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

(WT/DS363)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

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I. INTRODUCTION

1. Good morning, Mr. Chairman and members of the Panel. On behalf of the United States, we would like to begin by again thanking you, as well as the members of the Secretariat assisting you, for your time and hard work in evaluating the claims that have been raised in this dispute. Our delegation looks forward to continuing our work with you, and with the delegation of China, as you complete your efforts.

2. We appreciate this opportunity to appear before you today to present further views on the reasons why the Chinese measures at issue are inconsistent with China's obligations under the Accession Protocol, the GATS and the GATT 1994. Fundamentally, China disadvantages imported reading materials, AVHE products, sound recordings, and films for theatrical release, as well as importers and distributors of these products. China deprives itself, as well as all WTO Members, of one of the principal benefits of its WTO accession – that is, increased access to high quality goods, and enhanced competitive opportunities for importers and distributors. Where China has endeavored to rebut the U.S. claims, it has fallen short, while other U.S. claims have received no response. Likewise, China has failed to sustain its burden with respect to the defenses it has raised.

3. Our previous submissions, statements and answers to the Panel's questions have already addressed many of the arguments that China has made in this dispute. In this statement, we will focus on those points that China has offered for the first time – or chose to re-emphasize – in its second written submission. During the course of this panel meeting, we will of course also be pleased to elaborate on any of these topics, or to address any other issues that may be of interest to the Panel.

II. TRADING RIGHTS: FILMS FOR THEATRICAL RELEASE, UNFINISHED AVHE PRODUCTS AND UNFINISHED SOUND RECORDINGS ARE GOODS SUBJECT TO CHINA'S TRADING RIGHTS COMMITMENTS

A. Films for Theatrical Release

4. China's most recent attempt to claim that films for theatrical release are not goods merely restates China's previous unsuccessful arguments on this same issue. For the reasons we have set

forth, all of these arguments fail.[1] In its second written submission, China contends that the United States has shifted the focus of its claim from films for theatrical release to cinematographic film, which, according to China, are two distinct concepts – cinematographic film supposedly is merely the material that carries an artistic work, and a film for theatrical release supposedly relates to a "motion picture," which China considers to be the artistic work itself. China then argues that the relevant measures deal with the importation of "motion pictures for theatrical release, i.e. artistic works, and not cinematographic film."[2]

5. China's arguments today, as well as in its previous submissions, are misplaced in all respects. First, China's contention that the United States has shifted the focus of its claim is baseless. Throughout this dispute, the U.S. claims have related to the product that the relevant Chinese measures regulate in a manner that is inconsistent with China's trading rights commitments. The U.S. claims from the beginning have related to an integrated product that includes a carrier medium carrying content that can be commercially exploited by projection in a theater. And, in response to a question from the Panel, the United States confirmed that the U.S. claims concerning trading rights relating to films for theatrical release cover "cinematographic film used to exhibit motion pictures in a theater."[3]

6. In addition, China's attempt to artificially separate goods containing content from the content itself also fails to overcome the U.S. claims. We would like to take this opportunity to discuss a few of the points raised by China.

7. Beginning with the text of the WTO Agreement, Article IV of the GATT 1994, an agreement relating to trade in goods, refers to the "exhibition of cinematographic films" in relation to screen quotas. The provision thus makes clear that, contrary to China's contentions,[4] even when discussing the commercial exploitation of the artistic work in a theater, the GATT 1994 uses the

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[1] *See* U.S. First Oral Statement, paras. 9-18; U.S. Second Written Submission , paras. 12-29.
[2] China's Second Written Submission, para. 36.
[3] U.S. Answers to the First Set of Panel Questions, para. 47.
[4] China's Second Written Submission, para. 61.

term "cinematographic film," not motion pictures. China's attempt to understate the relevance of this provision is unpersuasive. As the United States set forth in its second written submission, Article III:10 of the GATT 1994 provides an exception for films to the national treatment obligations set forth in the other paragraphs of Article III. The GATT's national treatment obligations apply only with respect to goods; thus, an exception to those obligations also applies only to goods. Article IV sets forth the exception itself and provides the form that internal quantitative regulations for a particular good – exposed cinematographic film – may take.[5]

8. In addition, China points to the language in the Harmonized Commodity Description and Coding System (HS) description of the product as referring to cinematographic film "for the projection of motion pictures."[6] However, this language demonstrates that the Harmonized System contemplates a physical product with integrated content that may be commercially exploited in a particular way. This HS description does not take films out of the category of goods, but instead confirms that films containing content to be exploited are goods. China's accession schedule of tariff concessions, incorporates the HS description of these products under heading 3706.[7]

9. China's discussion of the terms in its own measures is also unavailing. China contends that the Chinese term used in these measures, *Dian Ying*, translates to "motion picture" rather than "cinematographic film." China goes on to conclude that the Film Regulation "provides that the importer of motion pictures . . . instead of the importer of cinematographic film . . . requires designation."[8] Indeed, China has conceded that such products – the carrier medium containing content – must go through "customs clearance"[9] as part of the importation process. Thus, the motion picture, *i.e.*, the content, is part of the integrated product that is treated as an importable good for purposes of China's measures.

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[5] U.S. Second Written Submission, paras. 26-27.

[6] China's Second Written Submission, para. 34 citing Harmonized Commodity Description and Coding System, Explanatory Notes (2nd Edition), Volume 2, Sections VI-XI, Chapters 30-63, p. 549 (Exhibit CN-8).

[7] *See* Extracts from Schedule CLII (in HS96 nomenclature) (Exhibit JPN-2).

[8] China's Second Written Submission, para. 48.

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

10. China also repeats its argument that because films are a mere accessory to a service, measures relating to importation should be analyzed exclusively under the GATS, rather than the trading rights disciplines. As the United States has set forth in previous submissions, China's reasoning is flawed and has been rejected by the Appellate Body.[10] In a related argument, China asserts that a good that is an accessory to a service cannot be scrutinized under the WTO disciplines on goods. This assertion is equally untenable. First, there is no textual basis in the WTO Agreement for China's assertion that a good used to provide a service is no longer a good. Similarly, as the United States has explained, China's proposed criteria for determining when a good is a mere accessory of a service have no textual basis in the GATT 1994 or the GATS and, in any event, do not create a principled rationale for distinguishing among different kinds of goods.[11] Indeed, while China has recycled this argument numerous times during this dispute, China has ignored not only the lack of any textual basis but also the problematic implications of this line of reasoning, namely, that this approach would transform all kinds of goods into services.

11. In addition, China's repeated argument that the relevant measures regulate copyright licensing as opposed to the importation of films is without merit. While certain provisions of these measures may regulate copyright licensing, other provisions of these measures also regulate the importation of films.[12] China does not even address the other measures challenged by the United States, and provides no textual analysis to support the assertion that these measures relate exclusively to services. Indeed, China concedes that its measures regulate films when it states that "the right to import cinematographic film *in the context of these measures* exists only as a logical outcome of the right to import a motion picture for theatrical release."[13] China also concedes that it maintains a designation system for the importation of these products,[14] and as the United States has shown, China has only designated a single state-owned enterprise – the China Film Import and

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[10] U.S. First Oral Statement, paras. 13-18; U.S. Second Written Submission, paras. 18-20; U.S. Answers to the First Set of Panel Questions, paras. 259-70. *See Canada – Periodicals (AB)*, p. 17; *EC – Bananas (AB)*, para. 221.

[11] U.S. Second Written Submission, paras. 18-20.

[12] U.S. First Oral Statement, para. 14.

[13] China's Second Written Submission, para. 55 (emphasis added).

[14] China's First Written Submission, paras. 93-96; 103; China's Second Written Submission, para. 68.

Export Corporation – as an entity that can import such products.[15] China is asking the Panel to ignore the provisions of its measures relating to the importation of films and conclude that only the provisions relating to copyright licensing are relevant. But, as the Appellate Body has made clear, a measure regulating both goods and services may be analyzed under the goods and services disciplines.[16]

12. Finally, China's attempt to use its services commitments with respect to motion pictures as a shield for its trading rights-inconsistent measures is meritless. Contrary to China's contentions, these services commitments in no way "reserved [China's] right" to maintain measures that are inconsistent with its trading rights commitments – let alone the right "to maintain a designation system for the importation of motion pictures for theatrical release."[17] Moreover, the text of China's Services Schedule has no relevance to a determination of whether China's measures restricting who may import films are inconsistent with China's trading rights commitments. Indeed, China's argument is tantamount to reading its trading rights commitments out of existence with respect to these films.

13. In short, China has provided no basis for the Panel to conclude that films for theatrical release should not be considered goods subject to China's trading rights commitments.

B. Unfinished AVHE Products and Unfinished Sound Recordings

14. With respect to unfinished AVHE products and unfinished sound recordings, China appears to have abandoned its contention that such products are not goods subject to its trading rights commitments. For the reasons set forth in the U.S. submissions, China's previous arguments in this regard are without merit.[18]

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[15] U.S. First Written Submission, para. 62.
[16] *EC – Bananas (AB)*, para. 221.
[17] China's Second Written Submission, paras. 67-68.
[18] U.S. First Oral Statement, paras. 19-22; U.S. Second Written Submission, paras. 30-38.

III. TRADING RIGHTS: CHINA'S MEASURES REGARDING READING MATERIALS, FINISHED AVHE PRODUCTS AND FINISHED SOUND RECORDINGS ARE NOT JUSTIFIED UNDER ITS RIGHT TO REGULATE TRADE IN A MANNER CONSISTENT WITH THE WTO AGREEMENT OR ARTICLE XX OF THE GATT 1994

15. Turning to reading materials, finished AVHE products and finished sound recordings, and China's affirmative defense to the U.S. trading rights claims regarding them, the United States submits that China has failed to establish its *prima facie* case. China's second written submission again concedes that its measures "necessarily imply the limitation of the right to import goods into China"[19] and recognizes that its trading rights restrictions have been a matter of long-standing concern to WTO Members.[20] China, however, is unable to demonstrate that the measures at issue are justified by the first clause of paragraph 5.1 of its Accession Protocol or by Article XX of the GATT 1994.

A. China's Right to Regulate Trade in a Manner Consistent with the WTO Agreement Does Not Justify the Measures at Issue

16. Regarding the first clause of paragraph 5.1 referring to the "right to regulate trade in a manner consistent with the WTO Agreement," China's second written submission simply repeats its previous unavailing arguments. It states that the right to regulate trade is distinct from the exceptions contained in Annexes 2A and 2B of the Accession Protocol,[21] but asserts that the right to regulate trade permits it to impose limitations on its trading rights commitments identical to those contained in Annexes 2A and 2B.[22]

17. As the United States has demonstrated, the "right to regulate trade" clause does not permit the derogations to China's trading rights commitments that are contained in the measures at

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[19] China's Second Written Submission, para. 82.

[20] China's Second Written Submission, para. 91 (referring to paragraphs 80 and 81 of China's Working Party Report).

[21] China's Second Written Submission, para. 76.

[22] China's Second Written Submission, para. 78.

issue.[23] The "right to regulate trade" clause applies to measures addressing the goods being traded, rather than the traders of those goods. As is clear from paragraph 84(b) of the Working Party Report, regulating the right to trade includes applying WTO-consistent requirements concerning import licensing, TBT and SPS. Thus, for example, China can prevent imports of wholly prohibited goods by all importers, or apply tariffs and health and safety requirements to imported goods without infringing its trading rights commitments.

18. Thus, the right to regulate trade in a WTO-consistent manner is fundamentally different from the "right to regulate *the right to trade* in a manner consistent with the WTO Agreement." It is the "right to regulate the right to trade" that China seeks to read into paragraph 5.1 in order to justify depriving all foreign importers of the right to trade on the basis of national origin. However, the text of China's Accession Protocol provides for no such right, nor can the text support its *ex post facto* inclusion.

19. While the United States agrees with China's statement that the "right to regulate trade" clause is distinct from the exceptions contained in Annexes 2A and 2B, the United States does not agree with China's contention that both the "right to regulate trade" clause and Annexes 2A and 2B permit China to reserve certain products *per se* to state trading. China itself acknowledges that this is the function of Annexes 2A and 2B.[24] However, under China's expansive reading of the "right to regulate trade" clause, these Annexes would be rendered redundant, which is hardly in line with China's own invocation that is has made today and in past submissions that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."[25]

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[23] U.S. First Oral Statement, paras. 27-31; U.S. Answer to the First Set of Panel Questions, paras. 50-51, 57-59, 68-80, and 83-86; and U.S. Second Written Submission, paras. 39-42.

[24] China's Second Written Submission, para. 77.

[25] China's Second Written Submission, para. 75, quoting *U.S. – Cotton (AB)*, para. 549 (emphasis in original), and *Argentina – Footwear (AB)*, para. 81.

20. China's own reasoning on this point is contradictory and unpersuasive. On the one hand, it argues that the "right to regulate trade" clause and Annexes 2A and 2B provide for different limitations on China's trading rights commitments. On the other hand, China asserts that Annexes 2A and 2B subject goods to state trading, while the "right to regulate trade" clause also subjects goods to state trading. How can the "right to regulate trade" clause and Annexes 2A and 2B provide for *different* limitations when China also argues that they provide for *identical* limitations – *i.e.*, depriving foreign importers and privately-held importers in China of the right to import certain products? China cannot have it both ways, and the proper interpretation of these two clauses, both found in the same sentence, must be that they have different meanings.

21. Therefore, the "right to regulate trade" clause does not justify the measures at issue.[26] China's measures provide that only Chinese wholly state-owned enterprises can import reading materials, AVHE products, sound recordings, and films for theatrical release. This is precisely the type of exception to China's trading rights commitments that WTO Members agreed China could reserve through Annexes 2A and 2B. However, in its Accession Protocol, China did not avail itself of these exceptions for the products at issue, and should not be permitted to do so now.

22. In our view, it is not necessary in this dispute to decide on the exact contours of the "right to regulate trade" clause or to endeavor to balance China's rights and obligations against those of other WTO Members as China suggests.[27] Instead, it is sufficient to recognize that China's reservations of trading rights to state-owned enterprises are outside the scope of the "right to regulate trade" clause. The United States submits that it has demonstrated that the Chinese measures at issue are clearly excluded from the "right to regulate trade" clause when that clause is read in the context of China's trading rights commitments as a whole, particularly with respect to the exceptions contained in Annexes 2A and 2B.

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[26] U.S. First Oral Statement, paras. 27-31; U.S. Answer to the First Set of Panel Questions, paras. 50-51, 57-59, 68-80, and 83-86; and U.S. Second Written Submission, paras. 39-42.

[27] China's Second Written Submission, para. 87.

B. China's Measures at Issue are Not Justified under Article XX(a) and are Applied in a Manner Inconsistent with the *Chapeau* of Article XX

1. China's Measures at Issue are Not Justified under Article XX(a)

23. While we do not concede its availability, China's Article XX defense is likewise without merit. In its second written submission and again today, China argues without success that denying all foreign importers and privately-held importers in China the right to import the products at issue is "necessary to protect public morals" based on the following four asserted requirements for its content review system:

- First, content review must be performed in association with importation;[28]

- Second, content review must be performed by importers;[29]

- Third, importers must be Chinese wholly state-owned enterprises as no other entities are capable of conducting content review;[30] and

- Fourth, content reviewing entities must be limited in number so that individual reviewers can be "examined and supervised" by the Chinese government.[31]

24. According to China, this is the only system that can ensure its chosen level of protection against problematic content, that is adequately efficient, and that prevents circumvention.[32] China then dismisses the U.S.-proposed reasonably-available WTO-consistent alternatives on the grounds that they allegedly do not fit this formulation.[33] China's arguments, however, do not withstand scrutiny.

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[28] China's Second Written Submission, paras. 100, 103, and 114-115.
[29] China's Second Written Submission, paras. 100, 103.
[30] China's Second Written Submission, paras. 100, 104, 116, and 118.
[31] China's Second Written Submission, paras. 117 and 129.
[32] China's Second Written Submission, paras. 102 and 105.
[33] China's Second Written Submission, paras. 107-132.

25. The United States proposes several reasonably-available WTO-consistent alternatives.[34] For example, by training or hiring content review experts, foreign-invested enterprises themselves could conduct the content review of the products they import. Alternatively, the Chinese Government could conduct the review of products imported by foreign-invested importers. Foreign-invested importers could also hire domestic Chinese entities with the appropriate expertise to perform the necessary review.

26. Ironically, while China contends that its four system requirements demonstrate that the WTO-consistent alternatives proposed by the United States are not practicable, China's own system as described to the Panel does not attempt to meet these requirements. Thus, in order to assess the U.S. alternatives, it is first necessary to have a correct understanding of the actual Chinese system that China states achieves its desired level of enforcement.

27. First, despite China's assertions that content review cannot be disassociated from importation,[35] China's own system de-links these unrelated activities. As conceded by China, and reaffirmed today, China National Publications Import and Export Corporation (CNPIEC), which is among the largest Chinese wholly state-owned importers of reading materials in China, reviews the content of reading materials independently from, and in advance of, importation.[36] Moreover, GAPP reviews the catalogues of reading materials submitted by importers prior to importation and may prevent the importation of any products with prohibited content.[37] Likewise, the Chinese Government itself reviews the content of all foreign films before any such film is permitted to be imported into China.[38] China has yet to respond to these facts, which effectively demonstrate that achieving China's desired level of enforcement – *i.e.*, preventing the dissemination of products

[34] U.S. Answers to the First Set of Written Questions, para. 62; and U.S. Second Written Submission, para. 49.

[35] China's Second Written Submission, para. 114.

[36] China's First Written Submission, para. 226.

[37] Management Regulation, Article 45 (Exhibit US-7).

[38] Film Regulation, Article 31 (Exhibit US-20).

with prohibited content into China[39] – does not require content review to occur in association with importation activities.

28. Second, contrary to China's contentions,[40] importers are not integral to the content review process. For AVHE products, sound recordings and films for theatrical release, the Chinese Government has exclusive jurisdiction over content review and is the only entity performing that review.[41] The state-owned importers that have been given the exclusive rights to import these products are not authorized under Chinese law to review the content of these products.[42] Even for reading materials, the state-owned importers take part in the content review process, but it is still the Chinese Government that plays the central role. In fact, GAPP reviews all titles before they are imported, is authorized to directly examine the content of reading materials, and may be requested by importers to perform such review for a fee.[43] Thus, China's own system demonstrates that it is not necessary for importers to perform content review in order to achieve China's objectives.

29. Third, reserving importation exclusively to Chinese wholly state-owned enterprises is also unnecessary. As just explained, content review in China is performed principally, if not exclusively, by the Chinese Government for imported products, and not by wholly state-owned enterprises. Furthermore, many privately-invested Chinese enterprises work with content review specialists, whether in the Chinese Government or in state-owned content review entities, to have the content of their domestically-produced products reviewed. For example, numerous privately-

[39] China's Second Written Submission, paras. 98 and 103.

[40] China's First Written Submission, paras. 200-209.

[41] Audiovisual Regulation, Article 28 (Exhibit US-16) (stating, "[a]udiovisual products imported for publication and finished audiovisual products imported for wholesale, retail and rental shall be submitted to the cultural administration under the State Council for review of their contents."); and Film Regulation, Article 31 (Exhibit US-20) (providing, "[t]hose intending to import films for public screening shall, before importing, submit the film to the Film Censorship Board [of SARFT] for review.").

[42] Audiovisual Regulation, Article 28 (Exhibit US-16); Audiovisual Import Rule, Articles 11-18 (Exhibit US-17); and Film Regulation, Article 31 (Exhibit US-20).

[43] Management Regulation, Articles 44-45.

held Chinese film studios[44] engage with SARFT in that agency's content review process.[45] Therefore, China is able to maintain its desired level of enforcement when state-owned enterprises are not serving as intermediaries between producers and the Chinese Government. Indeed, China is able to maintain its desired level of enforcement even when state-owned enterprises are *not* reviewing content at all. Accordingly, it is not necessary to reserve importation to such enterprises, as China itself accepts that its own agencies are capable of handling content review and that state-owned enterprises are not needed to play the role of forced middleman.

30. Fourth, the number of content reviewing entities does not need to be drastically limited as China suggests. Indeed, China's own system for content review by domestic producers reveals the fallacy of China's arguments with respect to importers. For example, in 2007, there were 363 domestic audiovisual publishers licensed in China and authorized to conduct content review of their products "in-house".[46] In contrast, only one state-owned importer has been designated to import finished audiovisual products into China.[47] Similarly, in 2007, there were 806 domestic book and electronic publication publishers in China conducting "in-house" review,[48] compared with only 42 state-owned reading material importers.[49] The large number of content review entities for domestic products indicates that it is not overly burdensome or too costly to "examine and supervise" all of the individual reviewers working at all of these enterprises in order to achieve China's desired level of enforcement. Given these facts, China's assertion that it cannot support an increased number of importers participating in content review is not credible.

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[44] *See* China eCapital Corporation "Chinese Market & Entertainment Research: the Chinese Film Market", pages 45-47 (Exhibit US-26).

[45] Film Regulation, Article 31 (Exhibit US-20).

[46] "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).

[47] *See* Imported Cultural Products Measure, Article 5 (Exhibit US-10).

[48] "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).

[49] *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).

31. In sum, China's content review system differs substantially from a system meeting the four purported requirements described in its submissions. China has de-linked content review from importation, and the Chinese-government, not the state-owned importer, normally undertakes content review. In fact, the only significant difference between China's system and the reasonably available WTO-consistent alternatives proposed by the United States is that China reserves importation to wholly state-owned enterprises. Yet, the United States has demonstrated, and China has implicitly acknowledged, that such limitations are unnecessary.

32. Likewise, China's concerns regarding cost are addressed under the U.S. proposals.[50] Two of the U.S. proposals – either having the foreign importers and privately held importers in China conduct content review after obtaining the necessary expertise, or having these importers hire domestic entities with the appropriate expertise to conduct content review – would require minimal additional costs. These proposals essentially involve substituting foreign importers and privately held importers in China into the roles currently played by the state-owned importers. Indeed, foreign importers and privately held importers in China are already paying much of the costs associated with the content review that currently takes place. Under China's current system, China is effectively passing along the costs of content review to foreign importers and privately held importers in China by taking away their importation rights and giving those rights to designated and approved wholly state-owned enterprises.

33. The third U.S. proposal – having the Chinese Government conduct all content review – would also require minimal additional costs, as much of the content review of imported products is already performed by the Chinese Government, and the Chinese Government is already bearing the costs of these activities. If necessary, China could also take advantage of provisions already in its law that authorize charging fees for the review of content.[51]

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[50] China's Second Written Submission, paras. 104.

[51] Management Regulation, Article 44 (Exhibit US-7).

34. China's arguments regarding alleged problems associated with the examination and supervision of reviewers are also misplaced.[52] On the burden of such examination and supervision, the content review system applicable to domestic products demonstrates China's ability and willingness to oversee hundreds of domestic content review entities. Moreover, a system in which government officials review the content of products imported by foreign importers and privately-held importers would impose no additional structural burden, because these reviewers are already in place and are being examined and supervised in the context of the content review of imported products.

35. China's objections regarding its alleged inability to assert jurisdiction under the U.S. proposals are also unavailing.[53] Under the U.S. proposals in which the Chinese Government or enterprises in China are conducting content review, China's ability to assert jurisdiction is clear. On this point, China asserts that no entity would be willing to conduct content review on behalf of other entities because the responsibility and penalties involved are too great.[54] Of course, this ignores China's own arguments that state-owned enterprises are the only entities capable of reviewing products manufactured by other producers.

36. Finally, while the United States is not in this dispute challenging China's right to determine its desired level of enforcement, the United States is challenging the means China has chosen to achieve those ends. As the United States has shown, the means China has selected are not "necessary" within the meaning of Article XX(a) as there are WTO-consistent alternatives that are reasonably available.

37. Indeed, this is the approach taken by the Appellate Body in *Korea – Beef*, on which China relies in support of the right to determine its desired level of enforcement.[55] The Appellate Body's reasoning is particularly relevant here. In that dispute, the Appellate Body found that the measure

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[52] China's Second Written Submission, paras. 117 and 129.
[53] China's Second Written Submission, para. 116.
[54] China's Second Written Submission, para. 126.
[55] China's Second Written Submission, para. 106.

at issue was one "instrument" to achieve the desired level of enforcement, but that it was disproportionate and unnecessary, and that WTO-consistent alternatives were reasonably available.[56] Interestingly, the Appellate Body was skeptical of Korea's assertions, as the defendant in that case, that conventional enforcement measures could not be used to achieve its desired level of enforcement through a WTO-consistent alternative absent a significant injection of resources.[57] Given that China is using a range of measures to achieve content review now, we urge a similar skepticism on the part of the Panel here.

2. China's Measures at Issue are Applied in a Manner Inconsistent with the *Chapeau* of Article XX

38. China has likewise failed to show that the application of its measures satisfies the requirements of the *chapeau* of Article XX. In fact, China's second written submission is silent on how the challenged measures are applied. Instead, China simply directs the Panel to its arguments with respect to Article XX(a). However, even if a measure is "necessary", its application must also constitute neither a "means of arbitrary or unjustifiable discrimination" nor a "disguised restriction on international trade". In contrast, the United States has demonstrated that China's measures fall far short of the *chapeau's* requirements, and that China should not profit from its own lack of transparency regarding the State's plans for, and the designation of, importers of the products at issue.[58]

IV. TRADE IN SERVICES: CHINA'S SERVICES COMMITMENTS COVER THE MASTER DISTRIBUTION OF READING MATERIALS

39. Before turning to our next issue Mr. Chairman, we wanted to note the conspicuous absence of any discussion of the U.S. GATS claims on reading materials in China's second written submission. This is particularly interesting in the context of China's responses in its previous submissions that in many ways confirm the U.S. claim that the prohibition on foreign-invested

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[56] *Korea – Beef (AB)*, paras. 178-179.
[57] *Korea – Beef (AB)*, para. 180.
[58] U.S. First Oral Statement, paras. 36-39; and U.S. Second Written Submission, paras. 50-57.

enterprises engaging in the master distribution of reading materials is inconsistent with Article XVII of the GATS.[59] As the United States has explained, master distribution is covered by China's commitments under mode 3 of Sector 4 of its Services Schedule.[60] We have included Exhibit US-99 that further illustrates our rebuttal arguments regarding master distribution and its inclusion of "wholesaling" within the meaning of Annex 2 of China's Services Schedule.

V. TRADE IN SERVICES: CHINA'S SERVICES COMMITMENTS COVER THE ELECTRONIC DISTRIBUTION OF SOUND RECORDINGS

40. With respect to the electronic distribution of sound recordings, China's measures accord less favorable treatment to foreign-invested entities engaged in the electronic distribution of sound recordings than to wholly Chinese-owned distributors, thereby contravening Article XVII of the GATS.[61] China does not deny that the relevant measures discriminate against foreign-invested entities engaged in the electronic distribution of sound recordings. Instead, China's principal defense rests on the argument that the electronic distribution of sound recordings is outside the scope of China's services commitments. This assertion is fundamentally flawed. As with China's other defenses, China's second written submission repeats numerous flawed arguments but fails to rebut the U.S. *prima facie* case.

A. Vienna Convention on the Law of Treaties

41. First, China unsuccessfully attempts to apply an analysis of the ordinary meaning of the relevant terms under the customary rules of interpretation reflected in Article 31 of the *Vienna Convention on the Law of Treaties*. As the United States has set forth, China's contention that the term "distribution" can only encompass distribution of goods is belied by the text of the GATS,

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[59] China's First Written Submission, paras. 252 and 255 (confirming that master distribution is a type of distribution service); China's Answers to the First Set of Panel Questions, Question93 (stating that master distribution involves reselling); China's First Written Submission, para. 259 (explaining that master distribution is synonymous with a type of wholesaling); China's Answers to the First Set of Panel Questions, Question 101 (indicating that master distributors sell to institutional buyers); and China's First Written Submission, paras. 283-284, and China's Answers to the First Set of Panel Questions, Questions 102 and 104 (noting that master distribution involves retailing).

[60] *See* U.S. Second Written Submission, paras. 73-85.

[61] U.S. First Written Submission, paras. 342-54.

which explicitly contemplates distribution of a service in Article XXVIII(b).[62] This provision makes clear that "distribution," in the context of the GATS, is broader than distribution of a good. In addition, China's reliance on Annex 2 of its Services Schedule is of little utility in explaining the meaning of the term "distribution" in Sector 2D of China's schedule. While Annex 2 is referenced in Sector 4 – the general distribution services sector – of China's Services Schedule to explain the meaning of "distribution," Sector 2D, concerning audiovisual services, does not reference Annex 2, and nothing in China's Services Schedule supports the assertion that Annex 2 applies to Sector 2D.[63]

42. With respect to supplementary means of interpretation under Article 32 of the Vienna Convention, China has failed to provide any support for its assertion that the electronic distribution of sound recordings was unknown at the time of its December 2001 accession to the WTO. Indeed, China continues to ignore – and would have the Panel ignore – the considerable evidence adduced by the United States demonstrating that the electronic distribution of sound recordings was a phenomenon known to China and other WTO Members before China joined the WTO. Indeed, many of the third parties' submissions in this dispute confirm the U.S. view.[64] As the United States set forth in its first oral statement, even some of China's own exhibits betray the fact that this phenomenon existed well before China's accession.[65] Moreover, the United States provided numerous other examples of the discussions within the WTO context, in mainstream media, and by the intellectual property community about the electronic distribution of sound recordings.[66]

43. As for China's contention that the "sole reality" abroad and in China was "unauthorized download offers," these assertions are erroneous and are contradicted by the evidence submitted thus far in this dispute. Indeed, the article by Jenny Vacher at a 2001 WIPO Conference, which

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[62] U.S. First Oral Statement, para. 55.
[63] U.S. First Oral Statement, para. 55.
[64] Australia's Third Party Submission, paras. 22-23; Japan's Third Party Submission, paras. 29-32.
[65] U.S. First Oral Statement, paras. 61-62.
[66] U.S. First Oral Statement, paras. 60-67; U.S. Second Written Submission, para. 154 n. 232.

China submits as an exhibit, in no way supports the proposition that electronic distribution of sound recordings was *only* available through unauthorized downloads. Instead, the article explains that countries were adjusting their legal regimes to accommodate the increasing prevalence of electronic distribution of music.[67] Moreover, the article points out that settlements of lawsuits relating to copyright infringement "have resulted in agreements under defined licensing terms and conditions."[68]

44. China's assertion that it is unaware of the existence of the joint venture between the Chinese government and a Houston-based company to supply music online[69] is also contradicted by the facts. Houston Interweb Design, Inc.'s Form 10-KSB, filed with the U.S. Securities and Exchange Commission (SEC) for the one-year period ending July 31, 2000, states "Beijing Artists Online Co. Ltd is a joint venture between Houston Interweb Design, Inc., Hainan Dingshen Investment Co. Ltd. and China Culture Information Net (PRC government entity)."[70] The company's SEC filing also states, "[i]n August 2000, Interweb launched listentochina.com an English version of the PRC government approved MP3 site, Beijing Artists On Line, for the promotion and distribution of Chinese music worldwide."[71] This development in 2000 was well before China's accession to the WTO.

45. In short, China has failed to provide support for its assertion that it was unaware of the electronic distribution at the time of its WTO accession. To the contrary, China has submitted evidence supporting the U.S. evidence and arguments in this regard.

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[67] Exhibit CN-102.
[68] Exhibit CN-102.
[69] China's Second Written Submission, para. 157.
[70] Houston Interweb Design, Inc., Form 10-KSB, (November 14, 2000) (Exhibit US-100).
[71] Houston Interweb Design, Inc., Form 10-KSB, (November 14, 2000) (Exhibit US-100).

B. Electronic Distribution of Sound Recordings is a New Means of Supply of an Existing Service

46. Even if China were correct that the electronic distribution of sound recordings was unknown at the time of its WTO accession, China fails to establish that the electronic distribution of sound recordings is a new service rather than a new means of supplying an existing service. China also repeats its argument that the principle of technological neutrality is not relevant to understanding the scope of China's services commitments for the electronic distribution of sound recordings. However, China's argument fails to take into account that this principle ensures that the GATS is sufficiently dynamic so that Members' services commitments can accommodate advances in technology. Furthermore, China's own exhibit, the WTO World Trade Report 2005, explains that "[i]n the discussions on electronic commerce, there was a generally shared view among WTO Members that the GATS was technologically neutral, in the sense that 'it does not contain any provisions that distinguish between the different technological means through which a service may be supplied'."[72] In support of this statement, the report cites a document adopted by the Council for Trade in Services in 1999, which has been submitted to the Panel in this dispute.[73]

47. China also contends that technological neutrality is only relevant where a new means of supplying an existing service is involved. However, China argues, the electronic distribution of sound recordings is an altogether new service from the distribution of sound recordings in hard-copy such that technological neutrality is not relevant.

48. In an attempt to buttress this position, China has articulated certain criteria that it maintains should "be taken into consideration when distinguishing one service from another."[74] However, there is no textual basis in the GATS – and China has articulated none – for the application of these criteria to an analysis of a Member's services commitments. Moreover, as explained in the U.S. second written submission, these criteria fail to provide any principled basis for

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[72] Exhibit CN-103, p. 290.

[73] *Work Programme on Electronic Commerce, Progress Report to the General Council*, adopted by the Council for the Trade in Services on 19 July 1999, S/L/74, paragraph 4 (Exhibit US-51).

[74] China's Second Written Submission, para. 170.

distinguishing among services.[75] Finally, an application of these criteria to China's Services Schedule fails to support China's assertion that the electronic distribution of sound recordings is an altogether different service from the distribution of sound recordings in hard-copy.[76] Instead, the application of these criteria to the electronic distribution of sound recordings only exposes the flaws in China's argument.

49. First, China argues that the "operational characteristics" differ as between the electronic distribution of sound recordings and the distribution of sound recordings in hard-copy because distributors must set up different infrastructure and employ personnel with different skills.[77] As the United States has set forth previously, these differences also exist between different means of supplying a particular service, which will often involve different distribution infrastructure and personnel.[78] The same flaw plagues China's second criterion – end-uses and consumer perceptions. Consumers may perceive different means of supplying a particular service differently depending on how that means of supply fits with their preferences. A difference in the consumer's perceptions, therefore, does not necessarily suggest that two altogether different services are involved.[79]

50. With respect to the international classifications of services, as the United States set forth in its second written submission, China appears to take a contradictory position regarding the relevance of such classification instruments by relying on classification instruments that support its argument and dismissing those that are disadvantageous to its position. China claims that W/120 and the Provisional Central Product Classification (CPC) are not binding on Members and have little utility in determining the meaning and scope of China's commitments. However, many WTO Members have used CPC codes in preparing their schedules, and when they have done so, the Provisional CPC is the one version of the CPC accepted by WTO Members as relevant.

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[75] U.S. Second Written Submission, paras. 156-63.
[76] U.S. Second Written Submission, paras. 157-63.
[77] China's Second Written Submission, paras. 171-75.
[78] U.S. Second Written Submission, para. 157-58.
[79] *See* U.S. Second Written Submission, paras. 157-58; U.S. First Oral Statement paras. 72-73.

Moreover, where services in China's schedule do cross-reference the CPC, such services are framed in terms of the Provisional CPC. However, China also argues that the classification of "online audio content" in the CPC Ver. 2 establishes that the electronic distribution of sound recordings is distinct from other sound recording distribution services.[80] This is in spite of the fact that the CPC Ver. 2 is still in draft, is not the version of the CPC that was the basis for any of China's services commitments, and has not been accepted by WTO Members as relevant for Members' services commitments. It is also noteworthy that while China's Services Schedule cross-references the Provisional CPC for certain services, the entry for sound recording distribution services contains no such cross-reference. Accordingly, the Provisional CPC has limited utility in explaining the meaning of that commitment. China's argument that the CPC Ver. 2 is a relevant criterion for determining the meaning of the sound recording distribution services commitment is even less credible. In reality, as explained in the U.S. second written submission, China's lengthy discussion of the draft CPC Ver. 2 is ultimately fruitless.[81]

51. In short, China's innovative – but entirely unfounded – criteria for distinguishing among services fail to support the assertion that the electronic distribution of sound recordings is a new service rather than a new means of supplying sound recording distribution services. Indeed, China's argument in this context would have serious systemic implications because it would create great uncertainty regarding the scope of Members' services commitments. In light of the increasing prevalence of the provision of services through the Internet, or other electromagnetic means, China's argument would imply that the supply of such services (including accountancy services, translation services, or legal services) through electronic means is without the protection of the GATS disciplines. Indeed, given its burgeoning participation in these fields, it is remarkable that China is arguing for less rather than more robust disciplines here.

52. With respect to China's contention that the relevant measures only relate to the distribution of sound recordings over the Internet, and not through "other electromagnetic means," China's

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[80] *See* U.S. Second Written Submission, para. 161.

[81] U.S. Second Written Submission, para. 161, n. 240.

contentions are erroneous. In making this argument, China refers only to one of the measures relevant to the U.S. GATS claim on electronic distribution of sound recordings. However, Article I(1) of the Network Music Opinions, which China does not discuss, refers to the network music market as encompassing "music products transmitted through such wired or wireless media as the internet *and mobile communications*."[82] Moreover, an interpretation of the Network Music Opinions posted on the Chinese Ministry of Culture's website states that in the Network Music Opinions,

> music was defined for the first time, referring to music products as transmitted through the Internet, mobile communication network as well as other wired and wireless media . . . This pattern is mainly composed of two parts: one is to provide - via the Internet - online music to be downloaded or played in the computer terminals; the other is for wireless network business operators to provide - through their value-added wireless services - wireless music to be played in the terminals of mobile phones, which is also known as mobile music. For the purpose of network music, the word "network" not just refers to what we normally call as the Internet. It refers to information networks, including telecommunication network, mobile Internet, cable television network, satellite communications, microwave communication, optical fiber communication, as well as other various interconnection between intelligent networks whose interaction is achieved based on the IP protocol.[83]

Finally, Article 8 of the Network Music Opinions provides that "[f]oreign-invested network cultural business units are prohibited."[84]

53. Thus, China's argument that the measures are limited to the distribution of music over the Internet fails.

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[82] Exhibit US-34 and Exhibit CN-68 (emphasis added).

[83] Interpretation of the "Several Opinions of the Ministry of Culture on the Development and Management of Network Music" (excerpt), available at: http://www.ccnt.gov.cn/xwzx/whbzhxw/t20061211_32441.htm (Exhibit US-101).

[84] Exhibit US-34.

VI. TRADE IN GOODS: CHINA'S MEASURES REGARDING THE INTERNAL SALE, OFFERING FOR SALE, PURCHASE, DISTRIBUTION AND USE OF THE PRODUCTS ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

A. Sound Recordings Intended for Electronic Distribution

54. China has also failed to rebut the U.S. *prima facie* case that the measures regulating hard-copy sound recordings intended for electronic distribution accord less favorable treatment to imported products than to domestic like products in contravention of Article III:4 of the GATT 1994. It is noteworthy that while China makes numerous arguments in this context, China never denies the existence of a regime that imposes a discriminatory content review requirement on imported products.

55. China's first erroneous assertion is that the U.S. claim relates to the treatment accorded to the electronic distribution of sound recordings.[85] In fact, the U.S. claim relates to China's less favorable treatment of imported hard-copy sound recordings intended for electronic distribution. Thus, China's discussion that an Article III:4 claim can only relate to a good, which must be a tangible item, is irrelevant.[86]

56. In addition, China's contention that the relevant measures do not affect the distribution of hard-copy sound recordings because these measures only relate to sound recordings in a format suitable for electronic distribution misses the mark.[87] First, China provides no citations to any of the relevant measures – let alone a textual analysis – to support this assertion. Moreover, the Network Music Opinions provides that the content review requirement is "[i]n regard to imported audiovisual products (including those officially published and distributed) whose content has already been examined by the Ministry of Culture *and are to be transmitted over the information network*."[88] The Internet Culture Rule, on which the Network Music Opinions are based, refers to "[a]udiovisual products . . . produced or reproduced by the use of certain technological means to

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[85] China's Second Written Submission, para. 201.
[86] *See* China's Second written Submission, para. 198.
[87] China's Second Written Submission, para. 201.
[88] Network Music Opinions, Appendix 2, Article I (Exhibit US-34).

disseminate over the Internet."[89] Since hard-copy sound recordings are a type of "audiovisual product," the term "audiovisual products," to which the content review requirement in the Network Music Opinions applies, encompasses hard-copy sound recordings that may be disseminated electronically.

57. China's argument that the discriminatory content review requirement does not affect the distribution of the hard-copy, but only the "digitalized content," reflects an overly narrow view of the national treatment obligation in Article III:4.[90] As the United States has set forth previously, under Article III:4, a measure must be affecting the import's movement through the chain from production to consumption, including the "sale, offering for sale, purchase, transportation, distribution or use" of the imported product.[91] Moreover, the "affecting" requirement is interpreted broadly.[92]

58. In the case of hard-copy sound recordings intended for electronic distribution, the relevant measures affect the imported products within the meaning of Article III:4. Specifically, 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, a requirement not faced by domestic sound recordings intended for electronic distribution. This requirement creates an extra administrative hurdle and delay for imported products before they may be distributed. These obstacles can be especially disadvantageous to imports in a hit-driven industry – such as the recording industry where speed to the market is critical. Accordingly, the relevant measures affect the sale, offering for sale, purchase, transportation, distribution, or use of the imported product.

59. The fact that the hard-copy sound recording is converted after importation into a format that can be distributed electronically does not mean that the Chinese measures do not accord less

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[89] Internet Culture Rule, Article 2(2) (Exhibit US-32).

[90] China's Second Written Submission, paras. 199-201.

[91] U.S. Answers to the First Set of Panel Questions, paras. 254-57.

[92] *See* U.S. Answers to the First Set of Panel Questions, para. 257 citing *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.

favorable treatment to the imported products. The steps involved in moving the product from importation to the next stage (*i.e.*, from importation to the ICP or MCP, then to the Ministry of Culture for content review, and then back to the ICP or MCP) are part of the distribution of the product. Distribution is a broad term and can encompass the broad range of activities involved in a moving a product through the chain from production to consumption. There is no textual basis for a more narrow reading of distribution. Thus, the transfer of the sound recording from the importer to the ICP or MCP is one of the activities involved in the distribution of the product. Similarly, the ICP or MCP engages in certain activities – including 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. These activities are also part of the distribution process. Accordingly, by imposing an administrative hurdle on only the imported products before the ICP or MCP can move the product further downstream, the relevant Chinese measures adversely affect the conditions of competition for the imported product.[93]

60. In addition, a finding that a measure that accords less favorable treatment to imports does not "affect" the distribution of the product merely because there is further processing of the product downstream would undermine the discipline of Article III:4 by allowing a loophole in the national treatment obligation.[94] As the Panel in *Mexico – Taxes on Soft Drinks* found, the term "affecting" "covers not only laws or 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."[95] The relevant Chinese measures adversely modify the conditions of competition in favor of domestic sound recordings intended for electronic distribution by exempting them from the content review requirement that is applicable to imported sound recordings intended for electronic distribution.

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[93] *See* U.S. Answers to the First Set of Panel Questions, paras. 256-57 citing *Mexico – Taxes on Soft Drinks (Panel)*, paras. 8.107-8.113.

[94] *See* U.S. Answers to the First Set of Panel Questions, paras. 269-70.

[95] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.

61. Finally, there is no basis for China's contention that the United States has changed its claim by demonstrating that the relevant measures affect the use of the imported product, rather than the distribution. The U.S. Panel Request provides that "[i]t thus appears that sound recordings imported into China in physical form are treated less favorably than sound recordings produced in China in physical form . . . The measures at issue therefore appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994." Thus, as provided in Article 6.2 of the DSU, the Panel Request provides a brief summary of the legal basis sufficient to set forth the problem presented by the relevant measures clearly: namely, that the measures are inconsistent with Article III:4 of the GATT 1994. Article III:4 requires national treatment for imported products "in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or *use*."[96] Accordingly, an argument that the relevant measures affect the use of the imported product is covered by the U.S. claim under Article III:4 of the GATT 1994.

62. In short, China's measures accord less favorable treatment to imported sound recordings intended for electronic distribution by imposing a content review requirement on imports that is not applicable to domestic products. Accordingly, these measures are inconsistent with the national treatment obligation in Article III:4 of the GATT 1994.

63. Finally, China provided a lengthy discussion of its view of the translation of the relevant measures.[97] The United States provides a response to China's arguments in Exhibit US-102, which we are submitting today.[98] Through its discussion of the translations, China seeks to argue that Article 14(1) of the Audiovisual Import Rule and Article 28 of the Audiovisual Regulation relate to the import of audiovisual products rather than imported audiovisual products.[99] China then argues that its translation leads to the conclusion that these measures establish conditions for importation and are thus border measures. First, China's translation is unsupported by an analysis of the ordinary meaning of the relevant Chinese terms. In addition, regardless of the translation

[96] Emphasis added.
[97] Exhibit CN-100.
[98] U.S. Comments on China's Comments on Translation Issues in Exhibit CN-100 (Exhibit US-102).
[99] Exhibit CN-100; *See also*, China's Answers to the First Set of Panel Questions, Question 115.

issues, these measures are not border measures. Ad Note to Article III of the GATT 1994 makes clear that a regime that applies to both imported and domestic products is not a border measure simply because the measure is enforced at the border with respect to imports. China's relevant measures establish a content review regime for imported and domestic products. As the GATT 1994 provides, the fact that the content review requirement is enforced at the border with respect to the imported product does not transform the measures into border measures.[100] Moreover, China's discussion of the translation of these measures does not change this analysis.

B. Films for Theatrical Release

64. With respect to the U.S. Article III:4 claim regarding films for theatrical release, none of China's arguments is successful in rebutting the U.S. *prima facie* case. We would like to take this opportunity to discuss one of China's arguments, namely, the erroneous contention by China that the relevant measures do not affect the distribution of the relevant product within the meaning of Article III:4 of the GATT 1994.[101]

65. First, the relevant measures restrict which entities may import films and which entities may distribute imported films.[102] The restrictions as to which entities may distribute imported films do not apply to domestic films. We recall that the term "affecting" in Article III:4 has been interpreted broadly to encompass "laws or regulations which might adversely modify the conditions of competition between domestic and imported products."[103] The discriminatory treatment applicable to imported films in China adversely modifies the conditions of competition in favor of the domestic product because domestic films do not face the same limitations on their distribution opportunities as those faced by imported films.[104]

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[100] *See* U.S. First Oral Statement, paras. 79-80.

[101] China's Second Written Submission, para. 216.

[102] U.S. First Written Submission paras. 397-409.

[103] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.

[104] U.S. First Written Submission, paras. 397-409; U.S. Answers to the First Set of Panel Questions, paras. 266-70; U.S. Second Written Submission, paras. 200-13.

66. This point suffices to establish that China's measures are inconsistent with China's obligations under Article III:4 of the GATT 1994. In addition, as set forth above, the concept of distribution in Article III:4 is broad and encompasses a range of activities required to move a product downstream. In fact, 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.[105] Because the relevant Chinese measures place restrictions on which entities may engage in the distribution of films, these measures affect the distribution opportunities for the imported product. The fact that there may be changes to the product downstream does not change the fact that the imported film faces less advantageous distribution opportunities than a domestic like product. Indeed, as set forth previously, a finding that a measure that accords less favorable treatment to imports does not "affect" the distribution of the product because there are changes to the product downstream would undermine the discipline afforded by Article III:4 by allowing a major loophole in the national treatment obligation.[106]

VII. CHINA HAS NOT SUSTAINED ITS CLAIM UNDER ARTICLE 6.2 OF THE DSU WITH RESPECT TO THE PANEL'S TERMS OF REFERENCE

67. Finally, Mr. Chairman and members of the Panel, China has failed to sustain its claim that several of its measures and one of the U.S. claims fall outside of the Panel's terms of reference. In its previous submissions, the United States has demonstrated that China had not sustained this claim.[107] As we discuss below, China's second written submission also fails to meet this burden with respect to each of its three arguments concerning: (1) measures with the "same effects"; (2) "related" or "implementing" measures; and (3) "distribution requirements" and "different distribution opportunities".

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[105] U.S. Answers to the First Set of Panel Questions, paras. 41-43.

[106] *See* U.S. Answers to the First Set of Panel Questions, paras. 269-70.

[107] U.S. First Oral Statement, paras. 84-108; U.S. Answers to the First Set of Panel Questions, paras. 4-17, 197-206, and 235-242; and U.S. Second Written Statement, paras. 217-221.

A. China's Film Distribution and Projection Rule, Audiovisual Regulation and the Audiovisual Import Rule are Within the Panel's Terms of Reference

1. Measures with the "Same Effects"

68. China begins its second submission by characterizing one of the U.S. arguments regarding the inclusion of the Film Distribution and Projection Rule, the Audiovisual Regulation and the Audiovisual Import Rule in the Panel's terms of reference as relating to measures with the "same effects".[108] China contends that "describing the alleged effects of a measure does not amount to 'identifying the specific measure' and does not satisfy the 'requirement of precision'".[109]

69. The United States, however, makes no such argument, and China's citations to U.S. submissions contain no discussion of measures with the "same effects". Instead, the United States argues that these three measures are included in the Panel's terms of reference as they constitute the laws and regulations through which the WTO-inconsistent legal regime described in the U.S. panel request is put into place. As a result, the United States has "identif[ied] the specific measures at issue" pursuant to Article 6.2.

70. With respect to the Film Distribution and Projection Rule and our trading rights claim, the U.S. panel request provides: "China reserves to certain Chinese state-designated and wholly and partially state-owned enterprises the right to import the Products", with the term "Products" defined as including "films for theatrical release".[110] With the description contained in the U.S. panel request, China was on notice regarding the U.S. challenge concerning measures that restrict *inter alia* trading rights for film importers. The Film Distribution and Projection Rule is such a measure – stating explicitly that film importation is the exclusive reserve of a single Chinese state-owned enterprise – and is therefore included in the U.S. panel request. From the receipt of the U.S. panel request, China was well-aware that its film importation regime, and the legal instruments that comprise it, are at issue in this dispute. The U.S. panel request was sufficiently

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[108] China's Second Written Submission, paras.8 and 18-19.
[109] China's Second Written Submission, para. 18.
[110] U.S. Panel Request, Section I, para. 2.

clear so as to enable China to prepare its defense with regard to the Film Distribution and Projection Rule.

71. For the same reasons, the United States has also satisfied the requirements under Article 6.2 of the DSU with respect to the Audiovisual Regulation and the Audiovisual Import Rule. These two legal instruments are included in the U.S. claims under the GATT 1994 because they constitute part of the legal basis through which China carries out its WTO-inconsistent legal regime for the content review of imported hard-copy sound recordings that the United States described in its panel request and is challenging. As stated in the U.S. panel request, China imposes discriminatory content review requirements on imported sound recordings, which result in "distribution opportunities for sound recordings imported into China in physical form that are less favorable than the distribution opportunities for sound recordings produced in China".[111]

72. The Audiovisual Regulation and the Audiovisual Import Rule are covered by the U.S. panel request, since these two instruments legally mandate the discriminatory content review requirements that are expressly identified in the U.S. panel request. The specificity with which the challenged measure was described in that panel request provided China with more than adequate notice that its content review regime for imported hard-copy sound recordings was at issue. Since the Audiovisual Regulation and the Audiovisual Import Rule are integral parts of that content review regime, China had sufficient notice regarding the measures at issue to respond to the U.S. claims in this regard.

2. "Related" and "Implementing" Measures

73. China goes on to contend unsuccessfully that the Film Distribution and Projection Rule, the Audiovisual Regulation and the Audiovisual Import Rule are not included in the Panel's terms of reference, despite the fact that they are closely and directly related to measures identified in the

[111] U.S. Panel Request, Section IV, paras. 1 and 2.

U.S. panel request.[112] China simply asserts that parties to a dispute could never be sufficiently informed that closely and directly related measures are subject to challenge in a dispute. It adds that citing a specific measure followed by the use of clauses like the one contained in the U.S. panel request – *i.e.*, "as well as any amendments, related measures or implementing measures" – would "minimize unreasonably the burden of the complaining party".[113]

74. China's response, however, fails to address the two arguments that the United States has previously made in this regard. First, the United States has shown that these three measures are included in the U.S. panel request because they fall within the clause incorporating amendments, related measures and implementing measures contained in the U.S. panel request.[114] Of particular interest, China ignores the panel report in *EC – Bananas III*. In that dispute, the panel found the panel request was sufficient to meet the requirements of Article 6.2, explaining that the "banana regime" was adequately identified.[115] Notably, the panel request in question consisted of a reference to the EC banana regime, to a specific measure,[116] and to "subsequent EC legislation, regulations, and administrative measures . . . which implement, supplement and amend that regime".[117] While those subsequent pieces of EC legislation, regulations and administrative measures were not enumerated in the panel request, these numerous legal instruments were still considered by the panel to be part of the panel request and included in its terms of reference.[118]

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[112] China's Second Written Submission, paras. 8 and 20.

[113] China's Second Written Submission, para. 20.

[114] U.S. First Oral Statement, paras. 87-88 and 106; and U.S. Answers to the First Set of Panel Questions, paras. 4-8 and 240-241.

[115] *EC – Bananas III (Panel)*, paras. 7.27 and 7.45.

[116] Council Regulation (EEC) 404/93.

[117] Request for the Establishment of a Panel by the United States, *EC – Bananas III (Panel)*, WT/DS27/6, 12 April 1996.

[118] *See EC – Bananas III (Panel)*, paras. 3.1-3.36 (addressing the following pieces of EC legislation, regulations and administrative measures: Commission Regulation (EC) 478/95 (as amended); Commission Regulation (EC) 2791/94; Commission Regulation (EEC) 1442/93; Commission Regulation (EC) 2947/94; Commission Regulation (EC) 704/95; Commission Regulation (EC) 1387/95; Commission Regulation (EC) 2234/95 (as amended); Commission Regulation (EC) 2913/95; Commission Regulation (EC) 2500/95; Commission Regulation (EC); Commission Regulation (EC) 45/96; Commission Regulation (EC) 670/96; and Commission Regulation (EC) 1371/96).

75. Second, the United States has demonstrated that the three measures are "subsidiary or closely related to" measures cited by name in the U.S. panel request, and are thereby included in the Panel's terms of reference pursuant to the reasoning of the panel in *Japan – Film*.[119] Once again, China has chosen to disregard the U.S. arguments with respect to this report.

B. China's Discriminatory Requirements and Different Distribution Opportunities are Within the Panel's Terms of Reference

76. China's second written submission then turns to China's claims that discriminatory requirements (pre-establishment legal compliance, approval process, and decision-making criteria) and different distribution opportunities (restrictive subscription regime, conditions on subscribers, and limitations on electronic publications) imposed on foreign-invested enterprises are not within the Panel's terms of reference with regard to the U.S. claims under Article XVII of the GATS. China's, however, fails to sustain its claim under Article 6.2 of the DSU in this regard.

1. Discriminatory Requirements Imposed on Foreign-Invested Enterprises Engaging in the Distribution of Reading Materials and AVHE Products (GATS)

77. China's contentions that its discriminatory requirements are outside of the scope of the U.S. panel request are without merit, because they are factually incorrect and repeat previous assertions without responding to several U.S. arguments. First, contrary to China's assertion, the U.S. panel request explicitly refers to "discriminatory requirements" and "discriminatory limitations" in the context of the U.S. claims regarding reading materials,[120] and "requirements" and "discriminatory limitations" in the context of the U.S. claims regarding AVHE products.[121]

78. Second, China persists in its view that identifying the specific measures at issue, without also enumerating each relevant provision in those measures, does not satisfy the requirement of

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[119] U.S. First Oral Statement, paras. 89 and 107-108; U.S. Answers to the First Set of Panel Questions, paras. 9-11 and 242.

[120] U.S. Panel Request, Section II.A, para. 3.

[121] U.S. Panel Request, Section II.B, para. 2.

Article 6.2 to "identify the specific measures at issue".[122] As previously explained, the U.S. panel request explicitly enumerates all of the measures that contain the challenged discriminatory requirements.[123] Moreover, the U.S. panel request describes in detail the discriminatory requirements and the less favorable treatment they accord, and includes illustrative lists of those requirements for greater precision. However, contrary to China's contention, Article 6.2 does not require panel requests to identify each individual provision of each challenged measure. Nor does Article 6.2 require a detailed factual description of those measures. In the present dispute, the United States has adequately identified the measures at issue in accordance with Article 6.2 so as to give China satisfactory notice of the discriminatory requirements subject to challenge.

79. Finally, China maintains its misplaced reliance on the reports in *Japan – Film* and *US – Carbon Steel*, while ignoring the points made in this context by the United States.[124] As discussed in the U.S. first oral statement and in its answers to the first set of Panel questions, these reports address whether a *measure* not identified in a panel request can still be included in a panel's terms of reference. That is not the issue, because each of the challenged measures was explicitly identified in the U.S. panel request.[125] Furthermore, these reports do not support the proposition for which they are cited by China. China has recast their findings to suggest that a "reference to regulations in the Panel Request does not imply that each and every aspect of these regulations has been challenged."[126] However, these reports address whether *measures* have been adequately identified in a panel request and not whether *provisions* of measures have been adequately identified.[127]

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[122] China's Second Written Submission, para. 21.

[123] U.S. First Oral Statement, paras. 95-96.

[124] China's Second Written Submission, para. 22-23.

[125] U.S. First Oral Statement, paras. 97; and U.S. Answers to the First Set of Panel Questions, paras. 204-205 and 239.

[126] China's Second Written Submission, para. 22.

[127] U.S. First Oral Statement, paras. 97; and U.S. Answers to the First Set of Panel Questions, paras. 204-205 and 239.

80. We also note that China now appears to be arguing that all of the discriminatory requirements challenged by the United States as part of its GATS claims[128] are outside of the scope of the U.S. panel request, rather than the three requirement subject to China's original objection: *i.e.*, pre-establishment legal compliance, approval process and decision-making criteria.[129] China's objection is unavailing, whether it covers some or all of the discriminatory requirements at issue. As explained above, several of the discriminatory requirements are explicitly identified in the U.S. panel request. Moreover, the laws and regulations that carry out all of the discriminatory requirements, including the three requirements covered by China's original objection, are explicitly identified in the U.S. panel request, thereby satisfying the requirements of Article 6.2.[130]

2. Different Distribution Opportunities Available to Imported Reading Materials (GATT 1994)

81. In its first written submission, China contended that the U.S. Article III:4 *claim* regarding restrictions on distribution opportunities for imported reading materials was outside of the Panel's terms of reference, because it was not included in the U.S. consultation request. However, in its second written submission, China seems to confuse its objections to the inclusion of this *claim* with its objections to the inclusion of its *measures* imposing discriminatory requirements, as discussed above.[131] By taking this approach, however, China is mixing apples with oranges. In other words, China appears to be arguing that this U.S. claim is not included in the Panel's terms of reference because it is not a measure identified in the U.S. panel request.

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[128] U.S. First Written Submission, paras. 99-111, 127-137, 296-305, and 331-340; and U.S. Second Written Submission, paras. 91-115 and127-151 (challenging China's discriminatory requirements imposed on reading material wholesalers regarding: operating terms; pre-establishment legal compliance; registered capital; examination and approval process; and decision-making criteria; and challenging discriminatory requirements imposed on AVHE product distributors regarding: equity participation limits; operating terms; pre-establishment legal compliance; examination and approval process; and decision-making criteria).

[129] China's First Written Submission, paras. 237-250; and China's Second Written Submission, paras. 8, 16, and 21-25.

[130] *See* U.S. First Oral Statement, paras. 95-97.

[131] China's Second Written Submission, paras. 16 and 21.

82. Therefore, China blurs its *claim* objection with its *measures* objections, and neglects to provide any new argumentation in its second written submission as to why the U.S. claim regarding reading materials under Article III:4 is not included in the Panel's terms of reference. While China has previously contended that the U.S. claim should not be included in the Panel's terms of reference because it purportedly was not identified in the U.S. consultation requests, China has offered no response to the U.S. arguments explaining why this claim is included in the Panel's terms of reference, including with respect to the Appellate Body's reasoning in *Mexico – Rice*.[132]

83. Moreover, China's second written submission makes no reference to its previously asserted Article 6.2 claim that its restrictive subscription regime, its conditions on subscribers, and its limitations on electronic publications are not identified in the U.S. panel request and are not measures included in the Panel's terms of reference. The United States has demonstrated that these measures are properly before the Panel and included in its terms of reference.[133] China has failed to make out its claim to the contrary.

C. China's Several Opinions, Importation Procedure and Sub-Distribution Procedure are Within the Panel's Terms of Reference

84. Before departing the topic of the Panel's terms of reference, the United States would like to note that China's second written submission does not address the U.S. showing that the Several Opinions, the Importation Procedure and the Sub-Distribution Procedure are within the Panel's terms of reference.[134] We take this opportunity to highlight the fact that China has yet to articulate a basis on which its objections to these measures are founded. As the party invoking such procedural objections, it is incumbent on China to assert and establish a basis for its claims. China has failed to do so and its objections should be rejected.

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[132] U.S. First Oral Statement, paras. 98-100; and U.S. Answers to the First Set of Panel Questions, paras. 197-201.

[133] U.S. First Oral Statement, paras. 101-103; and U.S. Answers to the First Set of Panel Questions, paras. 202-206 and 235-239.

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

D. Conclusion

85. For the reasons described above and in previous U.S. submissions, the measures and the claim at issue are contained in the Panel's term of reference. The United States has adequately identified the measures being challenged, and has described its claims, in accordance with the requirements of Article 6.2 of the DSU. China has no basis for asserting that the due process objectives of that provision have not been met.

VIII. TRANSLATION

86. China provided a discussion of the translation of certain measures in an exhibit submitted with its second written submission. The United States would like to take this opportunity to respond to China's discussion of these translation issues in Exhibit US-102.

IX. CONCLUSION

87. Mr. Chairman and members of the Panel, this concludes the oral statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.

TABLE OF EXHIBITS

U.S. Exhibit No.	Description
US-98	"Bulletin of Statistics" (Excerpt), available at the Official Website of the General Administration of Press and Publications, available at http://www.gapp.gov.cn/cms/cms/website/zhrmghgxwcbzsww/layout3/xxml33.jsp?channelId=1392&siteId=21&infoId=459130
US-99	Master Distribution (*Zong Fa Xing*) Includes Wholesale Distribution Within the Meaning of Annex 2 of China's Services Schedule
US-100	Houston Interweb Design, Inc., Form 10-KSB (November 14, 2001)
US-101	Interpretation of the "Several Opinions of the Ministry of Culture on the Development and Management of Network Music" (Excerpt), available at Official Website of the Ministry of Culture, available at http://www.ccnt.gov.cn/xwzx/whbzhxw/t20061211_32441.htm.
US-102	U.S. Comments on China's Comments on Translation Issues in Exhibit CN-100
US-102-A	China Accounting Standards Committee Description and Organizational Chart
US-102-B	China Accounting Standards Committee website showing issuance of Accounting Standards of Business Enterprises