, requiring importers to conduct content review is not necessary because in fact China imposes no such requirement. Non-importing components of the Chinese Government are currently responsible for the exclusive review of content of all of the products at issue in this dispute, except reading materials, and are the principal reviewers of content for reading materials.

DISTRIBUTION AND AUDIOVISUAL SERVICES

Questions to the United States

201. *In para. 85 of its second written submission the US argues that master distribution is also covered by China's commitments under mode 3 of Sector 4C of China's Services Schedule and that China's measures are inconsistent with those commitments within the

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[91](...continued)
Canada asserted that the measure at issue was related to services and, therefore, not subject to the GATT 1994. The Appellate Body found that the measure affected trade in goods and was therefore subject to the GATT 1994. The Appellate Body stated: "The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994.")

meaning of Article XVII of the GATS. Can the United States please indicate where and how its request for establishment of a Panel indicates that the US claim relates to mode 3 of Sector 4C of China's commitments?

103. Section II.A of the U.S. panel request explains:

> In Sectors 4A-4E of its Schedule, China undertook market access and national treatment commitments with respect to the supply through commercial presence in China by service suppliers of other Members of, *inter alia*, distribution services of publications.

The U.S. panel request further provides:

> The measures at issue, however, appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging at least in types of distribution described in these measures as the "master distribution" and "master wholesaling" of publications.

Thus, the U.S. panel request encompasses the relevant sector (Sector 4; distribution services) and sub-sector (Sector 4C; retailing services) of China's Services Schedule. The U.S. panel request is not limited to wholesale trade services under Sector 4B, and covers all of China's distribution commitments under Sector 4, including retail.

104. The United States has addressed Sector 4C in response to China's concession that master distribution includes the retailing of reading materials. The United States is not precluded from including new arguments in its second written submission with respect to its claim regarding China's distribution services commitments under Sector 4 of its Services Schedule.

202. With reference to the US Reply to Panel Question 77, the US says that it does "not generally consider that the initial sale from the producer of good to a wholesaler or a retailer is a wholesale trade service". Are there situations in which it might be considered that an initial sale constitutes a wholesale trade service?

105. As the United States explained in its reply to Panel question 77, producers that engage in the first sale of a good are generally not engaged in "wholesaling" within the meaning of Annex 2 of China's Services Schedule. Beyond that, the United States is not in a position to comment, because any analysis of other situations would involve a case-specific inquiry.

203. *In answering Panel Question 70, the United States says that it is challenging the four identified measures as inconsistent with the GATS taken together and taken separately. Please indicate (perhaps in table form) how the provisions of each of the measures is inconsistent with the GATS taken separately.

106. The four measures referenced in the Panel's question are the Internet Culture Rule, the Internet Culture Notice, the Network Music Opinions, and the Several Opinions.

107. To provide general context for this response, the United States challenges these measures as inconsistent with Article XVII of the GATS because these measures accord less favourable treatment to foreign-invested entities engaged in the electronic distribution of sound recordings than what domestic Chinese enterprises enjoy.[92] Under market access for mode 3 in Sector 2D of China's Services Schedule, China committed to permit foreign service suppliers to establish contractual joint ventures with Chinese partners to engage in sound recording distribution services. In addition, China scheduled no national treatment limitations under mode 3 for these Chinese-foreign contractual joint ventures. Despite these commitments, China's measures prohibit any foreign-invested entities from engaging in sound recording distribution services in China.

108. First, the Internet Culture Rule sets up an overarching regulatory structure for enterprises engaging in the electronic distribution of sound recordings, including requiring entities engaging in such services to obtain a government approval. Article 4 of the Internet Culture Rule defines Internet culture units as "Internet information service providers approved . . . to engage in Internet cultural activities."[93] Thus, an entity may not engage in the electronic distribution of sound recordings without becoming an approved entity under the Internet Culture Rule.

109. Second, the Internet Culture Notice expands on the regulatory structure established by the Internet Culture Rule by setting up the procedures for the approval of entities engaged in the electronic distribution of sound recordings. The Internet Culture Notice explicitly states that its purpose is "to implement" the Internet Culture Rule. On this basis, Article II of the Internet Culture Notice provides that "all areas shall not accept applications to engage in Internet cultural activities from Internet information service providers with foreign investment."[94]

110. Third, Article (8) of the Network Music Opinions provides that "[f]oreign-invested network cultural business units are prohibited." Network cultural business units are entities engaged in network music product operations and network music includes "music products transmitted through such wired or wireless media as the internet and mobile communications." (Article I(1)).[95]

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[92] U.S. First Written Submission, paras. 350-58.

[93] Exhibit US-32.

[94] Exhibit US-34.

[95] Exhibit US-34.

111. Finally, Article 4 of the Several Opinions prohibits foreign investors from "setting up and operating [a] business dealing in internet culture."[96]

112. Therefore, the Internet Culture Notice, the Network Music Opinions, and the Several Opinions explicitly prohibit foreign-invested entities from distributing sound recordings electronically. As such, each of these measures is, on its own, inconsistent with China's Services Schedule and thus Article XVII of the GATS.

113. The Internet Culture Rule does not, on its own, provide for less favorable treatment for foreign-invested entities engaging in sound recording distribution services and thus is not, on its own, inconsistent with Article XVII of the GATS. However, the Internet Culture Rule sets up the overarching regime that, as implemented, accords less favorable treatment to foreign-invested suppliers of sound recording distribution services.

114. As suggested by the Panel, the table below shows the relevant provisions of each of the measures inconsistent with Article XVII of the GATS.

Measure	**Provisions**	**Inconsistency with GATS Article XVII**
Internet Culture Notice	Article II	provides that foreign-invested service suppliers may not apply to engage in the electronic distribution of sound recordings
Network Music Opinions	Article (8)	provides that foreign-invested entities may not engage in the electronic distribution of sound recordings
Several Opinions	Article 4	prohibits foreign investors from "setting up and operating" a business that distributes sound recordings electronically

204. With reference to paras. 147, 150 and 151 of the US first written submission where various activities are referred to, such as "digital wholesale distribution of sound recordings"; transmission of sound recordings through wired or wireless media, the Internet and mobile communications; and wholesale electronic distribution of sound recordings, could the United States explain why and how these activities constitute electronic distribution of sound recordings?

115. As the United States set forth in response to Question 110(a), the dictionary definition of "distribution" is "the action of dealing out in portions or shares among a number of recipients;

[96] Exhibit US-6.

apportionment; allotment; or the dispersal of commodities among consumers effected by commerce."[97] Accordingly, the United States considers that "distribution" refers to the various activities undertaken to deal out or disperse – *i.e.*, move – a good or service further downstream in the chain from production to consumption.

116. An entity engaged in the distribution of sound recordings will seek to move sound recordings downstream from production to consumption and there are various means for doing so. With respect to the particular activities identified in the Panel's question, each of those activities refers to a means of supplying sound recording distribution services.

117. First, the United States considers that the digital wholesale distribution and wholesale electronic distribution of sound recordings are synonymous.[98] As discussed in more detail in response to Questions 239 and 241, audiovisual products, such as sound recordings, may be the subject of an arrangement whereby an entity sells or rents to another entity the right to use a sound recording to distribute it to consumers.[99] For example, record companies may sell the right to use their sound recordings to an entity who has the right to sell – *i.e.,* retail – the digital copies of those sound recordings to consumers; the seller of digital copies would then share the revenue associated with the retail sales with the record company. The transaction between the record company and the retailer of sound recordings may be considered a wholesale transaction; *i.e.*, the record company sells the retailer the right to use the sound recording for the business of selling copies of the sound recordings to consumers. This would be one typical model for distributing sound recordings. The terms "wholesale electronic distribution" and "wholesale digital distribution" thus refer to these means of distributing sound recordings.

118. In addition, "transmission" (*i.e.*, using an electronic infrastructure, such as the Internet, to convey sound recordings) constitutes a means of supplying sound recording distribution services because it is a means of moving the sound recording through the stream of commerce.[100] To put the concept of transmission in context, the Panel, in its question, cites paragraph 150 of the U.S. first written submission as referring to the "transmission of sound recordings through wired or wireless media, the Internet and mobile communications."[101] This language comes from Article I(1) of the Network Music Opinions, which refers to "[m]usic products transmitted through such wired or wireless media as the internet and mobile communications . . . ."[102]

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[97] *New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).

[98] *See* U.S. Answers to Questions Posed by China to the United States, para. 2.

[99] This may involve a licensing arrangement whereby the record company is selling the limited right to use the sound recording to sell copies of that sound recording to consumers.

[100] *See* U.S. First Written Submission, para. 150.

[101] U.S. First Written Submission, para. 151 citing Network Music Opinions, Article 8 (Exhibit US-34).

[102] Exhibit US-34.

119. That same provision – Article I(1) of the Network Music Opinions – also provides that music products transmitted electronically "have helped shape the digital music production, dissemination, and consumer models, thus promoting the network culture industry in China and enriching the cultural and recreational life of the people."[103] By referring to the production, dissemination, and consumption of electronically transmitted music products, this provision makes clear that it deals with the movement of sound recordings downstream through electronic means; *i.e.*, the electronic distribution of sound recordings.

120. The specific activity of "transmission" could involve using the Internet, or other electromagnetic means or network, to transmit a sound recording to a consumer who downloads a copy of the sound recording on a personal device such as a computer or other device that can store digital copies of sound recordings. "Transmission" could also involve using the Internet, or other electromagnetic means or network, to transmit the sound recording to a consumer, allowing that consumer to listen to the sound recording without downloading or retaining a copy of the sound recording on any personal electronic storage device.

121. Both of these types of "transmission" are typical means of conveying sound recordings to consumers. As the United States has set forth previously, audiovisual products are of specific interest to consumers because of their content.[104] Thus, distribution of such products may involve a means of allowing the consumer to enjoy the content without retaining a copy of the product containing the content. Indeed, hard-copy audiovisual products such as DVDs and CDs may be distributed to consumers through rental services; the consumer rents the DVD or CD to enjoy the content (*e.g.*, the movie or music) but does not make or retain a copy for personal use.[105] Similarly, the transmission of a sound recording through the Internet is a means of conveying or distributing a sound recording to a consumer and, in some instances, the consumer may retain a copy of that sound recording, while in other instances, the consumer may enjoy the content without retaining a copy permanently.

122. In short, the United States considers that all of the activities identified in the Panel's question constitute electronic distribution of sound recordings. Moreover, because China prohibits foreign-invested entities from supplying such services, the relevant Chinese measures are inconsistent with Article XVII of the GATS.[106]

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[103] Exhibit US-34.

[104] U.S. Answers to the First Set of Panel Questions, para. 63. The United States notes that the context in which that statement was made in the answers to the first set of panel questions related to whether tangible items such as hard-copy sound recordings containing content were goods.

[105] In this regard, it is notable that Sector 2D of China's Services Schedule cross-references Provisional CPC section 83202, which refers to the "leasing or rental services concerning video tapes."

[106] *See* U.S. First Written Submission, paras. 349-358.

205. With reference to footnote 240 of the US second written submission, could the United States please provide its view regarding where in the provisional CPC it would classify sound recording distribution services (physical and electronic distribution)?

123. The United States begins its analysis by recalling that China has made clear that the Provisional CPC has no relevance in explaining the meaning of China's sound recordings services commitments in Sector 2.D. In response to Panel Question 87, China stated that "its GATS Schedule in the Audiovisual Services sector does not follow the W/120 or the CPC."[107] In addition, at the second panel meeting, China stated that it does not follow the Provisional CPC in Sector 2D of its Services Schedule.

124. As a threshold matter, in order to determine the meaning of China's services commitments, the text of China's Services Schedule is authoritative.[108] While Members could choose to use the W/120 and Provisional CPC as a structure for their schedule, they are not required to do so. Moreover, in the context of Audiovisual Services, the W/120 includes a sub-sector entitled "Sound recording" (which contains no CPC cross-reference), but contains no sector or sub-sector for sound recording *distribution* services. China scheduled commitments for "sound recording distribution services" and did not cross-reference any Provisional CPC codes in that commitment. Accordingly, the United States considers that the "sound recording distribution services" commitment in China's schedule is a *sui generis* category of services, not tied to the W/120 or the Provisional CPC, and must be interpreted in accordance with the customary rules of treaty interpretation in the *Vienna Convention on the Law of Treaties*.

125. Assuming *arguendo* that the classification of these services in the Provisional CPC was relevant for understanding the scope of China's commitments for sound recording distribution services, the United States submits that several subclasses of the Provisional CPC may be relevant to the distribution of sound recordings. Indeed, both the lack of a cross-reference to the CPC in the W/120 and the fact that various subclasses of the Provisional CPC may be relevant for classifying sound recording distribution services reinforces the *sui generis* nature of the single commitment for "sound recording distribution services" in China's schedule.

126. First, Provisional CPC subclass 62244 refers to "[w]holesale trade services of radio and television equipment, musical instruments and records, music scores and tapes." The services contained therein are described as "[s]pecialized wholesaling services of radio and televison equipment, musical instruments, music scores and audio and video records and tapes." Second, Provisional CPC subclass 63234 refers to "[r]etail sales of radio and television equipment, musical instruments and records, music scores and tapes." The services contained therein are described as "[r]etailing services of radio and television equipment, musical instruments, music

[107] China's Answers to the First Set of Panel Questions, Question 87.

[108] *See* U.S. Answers to the First Set of Panel Questions, para. 191.

scores, and audio and video records and tapes." As wholesaling and retailing are types of distribution and these Provisional CPC subclasses refer to audio records and tapes, the United States considers that these subclasses may be considered types of distribution of sound recordings.

127. In addition, Provisional CPC subclass 83201 referring to "Leasing or rental services concerning televisions, radios, video cassette recorders and related equipment and accessories" includes "rental services concerning pre-recorded records, sound cassettes, compact discs, and similar accessories." As the United States set forth in response to Question 204, rental service is a means of distribution typical for audiovisual products because a rental service allows the consumer to enjoy the product's content, which is of principal interest to the consumer. Indeed, the transmission of sound recordings through electronic means, where the user does not download the sound recording, may be another way of allowing the consumer to enjoy the product's content without necessarily involving a sale.

128. Finally, the United States considers that Provisional CPC Subclass 96199 ("[o]ther entertainment services not elsewhere classified") is also relevant to the extent it encompasses means of distribution of certain items not otherwise covered by the other subclasses discussed above. Class 961 refers to "[m]otion picture, radio and television and other entertainment services."

206. *With reference to paras. 140-154 of the US first written submission, is the United States alleging that China prohibits foreign-invested enterprises from engaging in digital wholesale and retail distribution of sound recordings, i.e., the reselling of sound recordings, and that this gives rise to an inconsistency with China's GATS obligations?

129. The United States challenges China's measures that prohibit foreign-invested entities from engaging in the electronic distribution of sound recordings. The electronic distribution of sound recordings may involve wholesale and retail, including reselling of sound recordings, but may also encompass other activities involved in conveying the sound recording downstream and to the ultimate consumer.

130. China's measures prohibit foreign-invested entities from engaging in any of these activities. Specifically, Article 3 of the Internet Culture Rule defines "[i]nternet cultural activities" as including *inter alia* "[a]ctivities of producing, reproducing, importing, wholesaling, retailing, renting out or broadcasting Internet cultural products."[109] The Internet Culture Notice, in turn, provides that "Internet information service providers with foreign investment" may not engage in "Internet cultural activities."[110] Because China prohibits foreign-invested entities from

[109] Exhibit US-32.

[110] Internet Culture Notice, Article II (Exhibit US-33).

engaging in any of the activities involved in electronically distributing sound recordings, these measures are inconsistent with Article XVII of the GATS.

131. Similarly, the Internet Culture Notice refers to "audiovisual products . . . that are disseminated online through the Information Network."[111] Finally, the Network Music Opinions refers to both the "dissemination" and "transmission" of network music.[112] These terms, "dissemination" and "transmission", are also means of conveying sound recordings downstream. Thus, these are means of supplying sound recording distribution services. China's measures also prohibit foreign-invested entities from engaging in any of these activities and, therefore, are inconsistent with Article XVII of the GATS.

132. In sum, the United States challenges China's measures that prohibit foreign-invested entities from supplying sound recording distribution services through various means.

207. With reference to para. 341 of the US first written submission, please clarify the concept of "AVHE product distribution". Is the United States alleging that China's measures affect the wholesale or retail of AVHE products, or something other than reselling of AVHE products?

133. The Chinese measures that are relevant to the U.S. claim affect the distribution of AVHE products. China's measures that accord less favorable treatment to foreign-invested service suppliers engaged in the distribution of AVHE products refer to the "sub-distribution" of audiovisual products. These measures are: the Audiovisual Sub-Distribution Rule, Audiovisual Regulation, the Catalogue, and the Several Opinions.[113] Article 2 of the Audiovisual Sub-Distribution Rule provides that Chinese-foreign contractual joint ventures that engage in audiovisual sub-distribution are:

> foreign enterprises and other economic organizations or individuals (hereinafter referred to as foreign parties for short) which, under the principle of equality and mutual benefit, set up cooperatively with Chinese enterprises or other economic organizations (hereinafter designated as Chinese cooperators for short) enterprises in China for the wholesale, retail or rental of audiovisual products with the approval of relevant departments of the Chinese government.[114]

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[111] Internet Culture Notice, Article I.2 (Exhibit US-33).

[112] Network Music Opinions, Article I(1) (Exhibit US-34).

[113] *See* U.S. First Written Submission, paras. 114-39 (describing the relevant measures).

[114] Audiovisual Sub-Distribution Rule, Article 2 (Exhibit US-18); *See* U.S. First Written Submission, para. 122.

134. The Audiovisual Sub-Distribution Rule was promulgated under the authority of the Audiovisual Regulation.[115] Moreover, Article 2 of the Audiovisual Regulation provides that the measure applies to "such activities as the publishing, production, reproduction, import, wholesale, retail, and rental of recorded audio and video tapes, records, and audio and video CD's."[116] Thus, based on the terms of China's measures, the "distribution" of AVHE products includes wholesale, retail, and rental of AVHE products. Indeed, in Sector 2.D of China's schedule, China makes reference to rental services by cross-referencing Provisional CPC section 83202.[117] Section 83202 of the Provisional CPC refers to "Leasing or rental services concerning video tapes."

135. The Catalogue and the Several Opinions also refer to the "sub-distribution" of audiovisual products.[118] Although these measures do not define "sub-distribution," the definition of "sub-distribution" in the Audiovisual Sub-Distribution Rule, and the activities covered by the Audiovisual Regulation provide guidance regarding the meaning of that term. Thus, because China's measures accord less favorable treatment to foreign-invested entities engaged in the distribution of AVHE products, which encompasses wholesale, retail, and rental of such products, these measures are inconsistent with China's commitments in Sector 2.D of its Services Schedule and Article XVII of the GATS.

208. With reference to para. 93 of the US second written submission, please elaborate on how the 30-year operating term places foreign-invested wholesalers at a competitive disadvantage.

136. As paragraph 93 of the U.S. second written submission explains, China requires foreign-invested wholesalers to cease their operations altogether upon the expiry of a fixed period of time. China does not impose the same termination requirements on wholly Chinese-owned wholesalers. This different treatment places foreign-invested wholesalers at a competitive disadvantage because they are formally prohibited from competing in the Chinese market, while their wholly-Chinese owned competitors are free to engage in the distribution of reading materials in China without being arbitrarily excluded from that market because a certain period of time has elapsed.

137. The operating term requirement not only disadvantages foreign-invested enterprises in terms of their post-30 year operations, but also undermines the quality of their pre-30 year operations. This requirement imposes a chilling effect on the business opportunities and

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[115] Audiovisual Sub-Distribution Rule, Article 1 (Exhibit US-18); *See* U.S. First Written Submission, para. 122.

[116] Exhibit US-16.

[117] Exhibit US-2.

[118] Catalogue of Restricted Foreign Investment Industries, Article VI:3 (Exhibit US-5); Several Opinions, Article 1 (Exhibit US-6).

commercial relationships available to foreign-invested enterprises. When faced with two potential wholesalers – a foreign-invested enterprise that can only operate for a certain period of time and a wholly Chinese-owned enterprise that operates without such constraints – the customer is likely to choose the wholly Chinese-owned enterprise, that does not have to apply to continue operations and that does not have to engage in government required internal negotiations with all investors and board directors in order to stay in existence.

138. The disadvantages experienced by foreign-invested wholesalers are particularly acute in the context of multi-year and supply contracts, where repeat services cannot be guaranteed by the foreign-invested enterprise as the expiration of its operating term approaches. Producers and customers alike are likely to disfavor suppliers with operating term limitations because that restraint entails the significant risk of service interruptions.

139. The possibility of extending an operating term does not diminish the detrimental effects of this requirement. Extension is not a certainty, despite China's unsupported assertions to the contrary. All foreign-invested wholesalers face the reality of termination at the end of their operating term. While they may obtain extension, they may not. This fact gives rise to considerable uncertainty, which negatively impacts the competitive opportunities available to foreign-invested enterprises. The questions of whether government authorities will approve extension, and whether negotiations with all investors and all board directors will be too disruptive, constitute additional prejudicial variables that place foreign-invested wholesalers at a significant disadvantage *vis-à-vis* their wholly Chinese-owned competitors.

209. With reference to paras. 101 to 103 of the US second written submission, please elaborate on how the pre-establishment legal compliance requirement is inconsistent with GATS Article XVII.

140. China's pre-establishment legal compliance requirement imposes formally different and less favorable treatment on foreign-invested distributors of reading materials by modifying the conditions of competition in favor of wholly Chinese-owned distributors of reading materials in a manner that is inconsistent with Article XVII of the GATS.[119] In Sector 4B of its Services Schedule, China undertook market access and national treatment commitments with respect to wholesale trade services through commercial presence for, *inter alia*, reading materials. Despite these commitments, China prohibits foreign-invested enterprises from engaging in wholesale trade services where they do not have a "record clean of law or regulation offences or other bad offenses for the past three consecutive years" prior to their application to engage in such

[119] *See* U.S. First Written Submission paras. 101 and 273-307; and U.S. Second Written Submission, 101-104.

services.[120] Chinese wholly state-owned enterprises are free of this restriction on their competitive opportunities in the Chinese market.

141. Thus, foreign-invested enterprises are excluded from the market if they have any infractions in the three years preceding their application to engage in wholesale trade services, no matter how minor nor how unrelated that infraction may be to the business of reading materials wholesaling. A wholly Chinese-owned distributor with the same infraction, however, is permitted to provide its services. This asymmetrical treatment works to the strong advantage of the wholly Chinese-owned enterprise, since it is permitted to distribute reading materials, while its foreign-invested counterpart is not. Fundamentally, this requirement modifies the conditions of competition in favor of wholly Chinese-owned distributors by shielding them from competition from foreign-invested enterprises that are subject to additional market entry barriers.

142. As explained in paragraphs 101-103 of the U.S. second written submission, China's argument that Article 65 of the Management Regulation subjects wholly Chinese-owned distributors to the same barriers is unavailing. First, Article 65 applies only to the "legal representative or principal person" of the wholly Chinese-owned distributor, and not the distributor itself. Thus, where the license of such a distributor is revoked for non-compliance with the Management Regulation, that individual is prevented from holding the same post for a certain period of time. Article 65 therefore simply provides for limited individual liability – *i.e.*, a demotion – where that individual's employer has its license revoked. This type of personnel action is wholly different from denying an entire foreign-invested enterprises from engaging in any reading materials distribution activities whatsoever because of a potentially unrelated minor infraction or "bad offense".

143. Second, Article 65 is narrowly tailored to cover only violations of the Management Regulation resulting in the revocation of a distributor's license. This involves two elements – a violation and a license revocation. Without both of these elements, the distributor's "legal representative or principal person" can maintain his or her level in the corporate hierarchy. In contrast, the pre-establishment legal compliance requirement is almost limitless in terms of its breadth and depth. The type of the infraction as well as the level of its severity is unbound. Indeed, the term "other bad offences" used in Article 6 of the Several Opinions is susceptible to extremely broad interpretation and could include alleged transgressions that may not be formally legal in nature, such as with respect to the concept of "friendliness" that is also found in that article.

210. With reference to "the US reply to Panel Question 73, please elaborate, with respect to each of the measures at issue, on how foreign-invested enterprises and wholly-Chinese owned enterprises are like service suppliers in the sense of GATS Article XVII.

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[120] Several Opinions, Article 6 (Exhibit US-6); *see also* Foreign-Invested Sub-Distribution Rule, Article 7.1 (Exhibit US-28); and Sub-Distribution Procedure, "Licensing Requirements" para. 1 (Exhibit US-29).

144. With respect to the U.S. claims under Article XVII of the GATS, China maintains numerous measures that accord less favorable treatment to foreign-invested entities engaged in the distribution of reading materials and AVHE products and the electronic distribution of sound recordings than the treatment given to wholly Chinese-owned enterprises.[121]

145. In all of these cases, whether the less favorable treatment applies to a particular entity depends solely on whether that entity is a foreign-invested entity or a wholly Chinese-owned entity; in other words, the national origin of the service supplier alone determines whether the less favorable treatment applies depends solely on the national origin of the service supplier.[122] As the United States set forth in response to Question 73, domestic service suppliers should be considered like foreign service suppliers where the measures at issue make distinctions between service suppliers solely based on origin.[123] Because the measures relevant to the supply of distribution services for reading materials, distribution services for AVHE products, and the electronic distribution of sound recordings, distinguish between service suppliers solely based on origin, the measures accord less favorable treatment to foreign service suppliers than to like service suppliers of China.[124]

Distribution of Reading Materials

146. Regarding reading materials, each of the measure at issue address "like service suppliers" within the meaning of Article XVII of the GATS. The Management Regulation, for instance, sets forth rules governing *inter alia* suppliers of distribution services of reading materials in China.[125] In particular, Chapter IV of the Management Regulation provides general rules governing both foreign-invested distributors and wholly-Chinese owned suppliers of the same service – reading materials distribution. Article 39, however, severely restricts the extent to which foreign-invested distributors can engage in the supply of that service in comparison to their like domestic competitors, providing that foreign-invested distributors can only engage in sub-distribution. These restriction are imposed on no basis other than the national origin of the service supplier. Accordingly, this measure accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

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[121] *See* U.S. First Written Submission, paras. 273-307 (describing the less favorable treatment accorded to foreign invested entities engaged in the wholesale distribution of reading materials); U.S. First Written Submission, paras. 326-341 (describing the less favorable treatment accorded to foreign-invested entities engaged in the distribution of AVHE products); U.S. First Written Submission, paras. 342-58 (describing the less favorable treatment accorded to foreign-invested entities engaged in the distribution of sound recordings).

[122] *See* U.S. Answers to the First Set of Panel Questions, paras. 133-35.

[123] U.S. Answers to the First Set of Panel Questions, para. 132.

[124] U.S. Answers to the First Set of Panel Questions, paras. 133-35.

[125] Article 2 (Exhibit US-7).

147. The Publication Market Rule, which implements the Management Regulation,[126] specifically addresses reading materials distribution, which includes master distribution, wholesale, and retail, and elaborates on the rules governing wholly Chinese-owned suppliers of these reading materials distribution services.[127] Article 16 of the Publication Market Rule imposes the same discriminatory limitation on foreign-invested reading material distributors, *i.e.*, that they may only engage in the sub-distribution of certain reading materials, *i.e.*, books, newspapers and periodicals. Thus, the right to engage in the full range of distribution services covered under mode 3 of Sector 4 of China's Services Schedule is contingent entirely on the national origin of the service supplier. Accordingly, this measure accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

148. The Foreign-Invested Sub-Distribution Rule, which also implements the Management Regulation,[128] is a parallel measure to the Publication Market Rule[129] and contributes to the regulation of foreign-invested reading material distributors in China. While the Publication Market Rule provides that wholly-Chinese owned distributors can engage in an extensive range of reading materials services in China, the Foreign-Invested Sub-Distribution Rule confines foreign-invested distributors to a limited sub-set of those services – *i.e.*, sub-distribution – with respect to a limited sub-set of reading materials – *i.e.*, books, newspapers and periodicals published in China.[130] Where a foreign-invested services supplier and a wholly Chinese-owned service supplier are equally capable on the merits of providing the like service, the wholly Chinese-owned supplier is granted more favorable opportunities that its foreign-invested counterpart with respect to the same service.

149. In addition, the Foreign-Invested Sub-Distribution Rule subjects foreign-invested reading materials distributors to discriminatory requirements *vis-à-vis* wholly Chinese-owned reading materials distributors. These discriminatory requirements are with respect to: operating terms;[131] pre-establishment legal compliance;[132] registered capital;[133] and examination and approval.[134] Under this measure, it is the origin of a distributor's investment alone that determines whether that distributor will be subject to the disadvantageous treatment imposed on foreign-invested enterprises as compared to wholly Chinese-owned enterprises. Accordingly, this measure

[126] Publication Market Rule, Article 1 (Exhibit US-27).

[127] Publication Market Rule, Article 2 (Exhibit US-27).

[128] Foreign-Invested Sub-Distribution Rule, Article 1 (Exhibit US-28).

[129] Publication Market Rule, Article 16 (Exhibit US-27).

[130] Foreign-Invested Sub-Distribution Rule, Article 2 (Exhibit US-28).

[131] Foreign-Invested Sub-Distribution Rule, Article 7(5) (Exhibit US-28).

[132] Foreign-Invested Sub-Distribution Rule, Article 7(1) (Exhibit US-28).

[133] Foreign-Invested Sub-Distribution Rule, Article 7(4) (Exhibit US-28).

[134] Foreign-Invested Sub-Distribution Rule, Articles 10-14 (Exhibit US-28).

accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

150. The Sub-Distribution Procedure confirms and elaborates on the discriminatory requirements set forth in the Foreign-Invested Sub-Distribution Rule relating to: operating terms;[135] pre-establishment legal compliance;[136] registered capital;[137] and examination and approval.[138] Again, none of these requirements are applicable to wholly Chinese-owned reading materials distributors, since they are not foreign-invested. For the same reasons as above, this measure accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

151. The Imported Publication Subscription Rule regulates the supply of distribution services associated with China's subscription regime for imported reading materials.[139] Pursuant to Article 4 of this measure only Chinese wholly state-owned enterprises are permitted to distribute reading materials subject to subscription – *i.e.*, imported newspapers and periodicals as well as imported books and electronic publications in the "limited distribution category".[140] Foreign-invested reading material distributors are completely excluded from providing this service, however, on the grounds that their national origin is not wholly Chinese. Accordingly, this measure accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

152. Article 2 of the Electronic Publications Regulation states that this measure applies to *inter alia* the distribution of electronic publications. This measure also confirms that foreign-invested reading material distributors and wholly Chinese-owned reading material distributors are "like" service suppliers. Article 62 provides explicitly that foreign-invested service suppliers are prohibited from engaging in wholesale and master wholesale services with respect to these products. Here again, the extent to which foreign-invested suppliers are permitted to participate in reading material distribution services is significantly reduced in relation to wholly Chinese-owned suppliers on the basis of national origin. Accordingly, the Electronic Publications Regulation accords less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

153. Finally, the Catalogue, the Foreign Investment Regulation and the Several Opinions also discriminate in favor of wholly Chinese-owned reading material distributors. The Catalogue and

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[135] Sub-Distribution Procedure, "Licensing Requirements", para. 5 (Exhibit US-29).

[136] Sub-Distribution Procedure, "Licensing Requirements", para. 1 (Exhibit US-29).

[137] Sub-Distribution Procedure, "Licensing Requirements", para. 4 (Exhibit US-29).

[138] Sub-Distribution Procedure, "Licensing Procedures" (Exhibit US-29).

[139] Imported Publications Subscription Rule, Article 2 (Exhibit US-30).

[140] Imported Publications Subscription Rule, Article 3 (Exhibit US-30).

Foreign Investment Regulation ban foreign-invested enterprises from engaging in the master distribution of books, newspapers and magazines.[141] Likewise, the Several Opinions also bans foreign-invested service suppliers from engaging in the master distribution of reading materials[142] and also impose disadvantageous pre-establishment legal compliance[143] and decision making criteria requirements on those suppliers.[144] The sole basis for this inequitable treatment is national origin. Accordingly, the Catalogue, the Foreign Investment Regulation and the Several Opinions accord less favorable treatment to foreign-invested service suppliers than that accorded to "like" domestic services suppliers within the meaning of Article XVII of the GATS.

Distribution of AVHE Products

154. In the context of the U.S. GATS Article XVII claim for AVHE products, Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment provides that the sub-distribution of audiovisual products is "limited to contractual joint ventures where the Chinese partner holds majority share."[145] Similarly, Article 1 of the Several Opinions requires the Chinese partner in a Chinese-foreign contractual joint venture engaged in the sub-distribution of AVHE products to hold 51 percent or more of the shares or occupy a "dominant position".[146] Under both of these measures, a wholly Chinese-owned entity supplying AVHE product distribution services is "like" the foreign-invested entity in that both entities are engaged in supplying the same service. However, the wholly Chinese-owned entity does not face the same limitations in structuring the entity as faced by the foreign-invested service supplier.

155. In addition, several provisions of the Audiovisual Sub-Distribution Rule set forth discriminatory requirements that are only applicable to foreign-invested suppliers, and are not applicable to domestic like service suppliers. To put this measure in context, Article 1 of the Audiovisual Sub-Distribution Rule states that one of the purposes of the measure is to "reinforce management over Chinese-foreign contractual joint ventures for the sub-distribution of audiovisual products."[147] Article 8 of the measure sets forth the requirement that the operating term for a Chinese-foreign contractual joint venture not exceed 15 years and that the Chinese party have no less than 51 percent equity in the contractual joint venture. A wholly Chinese-owned entity engaged in supplying the same service (*i.e.*, the sub-distribution of AVHE products) does not face these limitations solely because it is not a foreign-invested entity. In other words,

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[141] Catalogue, "Catalogue of Prohibited Foreign Investment Industries", Article X.2 (Exhibit US-5); and Foreign Investment Regulation, Articles 3-4 (Exhibit US-10).

[142] Several Opinions, Article 4(Exhibit US-6).

[143] Several Opinions, Article 6 (Exhibit US-6).

[144] Several Opinions, Article 6 (Exhibit US-6).

[145] Exhibit US-5.

[146] Exhibit US-6.

[147] Exhibit US-18.

the measure imposes certain restrictions on foreign-invested entities (not imposed on domestic service suppliers) solely because of their nationality. Accordingly, the measure accords less favorable treatment to foreign-invested service suppliers than to "like" domestic service suppliers within the meaning of Article XVII of the GATS.

156. In addition, Article 7 of the Audiovisual Sub-Distribution Rule provides that the parties to a Chinese-foreign contractual joint venture "shall have no record of law offenses in the three years before their application." This requirement is repeated in Article 6 of the Several Opinions. Because a wholly Chinese-owned entity engaged in supplying the same service does not have to meet this requirement, the measure distinguishes between service suppliers solely based on national origin. Accordingly, these measures accord less favorable treatment to foreign-invested service suppliers than to "like" domestic service suppliers within the meaning of Article XVII of the GATS.

157. Article 8 of the Audiovisual Sub-Distribution Rule states that "[t]he term of cooperation will not exceed 15 years" for a Chinese-foreign contractual joint venture engaged in the sub-distribution of audiovisual products. A wholly Chinese-owned entity engaged in the sub-distribution of audiovisual products is "like" the foreign-invested entity in that both entities are engaged in the same service. However, the measure distinguishes between these entities (and imposes a more burdensome requirement on the foreign-invested entity) solely based on nationality. Article 11 of the Audiovisual Sub-Distribution Rule also sets forth the examination and approval process applicable to a Chinese-foreign contractual joint venture engaged in the sub-distribution of AVHE products while Chapter V of the Audiovisual Regulation sets forth the examination and approval process applicable to wholly Chinese-owned entities supplying the same service. First, Article 31 provides that "[i]n establishing an audiovisual entity for the wholesale, retail or rental of audiovisual products, the following conditions shall be met . . ."[148] However, Article 35 provides that Chinese-foreign contractual joint ventures are permitted to sub-distribute audiovisual products but that "[s]pecific measures and steps shall be drawn up" in this regard.[149] Article 1 of the Audiovisual Sub-Distribution Rule, in turn, states that it is promulgated based on *inter alia* the Audiovisual Regulation and then sets forth the examination and approval process for Chinese-foreign contractual joint ventures.[150] This makes clear that there is one approval process that applies to wholly Chinese-owned entities engaged in the sub-distribution of audiovisual products and another that applies to foreign-invested entities engaged in the same service. The particular approval process that applies depends solely on national origin *i.e.*, whether the entity has foreign investment. Accordingly, the measure accords less favorable treatment to foreign-invested service suppliers than to "like" domestic service suppliers within the meaning of Article XVII of the GATS.

[148] Exhibit US-16.

[149] Exhibit US-16.

[150] Exhibit US-18.

158. Finally, Article 6 of the Several Opinions states that when considering applications for approval from a Chinese-foreign contractual joint venture, the relevant agencies "shall give priority to cultural enterprises outside China whose capability is great, management is standardized, technology is advanced, and are friendly toward us in conducting equity and contractual joint ventures, and ensure that the quality of the foreign investment introduced is reliable."[151] As with the other measures, because this requirement only applies if the entity is a foreign-invested entity, the measure accords less favorable treatment to foreign-invested service suppliers than to "like" domestic service suppliers within the meaning of Article XVII of the GATS.

Electronic Distribution of Sound Recordings

159. In the context of the electronic distribution of sound recordings, the relevant measures prohibit foreign-invested entities from supplying such services. As noted previously, the Internet Culture Rule sets up the overarching regime for the electronic distribution of sound recordings. Article II of the Internet Culture Notice, which implements the Internet Culture Rule, provides the requirements that an entity must meet in order to engage in the electronic distribution of sound recordings. However, that same provision also provides that "all areas shall not accept applications to engage in Internet cultural activities from Internet information service providers with foreign investment."[152] While a wholly-Chinese owned entity may engage in the electronic distribution of sound recordings by meeting the criteria set forth in Article II of the Internet Culture Notice, an entity with foreign investment may not even apply to supply such services. Whether an entity can apply to supply the services depends solely on the national origin of the supplier. Accordingly, the measure accords less favorable treatment to foreign-invested service suppliers than "like" domestic service suppliers within the meaning of Article XVII of the GATS.

160. In addition, Article 8 of the Network Music Opinions reinforces this discriminatory regime by providing that entities that want to engage in the electronic distribution of sound recordings shall meet the requirements in the Internet Culture Rule, implemented by the Internet Culture Notice.[153] However, the same provision provides that "foreign-invested" entities are prohibited from supplying such services.[154] The same "like" service supplier analysis with respect to the Internet Culture Notice also applies to Article 8 of the Network Music Opinions.

161. Finally, Article 4 of the Several Opinions confirms the discriminatory treatment in the other measures discussed above stating that "[f]oreign investors are prohibited from setting up

[151] Exhibit US-6.

[152] Internet Culture Notice, Article II (Exhibit US-33).

[153] Exhibit US-34.

[154] Exhibit US-34.

and operating . . .business dealing with internet culture."[155] The relevant measures establish a prohibition on the supply of electronic sound recording distribution services solely on entities that have foreign investment; in other words, whether the prohibition applies depends solely on the national origin of the service supplier. Accordingly, the measure accords less favorable treatment to foreign-invested service suppliers than "like" domestic service suppliers within the meaning of Article XVII of the GATS.

211. Please respond to paras. 77 and 78 of China's second oral statement.

162. In paragraph 77 and 78 of its second oral statement, China repeats its unsupported assertion that the concept of master wholesale ceased to exist after 1999. China's contention is unavailing for several reasons. First, the United States has adduced evidence in the form of two notices regarding professional training courses for master wholesale employees held in 2004.[156] These notices demonstrate that master wholesale was a type of business activity that was recognized and being conducted after 1999. The continued existence of master wholesale is further confirmed in 2006 by GAPP itself, which issued the Electronic Publications Regulation.[157] Evidence of the existence of a particular business activity does not need to take the form of a legal instrument, contrary to China suggestion.

163. Second, the Electronic Publications Regulation is a legal instrument that expressly identifies master wholesale and that prohibits foreign-invested enterprises from engaging in master wholesale.[158] China itself maintains that this measure was in effect until 2008.[159] In fact, China has only argued, albeit unsuccessfully, that the Electronic Publications Regulation stopped applying to the distribution of electronic publications by *foreign-invested enterprises* in 2004.[160] The logical consequence of this argument is that the Electronic Publications Regulation,

[155] Exhibit US-6.

[156] "Notice on Holding the On-the-Job Training Program for the Managers and Heads of Nationwide Private Bookstore and Newly-Approved Publication Master Wholesale [*Zong Pi Fa*] Companies" (Exhibit US-80) and "Notice on Holding the Second On-the-Job Training Program for the Managers and Heads of Nationwide Private Bookstore and Newly-Approved Publication Master Wholesale [*Zong Pi Fa*] Companies (Exhibit US-81).

[157] "Notice on Implementing the System for the Assignment and Training of Cadres within the Press and Publication Industries", General Administration of Press and Publication, *Xin Chu Ting Zi* [2006] No. 136, Section I.5 (excerpt) (Exhibit US-104).

[158] Electronic Publications Regulation, Article 62 (Exhibit US-15).

[159] China's First Written Submission, paras. 260, 262-263.

[160] As the United States has shown, China's prohibition on foreign-invested enterprises engaging in the master wholesale is still in effect. *See* U.S. First Written Submission, paras. 88-90 and 291-292; and U.S. Second Written Submission, paras. 86-90.

including its provisions on master wholesale, continued to apply to *wholly Chinese-owned enterprises* well after 1999.[161]

164. Third, China's reliance on the 1999 *Interim Provisions on the Administration of the Publications Market* is misplaced.[162] China contends that master wholesale ceased to exist after this measure was issued in 1999. China, however, not only fails to explain how this measure removed the concept of master wholesale from existence, but also fails even to submit this measure to the Panel. Therefore, China has failed to demonstrate that master wholesale no longer existed after 1999.

212. With reference to para. 44 of the US second oral statement, what is the main business of the joint venture?

165. The cooperation agreement of the joint venture indicates that the objective of the business is to *inter alia* "provide artists and their audiences with an unprecedented, financially sustainable music distribution and entertainment platform."[163] The agreement goes on to say that the business scope is *inter alia* to "engage in the website related music production, *distribution*, sales, and advertising."[164] The United States takes this opportunity to note that the use of "distribution" in this context exposes the flaws in China's arguments that distribution cannot encompass distribution of intangible items.

166. Moreover, as set forth previously by the United States, the Parties to the joint venture entered into this agreement on February 21, 2000, contradicting China's claim that at the time of its WTO accession, China could not have contemplated the electronic distribution of sound recordings as a commercial reality.[165] Not only could China contemplate such a commercial reality; the Government of China could become and, in fact was, an active participant in this commercial reality.

213. With reference to Exhibit US-99, is the United States suggesting that the initial sale (first sale) is part of wholesale?

167. The United States is not suggesting that the initial sale (first sale) is part of wholesale. Rather, Exhibit US-99 illustrates that master distribution includes wholesaling because it involves the constituent elements of that distribution service as defined in Annex 2 of China's

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[161] *See e.g.* Electronic Publications Regulation, Articles 61, 63, 65, and 69.

[162] China's Answers to the First Set of Panel Questions, Question 92; and China's Second Written Statement, paras. 77-78.

[163] Exhibit US-85.

[164] Exhibit US-85 (emphasis added).

[165] *See* China's First Written Submission, paras. 395-427.

Services Schedule. Exhibit US-99 includes the first sale from the publisher to the master distributor in order to demonstrate that the master distributor is engaged in "reselling".

168. Annex 2 provides that distribution – as that term is used in Sector 4 of China's GATS Schedule – consists of four main sub-sectors, including wholesaling, and that the "principal services rendered in each sub-sector can be characterized as reselling merchandise". Annex 2 then defines wholesaling as consisting of ". . . the sale of goods/merchandise to retailers, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services." Exhibit US-99 shows that master distribution, as conducted by an entity other than the publisher, satisfies the requirements of wholesaling, since it involves the reselling of reading materials to other wholesalers, retailers and industrial, commercial, institutional, or other professional business users.

214. With reference to para. 120 of China's second oral statement, does the United States agree with China that on-line music services are covered under "online information provision services"?

169. As set forth in more detail below, the United States does not agree with China that these services fall under group 843 of CPC Ver. 1.1 for "Online information provision services."

170. It is important to begin by recalling the context in which China made this statement. China argues that the electronic distribution of sound recordings is outside the scope of China's commitments for sound recording distribution services. As part of this defense, China maintains that the electronic distribution of sound recordings is not a new means of supplying an existing service, but instead is an altogether new service. China then asserts that in order to identify whether two different services are involved rather than two different means of supplying a particular service, the Panel should apply certain criteria to the service activities at issue.[166]

171. As the United States has demonstrated, not only are these criteria not grounded in any text of the WTO Agreement, but also they fail to provide a principled basis for distinguishing among services.[167]

172. One of the proposed criteria set forth by China is the international classification of the relevant service activities. In the context of applying this criterion to its analysis of the electronic distribution of sound recordings, China asserts that Version 1.1 of the United Nations Central Product Classification (CPC) classifies the electronic distribution of sound recordings in group 843 of the CPC Ver. 1.1 "Online information provision services", whereas, according to China, the distribution of physical items, such as hard-copy sound recordings, is classified elsewhere in

[166] China's Second Written Submission, paras. 160-93; China's Second Oral Statement, paras. 105-25; China's Answers to the First Set of Panel Questions, Question 97.

[167] U.S. Second Written Submission, paras. 156-63; U.S. Second Oral Statement, paras. 47-51.

the CPC Ver. 1.1.[168] According to China, this demonstrates that the electronic distribution of sound recordings is distinct from hard-copy sound recording distribution in China's Services Schedule, which is classified under a separate section of the CPC.

173. China's arguments fail. First, to the extent that the CPC is relevant for purposes of determining the meaning of a Member's services commitments, the only version of the CPC that is relevant is the Provisional CPC. This is because the Provisional CPC is the only version that Members have agreed to use to frame services commitments. Thus, the CPC Ver. 1.1 is not relevant for purposes of discerning the meaning of China's services commitments. In addition, China's Services Schedule does not contain a cross-reference to the Provisional CPC – let alone the CPC Ver. 1.1 – in the sound recording distribution services commitment in its Services Schedule.

174. Indeed, China concedes that the CPC Ver. 1.1 has limited relevance. The United States has argued that China invokes those versions of the CPC favorable to its position while disregarding versions of the CPC – including the Provisional CPC – that are unfavorable to its position.[169] In response to this argument, China states that "the United States' attempt to rebut China's argument in this respect is based on the incorrect assumption that China's reference to CPC Ver. 2 should serve as guidance for interpreting China's Services Schedule."[170] Accordingly, the United States submits that China is conceding that international classification instruments should not "serve as guidance for interpreting China's Services Schedule" and that the Panel should disregard the discussion of international classification instruments for that purpose.

175. Even if CPC Ver. 1.1 were relevant, China is incorrect that "Online information provision services" in group 843 refers to the electronic distribution of sound recordings. The Explanatory Note to group 843 provides that it includes database services, provision of information on web sites, provision of online data retrieval services from databases and other information, to all or limited number of users, and provision of online information by content providers. The United States considers that the types of services described herein refer to websites or other online platforms where a user can search for and retrieve information from a database maintained by that website or platform. For example, an Internet search engine may allow a user to search for information available on the Internet. However, the aggregation and provision of information through a search engine to the user does not appear to be the same as the supply of a service whereby an entity has a right to *sell*, *transmit*, or *distribute* copies of sound recordings.

[168] China's Second Oral Statement, para. 120.

[169] U.S. Second Written Submission, para. 161.

[170] China's Second Oral Statement, para. 122.

215. With reference to the US replies to Panel Questions 76 and 119, is the United States of the view that both sound recordings in physical form and sound recordings not in physical form are covered by China's commitments in Sector 2D of its Service Schedule? If yes, does the United States believe that distribution of the former and distribution of the latter can be different? Please explain.

176. The U.S. view is that China's commitments in Sector 2D of its Services Schedule cover distribution of both sound recordings in physical form (*e.g.*, sound recordings on a compact disc), and sound recordings that are not stored on a physical medium such as a compact disc, but that may be distributed electronically.

177. The United States considers that the distribution of sound recordings in physical form and electronic form differ in terms of the means of supplying the distribution service, but both retain the same essential character as distribution activities. As set forth above, the United States considers that distribution refers to the range of activities undertaken to move a product further downstream. The sale of a sound recording on a CD to a retail outlet or electronically to a company that then sells it through transmission over the Internet both involve distribution of a sound recording. Similarly, the retail of an item through a store or through a mail-order platform are both retail distribution activities. In both cases, the way the consumer interacts with the retailer is different, but that has little bearing on the essential activity of being able to obtain the product at issue.

178. Similarly, an entity that purchases a sound recording transmitted electronically or by purchasing a CD containing that sound recording interacts with the distributor in different ways, but the essential character of the service is the same because in the end the entity receives the sound recording.

Questions to Both Parties

239. *Please address whether the terms "distribution services" in section 2.D of China's schedule of specific commitments could be interpreted as meaning the same as - or as encompassing - "distribution services" as used under CPC 96113? Please explain why or why not, in reference to the phrases "sound recording distribution services" and "videos, including entertainment software and (CPC 83202), distribution services" as they appear in China's Schedule of specific commitments.

179. The Provisional CPC section 96113 refers to "Motion picture or video tape distribution services," which is described as "Distribution services of motion pictures and video tapes. This involves the sale or rental of movies or tapes to other industries for public entertainment, television broadcasting, or sale or rental to others." As set forth above, the United States considers that the term "distribution" encompasses the range of activities undertaken to move a good or service through the stream of commerce. Moreover, as set forth in response to Question

204, rental and leasing (and their digital analogs) are typical means of distribution for audiovisual products. This understanding is reinforced by the cross-reference to CPC 83202 ("Leasing or rental services concerning video tapes") in Sector 2D of China's Services Schedule. With respect to the "sale" of motion pictures or video tapes mentioned in Provisional CPC 96113, this appears to relate to the sale of such items to other industries; *i.e.*, wholesale. For example, a motion picture may be sold or rented to an entity (such as a television station or movie theater) that exhibits the motion picture for public entertainment, and that entity shares the revenue associated with that service with another entity upstream, such as the film production company.[171] As described in more detail in response to Question 204, this is analogous to one of the typical means for distributing sound recordings.

180. Thus, the term distribution services as it relates to sound recordings and AVHE products includes the kinds of "distribution services" set forth in Provisional CPC 96113 for motion picture or video tape distribution services. However, "distribution" is not necessarily limited to these activities. Distribution could include dissemination without charge to the recipient, for example. Indeed, distribution includes both wholesale and retail. As set forth in response to Question 204, aspects of wholesaling and retailing of certain audiovisual products also appears to fall within Provisional CPC 63234 and 62244, respectively. In addition, Provisional CPC 96199 also appears to be relevant for classifying other means of distributing sound recordings.

181. It is noteworthy that this description of "distribution services" in CPC 96113 is broader than the definition of distribution in Annex 2, which relates to the definition of distribution in Sector 4. Likewise, the inclusion of Provisional CPC 83202, rental and leasing services for videotapes, in Sector 2.D of China's Services Schedule reinforces the distinctive nature of "distribution" in the context of audiovisual services. Moreover, the fact that distribution in the context of audiovisual services can include activities not relevant to distribution in other services sectors undercuts China's attempt to limit the meaning of distribution in Sector 2.D to the meaning ascribed to that term in Annex 2 to its Schedule.

240. *Please explain how sound recordings as physical products, as well as videos and entertainment software as physical products can be covered by sector 2.D. of China's schedule in view of the fact that sector 4 (including Annex 2) does not expressly specify that the distribution of any particular good is excluded from the scope of the commitments. In your explanation, please make reference to the AB's discussion in Gambling (found at para. 180) on the mutual exclusiveness of sectoral commitments.

182. In *US – Gambling*, the Appellate Body stated that the "structure of the GATS necessarily implies [that] . . . because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that

[171] In this case, what is being "sold" or "rented" is a limited right (or license) to use the motion picture or video tape (*i.e.*, for public entertainment, broadcasting, or sale or rental to others).

service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."[172] The Appellate Body goes on to explain that: "If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other."[173]

183. Accordingly, the Appellate Body's guidance in *US – Gambling* is clear that a Member's commitment with respect to a particular service may only fall in one sector or subsector. With respect to the Audiovisual Services in Sector 2D of China's Services Schedule, the United States considers that this sector covers distribution services for, *inter alia*, hard-copy AVHE products and sound recordings.[174] While the Panel is correct that Sector 4 of China's Services Schedule does not explicitly exclude distribution services for any particular good, Sector 2D is a more specific commitment, as it relates to AVHE products and sound recordings, while Sector 4 relates to distribution services generally. The United States submits that where a Member has made a more specific commitment with respect to a particular service in one sector, the sector containing the more specific commitment should determine the scope of that services commitment, because it more accurately reflects the Member's and its negotiating partners' intentions with respect to that service. If Sector 4 were intended to encompass all of China's commitments for audiovisual services, then there would be no need for Sector 2D of China's schedule (which does, after all, expressly relate to "distribution"). Accordingly, the United States considers that the more specific Sector 2.D – not the more general Sector 4 – is the relevant sector for determining the meaning of China's commitments with respect to these services.

184. This view is reinforced by the point made in response to Question 204 that distribution of AVHE products and sound recordings, should be considered as distinctive (by comparison with distribution of other items) because of the nature of the items being distributed.

241. With reference to CPCprov subclass 96113 and its explanatory note, assuming arguendo that these might be relevant to the interpretation of commitments, please answer the following questions:

(a) What do the services described consist of? Are these different than in CPC ver. 1.1 subclass 96142?

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[172] *US – Gambling (AB)*, para. 180.

[173] *US – Gambling (AB)*, para. 180, n. 219.

[174] As noted in response to Panel Questions 76 and 119, the United States is challenging China's measures as they relate to the electronic distribution of sound recordings, and is not challenging China's measures as they relate to distribution services for hard-copy sound recordings.

185. Provisional CPC subclass 96113 refers to "Motion picture or video tape distribution services" and the Explanatory Note describes the services contained therein as "Distribution services of motion pictures and video tapes. This involves the sale or rental of movies or tapes to other industries for public entertainment, television broadcasting, or sale or rental to others." As set forth in response to Question 239, this subclass includes sale and rental of motion pictures or video tapes but only to other industries (such as movie theaters or educational institutions); *i.e.*, not for home entertainment. The supply of a service that falls in Provisional CPC 96113 will typically involve the sale or rental of the right to use a motion picture of video tape for public entertainment, broadcasting, or sale or rental to others.[175] The revenue associated with public entertainment, broadcasting, or sale or rental to others would typically be shared between the upstream and downstream entity.

186. With respect to the corresponding service in CPC Ver. 1.1, the United States understands the Panel's question to relate to subclass 96141, rather than 96142 of the CPC Ver.1, as that is the subclass that corresponds to subclass 96113 of the Provisional CPC.

187. CPC Ver. 1.1 consists of services that are different from those in Provisional CPC. CPC Ver. 1.1 subclass 96141 refers to "Motion picture and television programme distribution services" and is described as including: "distribution services of motion pictures and videotapes to other industries (but not to the general public)," "services connected with film and videotape distribution such as film and tape booking, delivery, storage," and "trade services of motion picture and video distribution rights."

188. Subclass 96141 of CPC Ver. 1.1 thus appears to encompass some of the same services activities as Provisional CPC subclass 96113, but also contains additional services activities not included in the description of Provisional CPC Subclass 96113.

(b) In referring to the sale or rental of "motion pictures or video tapes", is the explanatory note referring to the sale or rental of goods or of services?

189. The United States considers that the sale or rental of "motion pictures or video tapes" referred to in Provisional CPC 96113 refers to the sale or rental of items that are goods.

(c) Do the services covered in CPCprov subclass 96113 involve reselling?

190. The description of services contained in Provisional CPC Subclass 96113 refers to *inter alia* the sale of movies and videotapes. The United States considers that the sale of movies and videotapes can encompass the resale of such items. In addition, the Explanatory Note provides that the services contained therein involve "the sale or rental of movies or tapes to other

[175] This may involve a licensing arrangement whereby what is "sold" or "rented" is the limited right to use the motion picture or video tape for use in public entertainment, broadcasting, or sale or rental to others.

industries for public entertainment, television broadcasting, *or sale or rental to others*."[176] Accordingly, the Provisional CPC subclass 96113 contemplates that after the sale to "other industries," those "other industries" may, in turn, sell the relevant items to "others." Thus, the United States considers that the services covered in Provisional CPC 96113 may involve reselling.

(d) Is it customary, or at least possible, to provide the type of distribution services described in CPCprov subclass 96113 in respect of sound recordings as well?

191. The United States considers that it is possible to provide the type of distribution services described in Provisional CPC subclass 96113 in respect of sound recordings. In the context of the electronic distribution of sound recordings, for example, a company may sell the right to use a sound recording in digital format to another entity so that the entity may sell copies of that sound recording to other entities, such as consumers. The two entities would typically share the revenue associated with distributing the sound recordings to consumers. This is one typical means of electronically distributing sound recordings. Because the company is selling another entity the right to use the sound recording for the purpose of selling copies of it to others, these service activities with respect to sound recordings are analogous to the service activities classified in CPC Provisional subclass 96113.

242. *What is your interpretation of the term "CPC 83202" in China's commitment under section 2.D of its schedule?

(a) Please explain how "video (...) distribution services" could be meant to include "rental and leasing services of video tapes"?

192. Provisional CPC 83202 refers to "Leasing or rental services concerning video tapes" and the services contained therein are described as "Renting or hiring services concerning pre-recorded video cassettes for use in home entertainment equipment, predominantly for home entertainment." As set forth in response to Question 204, rental or leasing is one of the typical means of distribution for audiovisual products because of the nature of the product. Thus, it is reasonable for distribution of audiovisual products to include rental. Moreover, as set forth in response to Question 207, even China, in its own measure, explicitly refers to the "rental of audiovisual products" as one of the types of "sub-distribution" of such products regulated by that measure.[177]

[176] Emphasis added.

[177] Audiovisual Sub-Distribution Rule, Article 2 (Exhibit US-18).

(b) Is it your view that the inclusion of the terms "CPC 83202" in China's schedule means that, subject to limitations scheduled, a foreign supplier could, for example, establish in China to provide the service of renting videotapes to the general public? If not, why not? Does it cover anything else?

193. The United States is of the view that the inclusion of "CPC 83202" in Sector 2.D of China's Services Schedule means that, subject to limitations scheduled, a foreign supplier could establish in China to provide the service of renting videotapes to the general public.

194. The Explanatory Note for this CPC subclass provides that this subclass includes "[r]enting or hiring services concerning pre-recorded video cassettes for use in home entertainment equipment *predominantly* for home entertainment."[178] The word "predominantly" in the Explanatory Note suggests that the subclass 83202 may also cover additional activities.

ARTICLE III:4 OF GATT 1994

Questions to the United States

243. In para. 172 of its second written submission the United States argues that the subscription requirements imposed on subscribers are more onerous and delay and possibly prevent the receipt of the imported reading material by the subscriber. Given the US understanding of the meaning of the term "distribution" as used in Article III:4 (see US answer to Panel Question 138), please explain how the subscription requirements affect the distribution of the imported newspapers and periodicals.

195. China's subscription requirements disadvantage imported newspapers and periodicals by restricting: the channels through which they are distributed; the entities by whom they are distributed; and the customers to which they are distributed. Each of these restrictions affects the distribution of imported newspapers and periodicals.

196. As the United States explained in response to Panel question 138, "distribution in Article III:4 entails moving a good from one step in the chain from production to consumption to the subsequent steps in that chain." China's subscription requirement affects the movement of newspapers and periodicals (goods) through the stream of commerce to consumers.

197. The Imported Publication Subscription Rule directly regulates how, by whom and to whom imported newspapers and periodicals will be distributed in China. While domestic newspapers and periodicals move through the distribution chain on multiple tracks to consumers,

[178] Emphasis added.

their imported counterparts are limited to one track – *i.e.*, subscription. Moreover, imported newspapers and periodicals can only be moved along that single track by Chinese wholly state-owned enterprises. Domestic newspapers and periodicals, however, reach consumers through a variety of distributors, including foreign-invested enterprises, Chinese privately-held enterprises and Chinese state-owned enterprises.

198. Finally, the Imported Publication Subscription Rule affects the distribution of imported newspapers and periodicals by restricting the final step along the distribution chain – *i.e.*, consumption. Pursuant to China's subscription regime, imported newspapers and periodicals may only be distributed to subscribers that have been examined and approved by the relevant authorities. Thus, the final step of the distribution chain is constricted far more narrowly than the equivalent step in the distribution of domestic newspapers and periodicals.

244. With reference to para. 179 of the US second written submission, can the US please explain the relevance of the Imported Cultural Products Measure (in particular Article 14) to the Panel's analysis of the provisions of the Imported Publications Subscription Rule? Is the United States claiming that the Imported Cultural Products Measure provides for less favourable treatment of imported reading materials compared to treatment that is accorded to like domestic products?

199. The United States is not challenging the Imported Cultural Products Measure in this dispute.[179] The United States cites to this instrument as evidence of the operation of the Imported Publications Subscription Rule. The United States submits that the Imported Publication Subscription Rule is inconsistent with Article III:4 of the GATT 1994 in part because consumers of imported newspapers and periodicals can only obtain these products by subscription after being examined and approved by the Chinese Government. Consumers of domestic newspapers and periodicals do not face the same restrictions.

200. Article 14 of the Imported Cultural Products Measure confirms that the distribution of imported newspapers and periodicals to consumers is contingent upon examination and approval, stating, "[d]omestic units and individuals inside China who wish to subscribe to outside newspapers and periodicals from newspaper and periodical import units must go through examination and approval procedures." China's contention that the Imported Cultural Products Measure does not apply to the imported newspapers and periodicals subscription regime is belied by the fact that Article 14 explicitly regulates that regime.[180] Moreover, as the Imported Cultural Products Measure was issued in 2005, the Imported Publication Subscription Rule of 2004

[179] U.S. Answers to the First Set of Panel Questions, para. 40.

[180] China's Second Oral Statement, paras. 135-137.

cannot be a subsequent "rule or measure that runs contrary to" the Imported Cultural Products Measure, as China asserts.[181]

245. Please explain its statement in para. 186 of its second written submission that the "Internet Culture Rule and the Network Music Opinions establish two separate and distinct content review regimes for sound recordings intended for electronic distribution". Is there one regime established by one measure that applies to domestic products while the other measure applies to imported ones? Are imported products subject to different content review regimes under each measure?

201. The discriminatory content review regime applicable to hard-copy sound recordings intended for electronic distribution is established through the Internet Culture Rule and the Network Music Opinions. The Internet Culture Rule provides for one regime that reviews whether domestic products conform to China's content standards, and another, more onerous, regime that reviews whether imported products conform to China's content standards. The Network Music Opinions implements the Internet Culture Rule and reinforces the discriminatory treatment set forth in the Internet Culture Rule.

202. First, the Internet Culture Rule provides that imported Internet culture products "shall be reported to the Ministry of Culture for examination of their contents."[182] Such imported products must be approved by the Ministry of Culture. This is reinforced by Article 22 of the Internet Culture Rule, which provides that "[t]hose who engage in commercial Internet cultural activities without approval shall be investigated and dealt with by the cultural administration of the people's government at the provincial level or above . . . ."

203. In contrast, Article 16 of the Internet Culture Rule also provides that "Internet cultural units that circulate domestically produced Internet cultural products that need to be *filed* as required by relevant provisions shall file with the Ministry of Culture within 60 days of officially beginning circulation."[183] Thus, Article 16 of the Internet Culture Rule makes clear that imported Internet culture products must be *examined* by the Ministry of Culture for their contents while domestic like products need only be *filed* with the Ministry of Culture.

204. This discriminatory treatment is reinforced by Article 26 of the Internet Culture Rule. This provision sets forth the consequences for failing to abide by the content review requirements applicable to imported and domestic sound recordings intended for electronic distribution. Specifically, Article 26 provides the consequences for circulating imported Internet culture products without displaying the Ministry of Culture "approval number" or circulating

[181] China's Second Oral Statement, para. 136.

[182] Internet Culture Rule, Article 16 (Exhibit US-32).

[183] (Exhibit US-32) (emphasis added).

"domestically produced Internet cultural products without filing them with the Ministry of Culture before the deadline" or failing to display the filing number on such domestic products. These provisions of the Internet Culture Rule make clear not only that the content review requirement applicable to imported hard-copy sound recordings and domestic like products are different, but also that the imported products are subject to a more onerous content review requirement. The imported products must be submitted to the Ministry of Culture for examination of contents and be approved prior to circulation, whereas domestic products need only be filed with the Ministry of Culture within 60 days of the date the domestic product began to circulate.

205. The Network Music Opinions implements and reinforces the same discriminatory content review regime set up by the Internet Culture Rule.[184] These two measures do not set up two separate regimes. Instead, the Network Music Opinions provides more detail regarding the content review regime set forth in the Internet Culture Rule. The relationship between the two measures is made clear in the opening paragraph of the Network Music Opinions, which states that the Network Music Opinions "are based on the . . . the Interim Rules on the Management of Internet Culture (Ministry of Culture Order No. 27, revised in compliance with Order 32 of the Ministry of Culture, hereinafter designated as 'Rules')."[185]

206. Article 9 of the Network Music Opinions then reiterates the discriminatory treatment applicable to imported products stating that "[i]mported music products can *only* be used after the Ministry of Culture examines their content." This provision sets forth no such requirement applicable for domestic products. Instead, this provision reinforces the differential treatment in the Internet Culture Rule, which states that "[d]omestically produced music products that are to be exclusively transmitted over the network shall be filed with the Ministry of Culture."[186]

207. Finally, Appendix 2 of the Network Music Opinions provides additional detail regarding the approval process for imported sound recordings intended for electronic distribution.[187] Specifically, Appendix 2 lists the materials that need to be provided to the Ministry of Culture as part of the application for approval for such imported products.[188] No such requirements are set forth for the domestic like products.

208. In short, the Internet Culture Rule and the Network Music Opinions together create a discriminatory content review regime, setting forth an onerous approval process for imported sound recordings intended for electronic distribution and a mere filing requirement for domestic

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[184] *See* U.S. First Written Submission, para. 187.

[185] Exhibit US-34.

[186] Network Music Opinions, Article 9 (Exhibit US-34).

[187] Network Music Opinions, Appendix 2 (Exhibit US-34).

[188] *See* U.S. First Written Submission, paras. 190-95.

like products. The Internet Culture Rule establishes the discriminatory requirements, and the Network Music Opinions implements the Internet Culture Rule and provides greater detail regarding the content review requirement applicable to imported products.

246. With respect to the US response to Panel Question 126, please point the Panel to the portion of its Panel Request which refers to the various elements in Article III:4 other than distribution.

209. The U.S. Panel Request sets forth the U.S. claim that China's measures accord less favorable treatment to imported sound recordings intended for electronic distribution than domestic like products, and that such treatment is inconsistent with Article III:4 of the GATT 1994. Article III:4 requires Members to accord national treatment to imported products "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

210. Article 6.2 of the DSU requires a party requesting establishment of a panel to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consistent with this requirement, in the context of the U.S. claim under the GATT 1994 for hard-copy sound recordings intended for electronic distribution, the U.S. panel request identified all of the relevant measures and the relevant WTO obligation that these measures breached – *i.e.*, Article III:4. Thus, the United States has satisfied the requirement in Article 6.2 of the DSU.

211. The United States recalls that China contends that the United States is asserting a "new claim" by challenging the relevant measures' effects on the use *and* distribution of the imported product.[189] China's argument is without merit. The U.S. *claim* is that the relevant measures accord less favorable treatment to imported products in contravention of Article III:4. Whether the relevant measures affect the use or distribution of the imported product – or both – are *arguments* in support of the claim, not separate claims. Thus, the U.S. claim itself has not changed.

247. *In para. 195 of the US second written submission, the United States argues that the Chinese measures "affect the movement of these imports through the process from importation to consumption".

(a) Please explain the relationship between the "movement" of imports through the process from importation to consumption with the specified elements set forth in Article III:4 of the GATT 1994;

[189] China's Second Written Submission, para. 211.

212. Article III:4 provides that national treatment must be accorded to all imported products "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

213. As described in more detail below, many of the elements identified in the words "internal sale, offering for sale, purchase, transportation, distribution or use" in Article III:4 may involve distinct commercial activities. However, all of the elements have a connection to how a product gets into the stream of commerce and makes its way downstream; in other words, how it makes its way from the border to the ultimate consumer, including getting from one entity to another. Thus, these elements have a connection to the movement of the product from importation to consumption.

214. Moreover, these concepts – internal sale, offering for sale, purchase, distribution, transportation, and use – should not be understood as entirely discrete concepts or stages in a product's movements. Rather, these concepts often overlap and should be construed in recognition of this overlap. Each of these elements may involve distinct activities, but they may also overlap. For example, the sale or purchase of a product may be distinct activities; however, a measure affecting one of these elements will also often affect the other element since sale and purchase of a product often occur as part of a single transaction. In addition, distribution of a product may involve both purchase of that product and offering for sale of that product. A distributor may purchase the product from an upstream entity and offer it for sale to a downstream entity. Thus, distribution overlaps with purchase and offering for sale. Distribution of a product may also involve managing the logistics necessary to ensure that a product gets downstream. This particular distribution activity does not necessarily involve sale or purchase of the product, but it could overlap with transportation or use of the product.

215. Indeed, viewing each of the elements in the chain of a product's movement (*i.e.*, sale, offering for sale, purchase distribution, transportation, or use) as an entirely separate and discrete element could lead to gaps in the national treatment disciplines accorded under Article III:4 of the GATT 1994. Under such an approach, Members could circumvent the national treatment obligation with measures that accord less favorable treatment to imported products but are found to not "affect" the product's movement through the chain from production to consumption simply because one step in the product's movement downstream does not meet some potentially inflexible definition of sale, purchase, distribution, transportation or use. Given this situation, the requirement under Article III:4 that a measure be "affecting" one of these elements is more appropriately interpreted as a requirement concerning whether an imported product faces less favorable treatment than its domestic counterpart as it moves through the stream of commerce.

216. Let us take the specific example of a hard-copy sound recording intended for electronic distribution in China. Under the relevant Chinese measures, an imported hard-copy sound recording that is not submitted for content review and approved by the Ministry of Culture has no distribution opportunities in China, nor does such a product have opportunities for sale or use in

China. Instead, an imported product that has not been through the required content review procedures cannot move anywhere in the chain from importation to consumption, is effectively stuck in some early stage of the chain of distribution, and has no real commercial opportunities in China's market. In contrast, a domestic sound recording intended for electronic distribution has access to the sale, distribution, and use opportunities generally available in the Chinese marketplace without being submitted to government authorities for content review and approved.

217. Thus, if the Panel were to consider that the movement of the imported product from the importer to the Internet Culture Provider (ICP) or the Mobile Content Provider (MCP) did not constitute distribution, this would allow a measure that accords less advantageous opportunities to imports – that are effectively stuck in some early stage in the chain of distribution – to escape the national treatment disciplines in Article III:4.

218. It is important to reiterate that even where the imported sound recording intended for electronic distribution *is* submitted for content review, the discriminatory content review requirement delays and potentially blocks the movement of the imported product in a way that the domestic like product is not blocked or delayed. Because the domestic sound recording need only be filed with the Ministry of Culture, it does not face the potential administrative pitfalls of a content review and approval process that can delay or potentially block the imported product. This, too, amounts to less favourable treatment affecting the imported product's distribution.

219. Moreover, the fact that imported sound recordings are subject to the content review requirement has the potential to diminish their commercial appeal. Potential distributors know that the products are subject to greater delays and potential blocks during the distribution process because of the content review requirement and, as a result, may be less inclined to distribute imported products than domestic products.

220. The United States would also like to take this opportunity to reiterate that the relevant measures satisfy the "affecting" requirement in Article III:4 because the measures affect the use of the imported product. Because of the discriminatory content review regime, the ICP/MCPs' use of the imported product is limited compared to the use of the domestic product. The ICP/MCP may not engage in any of the activities necessary to move the imported product downstream without submitting the product for content review, while the ICP/MCP may move a domestic sound recording without subjecting it to the additional step of submitting it to content review and obtaining government approval.

(b) Please respond to China's argument in para. 151 of its second oral statement;

221. Contrary to China's contentions in paragraph 151 of its second oral statement, the United States is not, in its Article III:4 claim, challenging measures on the grounds that they affect the transmission of content over the internet.

222. The U.S. claim relates to the treatment of imported hard-copy sound recordings that are intended for electronic distribution. As discussed in response to the previous question, the movement of the imported hard-copy sound recording is limited in a way that the movement of the domestic like product is not limited. These limitations affect the internal sale, offering for sale, purchase, distribution, transportation, or use of the imported hard-copy sound recording intended for electronic distribution. The U.S. claim under Article III:4 challenges this less favourable treatment accorded to imports.

(c) Please tell the Panel where the hard-copy sound recording is "consumed";

223. In the case of hard-copy sound recordings intended for electronic distribution, when the ICP or MCP is supplied with the hard-copy sound recording intended for electronic distribution, the ICP/MCP is acting as the consumer of that product. The ICP/MCP uses (*i.e.*, consumes) the hard-copy sound recording as part of its process for moving the product downstream. The ICP/MCP may also be said to be acting as a distributor in moving the product further downstream.

224. Thus, the United States considers that consumption does not relate merely to retail consumption (just as a rental car company "consumes" the cars that it leases to its customers).

(d) Would your reasoning also apply to exposed and developed cinematographic film?

225. The United States understands the Panel to be asking whether the United States considers that China's measures regulating films for theatrical release contravene the national treatment obligation in Article III:4 because they accord less favorable treatment to imports of such products by affecting their movement through the stream of commerce. The United States considers that this reasoning does apply to exposed and developed cinematographic film.

226. Specifically, an imported film for theatrical release may not move anywhere in the stream of commerce unless it is moved through certain specified channels required under the relevant Chinese measures. As the United States has set forth previously, imported films may only be distributed by two state-controlled enterprises.[190] In contrast, domestic films, as they move through the stream of commerce, are not subject to these limitations and may be distributed by any distributor in China.[191] This results in less advantageous commercial opportunities for the imported product, a classic inconsistency with the national treatment obligation.

[190] U.S. First Written Submission, para. 382.

[191] U.S. First Written Submission, para. 382.

227. With respect to the fact that the product that is ultimately seen in a theater – a film print – is typically different from the product that is imported – internegative or interpositive – the United States considers that this fact does not alter the national treatment analysis. The sole factor for determining whether an imported internegative or interpositive is limited to being distributed by two state-controlled enterprises or may be distributed by any distributor in China, is whether the product is imported or domestic. The conversion of the internegative or interpositive into film prints during the distribution process does not eliminate the less favorable treatment accorded to the imported product. Accordingly, China's measures accord less favorable treatment to imports in contravention of Article III:4 of the GATT 1994.

248. *In para. 201 of the US second written submission, the United States argues that "regardless of whether this duopoly is mandatory, it is discriminatory nonetheless." Please clarify for the Panel exactly what it means by this statement.

228. The phrase quoted from paragraph 201 of the U.S. second written submission means that China's distribution duopoly for imported films for theatrical release, as it actually exists and operates, would still be discriminatory, even if China is correct, which it is not, that this duopoly is not explicitly provided for in its law. The United States has demonstrated,[192] and China has confirmed,[193] that there are only two state-owned distributors of imported films. Thus, the parties agree that a distribution duopoly exists in fact. China has only designated two state-owned distributors, a fact that has not changed since 2003, when Huaxia was established to transform China's imported film distribution monopoly into a duopoly.

229. The United States has also established that this duopoly is discriminatory.[194] In other words, imported films are accorded less favorable treatment than domestic films because they are limited to these two distributors, while domestic films are free to be distributed by these two distributors as well as any one of the 50 distributors available in China. Therefore, even if China is correct, which it is not, that this duopoly is not explicitly provided for in its law, the duopoly is nonetheless discriminatory.

[192] U.S. First Written Submission, paras. 201 and 398; and U.S. Second Written Submission, paras. 201-202.

[193] China's Answers to the First Set of Panel Questions, Question 136; and China's Second Oral Statement, para. 159.

[194] U.S. First Written Submission, paras. 201-222 and 397-409; U.S. Answers to the First Set of Panel Questions, paras. 246-253; and U.S. Second Written Submission, paras. 201-213.

230. Of course, paragraph 202 of the U.S. second written submission shows that China's distribution duopoly also exists as a matter of law, as provided in both the Film Distribution and Projection Rule[195] and the Distribution and Exhibition of Domestic Films Measure.[196]

249. For each measure challenged under Article III:4 of the GATT 1994, please clarify how the cited provisions of that measure regulate, or affect, the goods at issue as opposed to distribution services or service suppliers.

231. As explained in paragraphs 377 to 382 of the U.S. first written submission, China's measures challenged under Article III:4 of the GATT 1994 affect reading materials, hard copy sound recordings intended for electronic distribution, and films for theatrical release. These measures are: the Imported Publication Subscription Rule; the Foreign-Invested Sub-Distribution Rule; the Network Music Opinions; the Internet Culture Rule; the Audiovisual Regulation; the Audiovisual Import Rule; the Film Regulation; the Provisional Film Rule; and the Film Distribution and Projection Rule.

232. It is also important to note that while it is necessary that a measure affect goods in order to be challenged under the GATT 1994, it is not necessary for a measure to affect *only* goods in order to challenge that measure under the GATT 1994. WTO Members do not necessarily draft their measures to fall exclusively within the GATT 1994 or the GATS. As is evident in the present dispute, a single measure may be inconsistent with multiple covered agreements.

Reading Materials

233. The Imported Publication Subscription Rule is part of China's legal regime that regulates how imported newspapers, periodicals, books and electronic publications can be obtained in China. This measure mandates that all imported newspapers and periodicals as well as all imported books and electronic publications in the "limited distribution category" can only be acquired through subscription[197] by consumers that are examined and approved by the Chinese Government.[198] Moreover, the Imported Publication Subscription Rule provides that these reading materials may only be obtained from Chinese wholly state-owned enterprises.[199] As these restrictions do not apply to like domestic products, these products are accorded significant competitive advantages in the reading materials market in China. Therefore, the Imported Publication Subscription Rule "affects" reading materials within the meaning of Article III:4 of the GATT 1994.

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[195] Article III (Exhibit US-21).

[196] Article III.1 and Article IV.II.1 (Exhibit US-40).

[197] Article 3 (Exhibit US-30).

[198] Articles 5-9 (Exhibit US-30).

[199] Article 4 (Exhibit US-30).

234. The Foreign-Invested Sub-Distribution Rule also directly regulates imported reading materials in China. This measure provides that only domestic books, newspapers and periodicals can be obtained from foreign-invested sub-distributors.[200] In so doing, the Foreign-Invested Sub-Distribution Rule imposes discriminatory limits on how imported books, newspapers, periodicals and electronic publications may be obtained, *i.e.*, from only a sub-set of all of those entities permitted to distribute domestic reading materials. The Foreign-Invested Sub-Distribution Rule, therefore, affects reading materials by implementing the regime that limits the channels through which the imported products may be acquired.

Hard Copy Sound Recordings Intended for Electronic Distribution

235. The Network Music Opinions directly govern hard copy sound recordings intended for electronic distribution. In particular, Article III.9 of the Network Music Opinions directly affects the speed to market for imported and domestic sound recordings. It requires all imported versions of such goods to undergo content review by the Ministry of Culture prior to further distribution. As for domestic hard copy sound recordings intended for electronic distribution, these goods must only be registered with the Ministry of Culture. Therefore, the Network Music Opinions "affects" hard copy sound recordings intended for electronic distribution within the meaning of Article III:4 of the GATT 1994.

236. The Internet Culture Rule also directly governs hard copy sound recordings intended for electronic distribution by applying asymmetrical content review requirements on these goods. For example, Article 16 of the Internet Culture Rule confirms that the Ministry of Culture is responsible for the content review of imported hard copies of sound recordings intended for electronic distribution. Likewise, the same article also reiterates the requirement applied to domestic versions of such goods that they must be registered with the Ministry of Culture. Therefore, the Internet Culture Rule "affects" hard copy sound recordings intended for electronic distribution within the meaning of Article III:4 of the GATT 1994.

237. The Audiovisual Regulation and the Audiovisual Import Rule regulate audiovisual products, including sound recordings, and make clear that these goods are subject to the same bifurcated content review system as that provided for in the Network Music Opinions and the Internet Culture Rule. Pursuant to the Audiovisual Regulation, domestic audiovisual products are to be reviewed by their own publisher under the "editorial responsibility" system,[201] while imported audiovisual products are subject to content review by the Ministry of Culture.[202] The Audiovisual Import Rule reiterates that imported audiovisual products, including sound

[200] Article 2 (Exhibit US-28).

[201] Article 16 (Exhibit US-16).

[202] Article 28 (Exhibit US-16).

recordings, must be submitted for content review by the Ministry of Culture.[203] Accordingly, these measures "affect" hard copy sound recordings intended for electronic distribution within the meaning of Article III:4 of the GATT 1994.

Films for Theatrical Release

238. The Film Regulation is the principal Chinese measures regulating films for theatrical release and how they are produced, imported, exported, distributed and screened.[204] As the United States has demonstrated, films for theatrical release are goods.[205] This measure was issued by SARFT, which is the Chinese government agency with primary responsibility over these goods. The Film Regulation sets forth general rules governing films for theatrical release and is further elaborated by additional measures at issue, including the Provisional Film Rule and the Film Distribution and Projection Rule. The Film Regulation, thus, "affects" films for theatrical release within the meaning of Article III:4 of the GATT 1994.

239. The Provisional Film Rule was issued by SARFT and contains rules further regulating films for theatrical release and their production, distribution, projection, importation and exportation.[206] For example, Article 16 of this measure requires that imported films may only be distributed in China by entities "approved" by SARFT at its own discretion and without application procedures or other conditions. As a result, imported films are limited to the two state-controlled distributors who have been "approved". As for domestic films, Article 10 of the Provisional Film Rule states that these goods can be distributed by any Chinese-owned enterprise that satisfies the application criteria enumerated therein. Therefore, the Provisional Film Rule "affects" films for theatrical release within the meaning of Article III:4 of the GATT 1994.

240. Finally, the Film Distribution and Projection Rule was also issued by SARFT and provides further elaboration on the rules governing films for theatrical release in China. In particular, this measure provides that imported films may only be distributed by two state-controlled distributors.[207] In addition, the Film Distribution and Projection Rule contains quantitative limitations on imported films. Article III provides that the number of imported films to be distributed on a revenue-sharing basis is contingent on the successful domestic films in the previous year. Moreover, this measure sets forth various mechanisms to support domestic films. For example, domestic films are guaranteed "active support" from the two state-controlled

[203] Article 11 (Exhibit US-17).

[204] Article 2 (Exhibit US-20).

[205] U.S. First Oral Statement, paras. 9-18; U.S. Second Written Submission, paras. 12-29; and U.S. Second Oral Statement, paras. 4-13.

[206] Article 2 (Exhibit US-22).

[207] Article III (Exhibit US-21).

distributors of imported films.[208] Accordingly, the Film Distribution and Projection Rule "affects" films for theatrical release within the meaning of Article III:4 of the GATT 1994.

250. With respect to sound recordings intended for electronic distribution, can the United States please respond to China's argument in para. 200 of its second written submission that the "distribution allegedly affected by the content review requirements does not relate to the hard-copy, which is the good actually being imported, but to the digitalized content"?

241. The measures challenged by the United States under Article III:4 of the GATT 1994 do, in fact, "affect" (within the meaning of that word in Article III:4) the distribution of the hard-copy sound recording intended for electronic distribution, and China's contention that the measures affect only the digitalized content is misplaced.

242. As set forth in response to Question 247(a), under the relevant measures, an imported hard-copy sound recording intended for electronic distribution that is not submitted for content review may not move anywhere in the stream of commerce, while a domestic sound recording does not face such a limitation. Similarly, an imported hard-copy sound recording that is submitted for content review faces delays and potential blocks before it may move through the stream of commerce because of the requirement for approval by Ministry of Culture. Domestic like products do not risk the same delay or blockage because they need not have their content reviewed and approved by Ministry of Culture before being distributed.

243. Moreover, the hard-copy sound recording is "distributed" within China. As the United States set forth in response to Question 126, the imported hard-copy sound recording is provided to the ICP or MCP in China, who submits the imported hard-copy sound recording for content review, and makes an additional copy in hard-copy format of the sound recording, before engaging in a series of activities to move the product further downstream.[209]

244. The dictionary definition of distribution is "the action of dealing out in portions or shares among a number of recipients; apportionment; allotment; or the dispersal of commodities among consumers effected by commerce."[210] Thus, the United States considers that the concept of "distribution" encompasses the range of activities undertaken to move a product through the stream of commerce. The ICP/MCP in China engages in such activities in order to move an imported-hard-copy sound recording downstream. China's discriminatory content review regime affects these activities, and therefore the product's distribution, because by imposing more

[208] Article III (Exhibit US-21).

[209] U.S. Answers to the First Set of Panel Questions, para. 255.

[210] *New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).

onerous administrative requirements on the imported product before it may be distributed, the imported product faces less advantageous distribution opportunities than the domestic product.

245. Thus, the discriminatory content review requirement affects the distribution of the imported product within the meaning of Article III:4 of the GATT 1994.

251. *With respect to the US response to Panel Question 122(c) is the United States arguing that Articles 41, 42 and 55 of the Management Regulation provide for less favourable treatment of imported reading materials compared to the treatment accorded to like domestic products?

246. The United States is not making the argument referred to by the Panel in this question. Rather, the United States referred to these three provisions of the Management Regulation to show that only approved state-owned enterprises are permitted to distribute imported newspapers and periodicals as well as imported books and electronic publications in the "limited distribution category". As the United States has demonstrated, the Imported Publication Subscription Rule is the measure containing the requirement that these reading materials can only be distributed by state-owned enterprises.[211] This requirement discriminates against imported reading materials by severely restricting the distributors available for these imported products compared to domestic reading materials.

252. *With respect to the US response to Panel Question 123(b), please refer the Panel, without reference to the provisions of any other measures, to the provision in the Internet Culture Rule which distinguishes between imported and domestic products solely based on origin.

247. The following provisions of the Internet Culture Rule distinguish between imported and domestic products solely based on origin.

248. Article 16 of the Internet Culture Rule sets up the different content review requirements for imported Internet cultural products and the domestic like product.

249. Specifically, Article 16 provides that imported internet cultural products, which include sound recordings, "shall be reported to the Ministry of Culture for examination of their contents." That provision goes on to provide the steps in the approval process.

250. In contrast, with respect to domestic products, the last paragraph of Article 16 provides that "Internet cultural units that circulate domestically produced Internet cultural products that need to be filed as required by relevant provisions shall file with the Ministry of Culture within

[211] U.S. First Written Submission, paras. 388; U.S. Answers to the First Set of Panel Questions, paras. 102-102 and 215-217; U.S. Second Written Submission, para. 173.

60 days of officially beginning circulation and shall display the Ministry of Culture filing number in a prominent place on the products."

251. This discriminatory treatment is reinforced by Article 26 of the Internet Culture Rule. This provision sets forth the consequences for failing to abide by the content review requirements applicable to imported and domestic sound recordings intended for electronic distribution. Specifically, Article 26 provides the consequences for circulating imported Internet culture products without displaying the Ministry of Culture "approval number" or circulating "domestically produced Internet cultural products without filing them with the Ministry of Culture before the deadline" or failing to display the filing number on such domestic products. These provisions of the Internet Culture Rule make clear not only that the content review requirement applicable to imported hard-copy sound recordings and domestic like products are different, but also that the imported products are subject to a more onerous content review requirement. The imported products must be submitted to the Ministry of Culture for examination of contents and be approved prior to circulation, whereas domestic products need only be filed with the Ministry of Culture within 60 days after the date the product began circulating.

252. Thus, Article 16 of the Internet Culture Rule, as reinforced by Article 26, sets up two distinct content review requirements for sound recordings intended for electronic distribution, and the content review requirement that applies depends solely on whether the product is domestic or imported. By setting up such a distinction, the measure distinguishes between imported and domestic products solely based on origin.

253. *In its response to Panel Question 128(b), the United States avers that it "considers that whether the provision of the film . . . to the distributor qualifies as 'distribution' within the meaning of Article III:4 is not relevant for the U.S. claim because the relevant measures relate to the distribution of films in China." Please explain exactly what it means by "distribution of films in China" Does it include (i) the delivery of the film from the licensor to the distributor; (ii) the delivery of the film from the distributor to the movie theatres; (iii) the projection of the film for theatre-goers, (iv) some other transaction; (v) a combination of the above examples?

253. The United States considers that the distribution of films for theatrical release in China includes all of the activities referenced in the Panel's question with the exception of projection of the film, which the United States considers to be a different activity. However, distribution of films can also include additional activities not listed in the Panel's question.

254. As the United States has set forth previously, the United States considers that the term "distribution" can encompass the range of activities undertaken to help move a product through the stream of commerce.

254. *In para. 66 of its second oral statement, the United States argues that a "film distributor in China undertakes several steps in the distribution process for an imported film such as taking the imported internegative to a laboratory to produce the interpositive, having film prints made, and distributing the film prints to local cinemas" and that the relevant Chinese measures affect the distribution opportunities for the imported product (see also para. 157 of China's second oral statement). Please explain precisely what is the imported product. Does the US include the prints made in China within its definition of the imported product?

255. The item that is the imported product will depend on the particular transaction at issue.

256. As the United States has explained, typically the product that is imported into China is the internegative or interpositive.[212] Moreover, because of China's limitations on the distribution of imported films, which are not imposed on domestic films, these imported products (*i.e.*, internegative or interpositive) face less advantageous distribution opportunities than the domestic like product, which may be distributed by any of the film distributors established in China.

257. With respect to film prints produced in China from the imported internegative or interpositive, such prints may be considered a domestic product in China depending on the particular transaction at issue. However, the United States submits that even if such prints were a domestic product, this would not affect the national treatment analysis. It is precisely because film prints made in China from an imported internegative face less advantageous distribution opportunities than film prints made in China from a domestic internegative that there is an inconsistency with Article III:4 of the GATT 1994: the conditions of competition are skewed against the imported internegative because a film print made from a like domestic internegative does not encounter the distribution obstacles that a film print made from the imported internegative does.[213]

255. *The Panel notes that the United States is challenging the Film Regulation, the Provisional Film Rule, and the Film Distribution and Projection Rule under Article III:4 of the GATT 1994 "taken together" (see US first written submission, para. 397 and US response to Panel Question 125(a)). Would there be any effect on the US claim if the Panel were to agree with China that the Film Distribution and Projection Rule has been superseded by the Provisional Film Rule?

258. There would be no effect on the U.S. claim if the Panel finds that the Film Distribution and Projection Rule has been superseded by the Provisional Film Rule. The process for selecting

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[212] U.S. Answers to the First Set of Panel Questions, paras. 42-43.

[213] *See Mexico – Soft Drinks (Panel)*, para. 8.108 (The term "affecting" "covers not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.").

distributors of imported films that is contained in the Film Regulation and the Provisional Film Rule provides for the same discriminatory distribution duopoly for imported films that is explicitly provided for in the Film Distribution and Projection Rule.

259. In this regard, however, the United States reiterates that China's argument that the Provisional Film Rule supersedes the Film Distribution and Projection Rule is untenable because these two measures are entirely consistent. The United States has shown that the "approval" process provided in the Provisional Film Rule is identical to the "designation" process included in the Film Regulation, which was adopted prior to the Film Distribution and Projection Rule.[214] The Film Regulation and the Provisional Film Rule provide for no application procedures for the distribution of imported films and allow SARFT to appoint distributors of imported films at its own discretion. The Film Distribution and Projection Rule merely makes the current duopoly enjoyed by China Film Group and Huaxia explicit.

256. *Please respond to China's argument in paras. 153-154 of its second oral statement. In particular, please comment on the radio station example. Would such a measure, in your view, be inconsistent with GATT Article III:4?

260. Any measure that regulates trade in a good must comply with the national treatment obligation under Article III:4 of the GATT 1994.

261. As the Appellate Body noted in *EC – Bananas III*, even if a measure regulates services (including broadcasting services), if that measure also accords less favourable treatment to imported goods than to the domestic like product, the measure would be inconsistent with Article III:4 of the GATT 1994. A measure that accords less favourable treatment to imported products than the domestic like product within the meaning of Article III:4 does not escape the national treatment discipline merely because the good is used to provide a service.

262. Taking China's example of radio broadcasting, if a measure prohibited the broadcasting of sound recordings imported in hard-copy form but permitted the broadcasting of domestic sound recordings, that measure would appear to affect the sale, offering for sale, purchase, distribution, or use of the imported product within the meaning of Article III:4. This is because, as compared to the domestic product, the measure limits the commercial opportunities available to the imported product including with respect to its distribution and use.

257. With reference to para. 57 of its second oral statement, is the United States implying that the listed elements in Article III:4 are illustrative?

[214] U.S. Answers to the First Set of Panel Questions, paras. 31-33 and 243-244.

263. The United States was not suggesting that the list of elements in Article III:4 (*i.e.*, internal sale, offering for sale, purchase, transportation, distribution or use) are illustrative. However, the United States considers that these concepts can, and often do, overlap and can encompass a rich variety of activities involved in moving a product through the stream of commerce.

264. Moreover, as set forth in response to Question 247(a), viewing these concepts as entirely separate and discrete could lead to gaps in the national treatment discipline. Specifically, under a more rigid approach to the "affecting" requirement, Members could maintain measures that accord less favorable treatment to imported products by restricting that product's ability to move to the next stage in the stream of commerce, merely because the movement to the next stage did not meet some potentially inflexible definition of "internal sale, offering for sale, purchase, transportation, distribution or use." Finally, the GATT 1994 does not provide any textual basis for considering these elements as entirely separate and discrete concepts, as opposed to overlapping concepts. Thus, the "affecting" requirement should be understood in this context.

258. If China is correct that there is no *de jure* duopoly on film distribution, but rather that no other companies are interested in distributing foreign films (see para. 159 of China's second oral statement, China's response to Panel Question 136), would this situation be a "measure" attributable to China within the meaning of Article 3.3 DSU?

265. China's assertion in paragraph 159 of its second oral statement and in response to Panel question 136 are based on a fundamentally flawed premise. China contends that no Chinese-owned enterprise, other than China Film Group and Huaxia, has ever "applied" to distribute imported films in China. This semantic argument ignores the fact that there is *no* process for Chinese-owned enterprises to apply. In other words, whether or not companies, other than China Film Group and Huaxia, have applied is not the issue, because they *cannot* apply to distribute imported films.

266. Article 16 of the Provisional Film Rule mandates that imported films may only be distributed by entities "approved" by SARFT. Yet, the Provisional Film Rule is silent with respect to any application mechanism for the distribution of imported films. This is in stark contrast to Article 10 of the same measure, which sets out an explicit mechanism for Chinese-owned enterprises to apply to distribute *domestic* films.

267. In fact, the Provisional Film Rule contains numerous application procedures and qualification requirements concerning other aspects of the film business in China. For example, pursuant to Articles 10 and 12 of the Provisional Film Rule, entities are required to invest a specified minimum registered capital, provide certain paper work, obtain certain licenses from SARFT, etc. in order to be approved to engage in the distribution or theater chain business, respectively. In the context of these application procedures governing the distribution of domestic films as well as other aspects of the films business, the omission of equivalent procedures in Article 16 demonstrates China's intention not to permit companies to apply for

imported films distribution in China. This intent is confirmed by the Film Distribution and Projection Rule, which explicitly states that only two state-controlled enterprises are permitted to distribute imported films in China.[215]

268. If the Panel were to find that there is no *de jure* duopoly, however, the United States has demonstrated,[216] and China has verified,[217] that a *de facto* duopoly exists which accords imported films less favorable treatment than that accorded to domestic films.[218] Therefore, as they are applied, China's measures likewise would be inconsistent with Article III:4 of the GATT 1994.

259. Please respond to China's assertion in response to Panel Question 130(c) that because of their prohibited content reading materials in the limited category are not "distributed" in the same sense as reading materials in the non-limited category. Is China's description of access to reading materials in the limited category correct? If so, how is this distribution within the meaning of Article III:4 of the GATT 1994?

269. The Imported Publications Subscription Rule regulates the distribution of imported reading materials in China. Imported reading materials in the "non-limited distribution category" are subject to many of the same requirements that are imposed on imported reading materials in the "limited distribution category", and both categories of imported reading materials are "distributed" within the meaning of Article III:4 of the GATT 1994.[219]

270. Imported reading materials in both categories fit within the U.S. as well as Chinese understanding of the term "distribution". Under the U.S. understanding, both categories of imported reading materials are moved ". . . from one step in the chain from production to consumption to the subsequent steps in that chain."[220] Likewise, both categories of these products are supplied ". . . to on-sellers or consumers" in accordance with China's understanding of "distribution".[221]

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[215] Article III (Exhibit US-21).

[216] U.S. First Written Submission, paras. 201 and 398; and U.S. Second Written Submission, paras. 201-202.

[217] China's Answers to the First Set of Panel Questions, Question 136; and China's Second Oral Statement, para. 159.

[218] U.S. First Written Submission, paras. 201-222 and 397-409; U.S. Answers to the First Set of Panel Questions, paras. 246-253; and U.S. Second Written Submission, paras. 201-213.

[219] U.S. Answers to the Second Set of Panel Questions, Question 243.

[220] U.S. Answers to the First Set of Panel Questions, para. 138.

[221] China's First Oral Statement, para. 29.

271. Pursuant to the Imported Publications Subscription Rule, imported reading materials in the "limited distribution category" can only be obtained through subscription[222] from Chinese wholly state-owned enterprises[223] by individuals and entities that have been examined and approved by the Chinese Government.[224] Contrary to China's erroneous arguments regarding access to these imported products, there is no basis in the text of this measure or otherwise to conclude that products assigned to this category contain prohibited content for the exclusive consumption of Chinese government agencies and institutions for research purposes.[225] China's efforts to characterize the ordinary distribution of these imported reading materials as a wholly unique and undisciplined exception to Article III:4 thus are unavailing.

272. Moreover, imported newspapers and periodicals in the "*non-limited distribution category*" are "distributed in the same sense" as imported reading materials in the "*limited distribution category*". Both categories: (1) are limited to a single distribution channel (*i.e.*, subscription);[226] (2) may only be distributed by Chinese wholly state-owned enterprises;[227] and (3) may only be obtained by subscribers that have been examined and approved by the Chinese Government.[228]

260. In paragraph 371 of its first written submission the United States argued that the additional content review requirements for sound recordings intended for electronic distribution also applied to sound recordings made in China whose copyright is owned by "Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, and wholly foreign-owned enterprises". Is the United States making a claim with respect to these products? If so, please explain how these are "imported products" within the meaning of Article III:4 of the GATT 1994. If not, what is the relevance of these sound recordings to the US claim?

273. The statement referred to in the Panel's question refers to a provision of the Network Music Opinions, which in connection with the more onerous content review requirements, provides that "network music products from foreign countries shall be referred to and followed for the purpose of handling copyrighted network music products owned by Chinese-foreign

[222] Article 3 (Exhibit US-30).

[223] Article 4 (Exhibit US-30).

[224] Articles 6-9 (Exhibit US-30).

[225] U.S. Second Written Submission, paras. 175-178.

[226] Imported Publication Subscription Measure, Article 3 (Exhibit US-30).

[227] Imported Publication Subscription Measure, Article 4 (Exhibit US-30).

[228] Imported Publication Subscription Measure, Articles 5-9 (Exhibit US-30); and Imported Cultural Products Measure, Article 10 (Exhibit US-10). *See* U.S. Answer to the Second Set of Panel Questions, Question 244.

equity joint ventures, Chinese-foreign contractual joint ventures, and wholly foreign-owned Enterprises."[229]

274. To the extent that products that fall in this category are, in fact, imported and then subjected to the more onerous content review requirements applicable to imported hard-copy sound recordings intended for electronic distribution, such products are within the scope of the U.S. claim under Article III:4 of the GATT 1994 as it relates to hard-copy sound recordings intended for electronic distribution.

261. Please respond to China's argument in para. 133 of its second oral statement with respect to the relationship between the Provisions on Publications Market and the Measures for Administration of Subscription of Imported Publications by Subscribers.

275. China's contention that the "limited distribution category" consists of imported reading materials with prohibited content remains unsupported, notwithstanding paragraph 133 of its second oral statement. In paragraph 133, China summarizes the two categories of imported reading materials set forth in the Imported Publication Subscription Rule – *i.e.*, the "limited distribution category" and the "non-limited distribution category". China then jumps to the conclusion that the prohibition on the distribution of prohibited content contained in the Publication Market Rule does not apply to the Imported Publication Subscription Rule. Nothing in the text of either measure precludes the application of Article 24 of the Publication Market Rule to "a measure on the subscription system".[230] In fact, Article 37 of the Publication Market Rule expressly prohibits certain types of subscriptions containing content prohibited by Article 24 of the Publication Market Rule.

276. Moreover, the Imported Publication Subscription Rule implements the Management Regulation,[231] which provides for the same prohibition on the importation and distribution of reading materials with prohibited content. Article 40 of the Management Regulation provides in relevant part, ". . . a distributing entity shall not distribute, any publications under the following circumstances: (1) those containing content prohibited under Articles 26 and 27 of these Regulations . . . ." Similarly, Article 44 states, "[t]he publications imported by a publication import entity shall not include any content prohibited under Articles 26 and 27 of these Regulations."

277. Finally, the prohibition contained in both the Publication Market Rule and the Management Regulation is confirmed by China's own statements in the present dispute that it

[229] Network Music Opinions, Appendix 2, Article V (Exhibit US-34).

[230] U.S. Second Oral Statement, para. 133.

[231] Imported Publication Subscription Rule, Article 1 (Exhibit US-30). *See also* Articles 2 and 10 which explicitly reference the Management Regulation.

maintains a "complete prohibition" on the importation of products containing prohibited content.[232] Therefore, China's assertion that the "limited distribution category" consists of imported reading materials containing prohibited content is both contradictory and unsupported.

262. In para. 58 of the US second oral statement, the United States argues that "before the Internet Culture Provider (ICP) or Mobile Content Provider (MCP) can distribute an imported product electronically, it must submit the sound recording for content review". In para. 59 of the same oral statement, the United States argues that the transfer of the sound recording from the importer to the ICP, submitting the sound recording for content review, and converting it into a format suitable for electronic transmission – to be able to move the product further downstream are all part of the "distribution process". With respect to these arguments, please answer the following:

(a) Please explain what precisely the United States believes is the "imported product" within the meaning of Article III:4 of GATT 1994? Is it (i) the hard-copy sound recording; (ii) the electronic sound recording; or (iii) both?

278. In the context of the U.S. claim under Article III:4 of the GATT 1994 related to sound recordings intended for electronic distribution, the imported product is the hard-copy sound recording intended for electronic distribution. The United States does not consider that the electronic sound recording is the imported product.

(b) If the "imported product" includes the electronic sound recording, is the United States arguing that electronic sound recordings are goods subject to GATT disciplines?

279. As stated in response to sub-question (a), the United States considers that the imported product that is subject to the GATT 1994 disciplines and that is the subject of the U.S. claim under Article III:4 claim is the hard-copy sound recording. Thus, the question of whether an electronic sound recording is a good is not presented by this dispute.

(c) Is the product that is moved further downstream the imported product?

280. The imported product – *i.e.*, the hard-copy sound recording – is moved further downstream. As the United States has set forth, once the hard-copy sound recording is imported, it is provided to the ICP or MCP, submits the hard-copy sound recording to the Ministry of Culture for content review, makes an additional copy of the hard-copy sound recording, and engages in a series of activities necessary to move the imported product downstream.[233] After

[232] China's Second Written Submission, para. 98; China's First Written Submission, paras. 135-137.

[233] U.S. Answers to the First Set of Panel Questions, para. 255.

receiving content review approval, the ICP/MCP then uses the hard-copy sound recording to create a version of the sound recording that can be distributed electronically. Thus, the hard-copy sound recording moves downstream. The ultimate retail consumer may receive the sound recording distributed electronically. However, the hard-copy sound recording moves downstream in earlier stages of the stream of commerce.

(d) What precisely does the ICP or MCP submit for content review?

281. The United States understands that the product submitted for content review would be the imported hard-copy sound recording.

263. Does the United States believe that the term "distribution" has the same meaning in Article III:4 of GATT 1994 as it does in the GATS? Why or why not?

282. It is important to begin by putting the Panel's question in context. The term "distribution" in Article III:4 refers to the distribution of goods (*i.e.*, the imported product) and the term "distribution" in the context of the GATS can refer to the distribution of goods *and* the distribution of services. That is, the supply of a particular service can involve the distribution of a good. In addition, as Article XXVIII(b) of the GATS makes clear in its definition of "supply of a service," the supply of a service can also involve the distribution of a service.

283. Moreover, the meaning of Members' services commitments is determined by analyzing the ordinary meaning of the terms in a Member's schedule. Thus, the meaning of the term "distribution" as it relates to a services commitment can be informed by the context of that particular services commitment. The national treatment obligation in the context of the GATT 1994, in contrast, is contained in Article III:4, and the concept that a measure would be inconsistent with Article III:4 if it affected, *inter alia*, the distribution of the imported product is also contained in that provision.

284. In that context, let us again turn to the definition of the term "distribution." As the United States has set forth previously, the dictionary definition of distribution is "the action of dealing out in portions or shares among a number of recipients; apportionment; allotment; or the dispersal of commodities among consumers effected by commerce."[234]

285. The United States considers that, in the context of services, the concept of "distribution" is principally focused on ensuring that goods or services move through the steps in the chain from production to consumption.[235] Thus, distribution encompasses any of the activities

[234] *New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).

[235] *See* U.S. Answers to the First Set of Panel Questions, para. 144.

involved in moving the good or service through the stream of commerce from production through consumption.

286. In the context of the GATT 1994, the United States considers that the concept of "distribution" encompasses the range of activities undertaken to move a product through the stream of commerce – *i.e.*, from production to consumption.

287. Thus, there is overlap in the meaning of distribution in the GATT 1994 and services contexts. However, the analysis of the meaning of a particular Member's obligation or the Member's measure at issue will depend on the particularities of the context in which the complaining Member's claim arises.

Question to Both Parties

274. With reference to the four measures challenged in the claim on sound recordings intended for electronic distribution (i.e., the Audiovisual Regulation, the Audiovisual Import Rule, the Network Music Opinions, and the Internet Culture Rule), please tell the Panel the following:

(a) What is submitted to MOC for content review? Is it the hard-copy sound recording or the digitalized version, or both?

288. The United States understands that the imported hard-copy sound recording must be submitted for content review.

(b) When is the hard-copy sound recording submitted for content review by MOC, prior to, during, or after importation? What about the digitalized version?

289. The ICP or MCP must submit the imported hard-copy sound recording for content review prior to converting the sound recording into a format that can be transmitted electronically. Accordingly, the United States understands that the imported hard-copy sound recording is submitted for content review after importation but before it is converted into a digitally transmittable format.

(c) Are the content review procedures in the Audiovisual Regulation and the Audiovisual Import Rule the same as those discussed in the context of the Trading Rights claim?

290. In the context of the U.S. trading rights claim, the United States challenges the provisions of the Audiovisual Regulation and the Audiovisual Import Rule that prohibit foreign-invested

entities from importing finished and unfinished sound recordings.[236] In the context of the U.S. claim under Article III:4 of the GATT 1994, the United States challenges the discriminatory content review requirements applicable to imported hard-copy sound recordings intended for electronic distribution.[237] The Audiovisual Regulation and the Audiovisual Import Rule are relevant to both the trading rights claim and the Article III:4 claim; however, the measures are challenged on different bases under each claim.

[236] U.S. First Written Submission, paras. 260-267.

[237] U.S. First Written Submission, paras. 389-96.

TABLE OF EXHIBITS

U.S. Exhibit No.	Description
US-103	*New Century Chinese English Dictionary* (4th ed., 1993), p. 372
US-104	"Notice on Implementing the System for the Assignment and Training of Cadres within the Press and Publication Industries", GAPP (Excerpt) (2006)