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 FIRST SET OF QUESTIONS BY THE PANEL TO THE PARTIES

August 11, 2008

TABLE OF REPORTS

Short Form	Full Citation
Brazil – Tires (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Autos(Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
Canada – Wheat (Panel)	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Bananas (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EEC – Parts and Components(GATT)	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
Guatemala – Cement (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
India – Additional Duties (Panel)	Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United Sates*, WT/DS360/R, appealed 1 August 2008
India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R, WT/DS175/R, adopted 5 April 2002
Japan – Film (Panel)	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001

Korea – Commercial Vessels (Panel)	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
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 – Taxes on 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
U.S. – 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
U.S. – Gambling (Panel)	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R
U.S. – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
U.S. – 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
U.S. – Section 337(GATT)	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989
U.S. – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
U.S. – Shrimp Bonding (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/AB/R, *United States – Customs Bond Director for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R, adopted 01 August 2008

TRADING RIGHTS

For the United States:

Q1. With reference to Part IV and paras. 259 and 270 of the U.S. first written submission, please indicate or clarify (perhaps in table form):

(a) whether each of the relevant measures are being challenged separately.

(b) for each of the challenged measures please tell us the following:

(i) which specific provisions of the measures you are claiming to be in breach of which paragraphs of the Accession Protocol and, where applicable, the Working Party Report; and

(ii) whether an inconsistency arises in relation to Chinese or foreign enterprises, foreign individuals, etc.

1. In Part IV, including paragraphs 259 and 270, of our first written submission, the United States challenges each of the following measures separately and together: the Management Regulation; the Importation Procedure; the Catalogue; the Foreign Investment Regulation; the Several Opinions; the Electronic Publications Regulation; the Audiovisual Regulation; the Audiovisual Import Rule; the Audiovisual Sub-Distribution Rule; the Film Regulation; the Provisional Film Rule; and the Film Distribution and Projection Rule.[1]

2. The following table identifies the WTO-inconsistent measures challenged under the U.S. trading rights claims, the specific provisions of each challenged measure that give rise to U.S. concerns, the specific paragraphs of the Accession Protocol and Working Party Report under which the inconsistency arises, and the enterprise and/or individual for which trading rights are deprived.

3. The United States notes that his table includes only those provisions which directly give rise to the inconsistency with China's trading rights commitments. Other provisions of the challenged measures would be relevant for addressing issues such as, for example, the scope of the challenged measure (*e.g.*, Article 2 of the Management Regulation), or China's asserted defense under Article XX of the GATT 1994 (*e.g.*, Articles 25-27 and 44 of the Management Regulation).

[1] *See also* U.S. First Written Submission, para. 417.

WTO-Inconsistent Measure	**Specific Provisions of WTO-Inconsistent Measure**	**Paragraph of Accession Protocol/Working Party Report under which Inconsistency Arises**	**Party for which Trading Rights are Deprived**
Catalogue	"Catalogue of Prohibited Foreign Investment Industries," Articles X.2-X.3	Accession Protocol, paras. 5.1 and5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises and Foreign Individuals
Foreign Investment Regulation	Articles 3-4	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises and Foreign Individuals
Several Opinions	Article 4	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises and Foreign Individuals
Management Regulation	Articles 41-43	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Importation Procedure	"Licensing Requirements" paras. 2 and 8; "Quantity Restrictions: Yes"; and "Licensing Procedures"	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Electronic Publications Regulation	Articles 8, 50-55	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Audiovisual Regulation	Articles 5, 27-28	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Audiovisual Import Rule	Articles 7-10	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Audiovisual Sub-Distribution Rule	Article 21	Accession Protocol, paras.5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises and Foreign Individuals

Film Regulation	Articles 5 and 30	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Provisional Film Rule	Articles 3 and 16	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China
Film Distribution and Projection Rule	Article II	Accession Protocol, paras. 5.1 and 5.2; and Working Party Report, paras. 83(d) and 84(a)-(b)	Foreign Enterprises, Foreign Individuals, and Chinese Privately Invested Enterprises in China

Q2. Could the United States please expand on its arguments in para. 87 of its first oral statement that "the Film Distribution and Projection Rule is closely and directly related to both the Film Regulation and the Provisional Film Rule, which all explicitly address the importation of films for theatrical release":

(a) What is the relationship between these measures under Chinese law?

(b) What does the United States believe is the criteria for determining whether a measure is "subsidiary or closely related to" one mentioned in a Panel Request?

(c) Can the United States please explain why the Film Distribution and Projection Rule is mentioned in part III of its Panel Request and not in Part I?

(d) The United States bases its arguments on the phrase "any amendments, related measures or implementing measures" contained in its Panel Request. In this regard, given that the Film Distribution and Projection Rule (2001) pre-dates the Provisional Film Rule (2004) and is identified in another section of the United States' Panel Request, can the United States please comment on para. 7.50 of the panel report on *India – Additional Duties* (WT/DS360/R)?

4. The Film Distribution and Projection Rule[2] is a measure included in the U.S. panel request because it is a legal instrument that falls within the scope of: (1) the measure described in the second sentence of the second paragraph of Part I of the U.S. panel request; and (2) the phrase "any amendments, related measures or implementing measures" following the list of legal instruments involved with that measure. Paragraph 87 of the U.S. first oral statement notes that the Film Distribution and Projection Rule is a related measure to the Film Regulation and the

[2] Exhibit US-21.

Provisional Film Rule – which are legal instruments identified in Part I of the U.S. panel request – as these three measures regulate the importation of films into China.

5. The Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule are closely related measures under Chinese law. The Film Regulation is an administrative regulation issued by the State Council governing *inter alia* the importation of films into China. Articles 4 and 30 of the Film Regulation authorize SARFT as the Chinese agency responsible for regulating film importation. The Provisional Film Rule is a departmental rule and the Film Distribution and Projection Rule is an "other regulatory document".[3] Both are issued by SARFT pursuant to its authority under the Film Regulation, and further elaborate on the rules governing film importation. According to the hierarchy of legal instruments in China, departmental rules and other regulatory documents are subsidiary to administrative regulations.[4]

6. While the panel report in *India – Additional Duties* addressed a factual scenario that is distinct from that before the Panel here,[5] the U.S. position described in paragraph 7.50 of that report is consistent with the U.S. arguments in the present dispute concerning the phrase "amendments, related measures, or implementing measures" in the U.S. panel request. In *India – Additional Duties*, India contended that the panel should take two customs notifications into account that were issued after the panel was established, and that the panel should also rule on measures (included in the panel request) as modified by the new notifications. The United States argued, and the panel found, however, that the new notifications were not within the panel's terms of reference and that the panel would not make findings on measures as modified by the new notifications. In particular, paragraph 7.50 explains the U.S. view of the phrase in question as being limited to "any amendments or measures <u>in existence</u>"[6] when a panel is established, noting that the phrase's inclusive language seeks to ensure that citations to measures identified in a panel request are not overlooked.

7. In the present dispute, the Film Distribution and Projection Rule was in existence at the time of the Panel's establishment and consultations, consistent with the line of argumentation described in paragraph 7.50. This is in direct contrast to the new notifications at issue in *India – Additional Duties* that were issued subsequent to establishment of that panel. Although the Provisional Film Rule (October 10, 2004) was adopted after the Film Regulation (December 12, 2001) and the Film Distribution and Projection Rule (December 18, 2001), all of these measures were adopted prior to the Panel's establishment. The fact that one of these measures was issued after the other two does not detract from the fact that these three instruments are related measures regulating the importation of films into China.

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[3] *See* U.S. Answer to Panel Questions 3 and 4 for a detailed description of "other regulatory documents".

[4] *Trade Policy Review of the People's Republic of China, Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, paras. 18-24 and Chart II.1: Hierarchy of laws and regulations (Exhibit US-4).

[5] *India – Additional Duties (Panel)*, paras. 7.34-7.72.

[6] Emphasis added.

8. Likewise, the identification of the Film Distribution and Projection Rule in Part III of the U.S. panel request neither prevents its inclusion under Part I nor does it depart from the logic outlined in paragraph 7.50 of the panel report in *India – Additional Duties*. In fact, the phrase "amendments, related measures, or implementing measures" ensures that the Panel has before it those measures through which China reserves to certain Chinese state-designated and wholly state-owned enterprises the right to import the Products. Thus, while this measure was identified in Part III of the U.S. panel request because it also addresses the distribution of imported films, it became clear upon further refinement of the translation that it also directly regulates the importation of films into China. Therefore, the Film Distribution and Projection Rule is included in the U.S. panel request as part of the measure identified in the second paragraph of Part I, and as part of the phrase "amendments, related measures, or implementing measures."

9. The Panel may also wish to consider the reasoning of the panel in *Japan – Film*.[7] In that dispute, the panel stated in relevant part:

> To fall within the terms of Article 6.2 [of the DSU], it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.[8]

10. The Film Distribution and Projection Rule is subsidiary and closely related to measures specifically identified in Part I of the U.S. panel request, such that it can be said to be included in the measures (including those that fall within the scope of the term "amendments, related measures, or implementing measures" in the panel request). As a departmental rule issued by SARFT that regulates how films are imported into China, the Film Distribution and Projection Rule is subsidiary to the Film Regulation, which is an administrative regulation that authorizes SARFT to regulate the importation of films. The Film Distribution and Projection Rule is likewise closely related to both the Film Regulation and the Provisional Film Rule. The Film Regulation states that only enterprises designated by SARFT are permitted to import films.[9] Likewise, the Provisional Film Rule allows only SARFT-approved enterprises to import films into China.[10] Article II of the Film Distribution and Projection Rule confirms the close relationship between this measure and the Film Regulation and the Provisional Film Rule by providing that China Film Group is entrusted by SARFT to unify the importation of foreign films.

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[7] *Japan – Film (Panel)*, paras. 10.4-10.20.

[8] *Japan – Film (Panel)*, para. 10.8 (emphasis added).

[9] Article 30 (Exhibit US-20).

[10] Article 16 (Exhibit US-22)

11. Therefore, China had adequate notice of the scope of the U.S. trading rights claim. The Film Distribution and Projection Rule is a measure that deprives all foreign enterprises, all individuals and all privately-held enterprises in China of the right to import films into China. Like the Film Regulation and the Provisional Film Rule, it is a legal instrument that gives regulatory form to the substance of China's trading rights restriction; a restriction that was specifically identified in Part I of the U.S. panel request. Moreover, through the Film Regulation and the Provisional Film Rule, China was on notice that the Film Distribution and Projection Rule, as a subsidiary and closely related measure, is included in the U.S. claims.

Q3. With reference to your response to China's statements in footnotes 49 and footnote 125 of its first written submission, please provide the basis for the United States' assertion, in para. 93 of its first oral statement, that the Importation Procedure and Sub-Distribution Procedure are "legally-binding on GAPP".

12. The Importation Procedure and the Sub-Distribution Procedure are examples of Chinese legal instruments called "other regulatory documents", which are widely used in routine administration and are fully recognized in Chinese administrative law. "Other regulatory documents" are binding on the agencies that issue them and often serve as the basis for the administrative acts taken by these agencies. As China's Supreme People's Court has explained:

> In judicial practice, the hearings of administrative cases often involve particular interpretation of legal application issues by related departments, as well as other regulatory documents issued by the latter, both for the purpose of guiding the enforcement of law or implementing administrative measures; these include, *inter alia*, the interpretation by the departments under the State Council, and by People's Governments of provinces, municipalities, autonomous regions and relatively large cities or their subordinate departments in charge, in respect of particular application of laws, regulations or rules; Orders, Decisions or other regulatory documents formulated and issued by People's Governments at the county level and the above, and by their subordinate departments in charge, which have a generally-binding force. Administrative organs often directly take these particular interpretation and other regulatory documents as the basis for their particular administrative acts. These particular interpretation and other regulatory documents are not formal sources of law, and shall not bind upon the People's Courts in the sense of legal norms. However, where such particular interpretation and other regulatory documents that have been taken as the basis for particular administrative acts are deemed to be legal, effective, reasonable and appropriate by the People's Courts upon the examination of them, the People's Courts shall, in determining the legality of the administrative acts concerned, recognize their legal force; the People's Courts may, in

> giving the reasoning for its ruling, decide whether those particular interpretation and other regulatory documents are legal, effective, reasonable or appropriate.[11]

Likewise, the *Administrative Licensing Law of the People's Republic of China* ("Administrative Licensing Law")[12] refers to the four categories of legal instruments, including other regulatory documents.[13]

13. Other regulatory documents bind the agencies that issue them, in that these instruments are used by their agencies to enforce laws, to implement administrative measures and to serve as the basis for administrative acts. The binding force of other regulatory documents, however, is limited and does not extend to the courts. While a court may examine the underlying other regulatory documents in its review of an agency's actions, those other regulatory documents remain binding on their issuing-agency unless the court finds that those documents are not "legal, effective, reasonable or appropriate".

14. The Importation Procedure and the Sub-Distribution Procedure were issued by GAPP to implement rules addressing importers of reading materials (as set out in the Management Regulation) and sub-distributors of books, newspapers and periodicals published in China (as set out in the Foreign-Invested Sub-Distribution Rule), respectively. The Importation Procedure and the Sub-Distribution Procedure serve as a basis for the examination and approval of importers and sub-distributors applying for licenses to engage in these businesses in China. These two other regulatory documents elaborate on and interpret the Management Regulation and the Foreign-Invested Sub-Distribution Rule, and impose binding requirements and procedures that GAPP must follow in granting licenses to importers of reading materials and sub-distributors of books, newspapers and periodicals published in China.

Q4. Please explain what the United States means when it states, in para. 94 of its first oral statement, that the Sub-Distribution Procedure "fulfils GAPP's administrative law obligations by implementing and elaborating upon China's legal regime governing the importation and sub-distribution of reading materials."

15. The Importation Procedure and the Sub-Distribution Procedure were issued by GAPP pursuant to its administrative law obligations under the Administrative Licensing Law. The Administrative Licensing Law addresses the examination and approval by government agencies of

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[11] *Minute of Meeting on Issues Related to the Application of Legal Norms in the Hearings of Administrative Cases*, Supreme People's Court, May 18, 2004, p.2-3 (Exhibit US-62).

[12] *Administrative Licensing Law of the People's Republic of China* ("Administrative Licensing Law"), adopted at the 4th Session of the 10th National People's Congress on August 27, 2003; promulgated under Order of the President of the People's Republic of China No. 7 on August 27, 2003; effective as of July 1, 2004; Articles 14, 15 and 17 (Exhibit US-63).

[13] *See* U.S. response to Panel Question 4 for a detailed discussion of the Administrative Licensing Law.

applicants seeking to engage in activities in China for which a license is required.[14] Pursuant to Article 5 of the Administrative Licensing Law, administrative licensing requirements must be announced to the public. Articles 30 and 33 of the Law further require government agencies to display in their offices, and announce on their websites, all requirements related to the administrative licenses for which the agency is responsible.

16. Pursuant to the Administrative Licensing Law, GAPP issued two instruments to elaborate on its obligations under the Law: the *Announcement of the General Administration of Press and Publications of the People's Republic of China No.1* ("GAPP Announcement No. 1")[15] and the *Communication Regarding the Situation on the GAPP's Reform on the System of Administrative Examination and Approval* ("GAPP Communication").[16] GAPP Announcement No. 1 provides that GAPP will implement 36 "administrative licensing items" in accordance with the Administrative Licensing Law. The Importation Procedure and the Sub-Distribution Procedure are two of these 36 "administrative licensing items", and are explicitly listed in Appendix 1 of the Announcement.[17] The GAPP Communication confirms the requirements of Article 30 of the Administrative Licensing Law, stating that the requirements of GAPP-related licenses, including the 36 items, must be displayed in GAPP offices.[18]

17. The Importation Procedure and Sub-Distribution Procedure therefore fulfill GAPP's administrative law obligations pursuant to the Administrative Licensing Law by implementing and elaborating upon China's legal regime governing the examination and approval of licensees engaged in the importation and sub-distribution of reading materials pursuant to the Management Regulation and the Foreign-Invested Sub-Distribution Rule. By posting the Importation Procedure and the Sub-Distribution Procedure on its website, GAPP satisfies its requirements under the Administrative Licensing Law and the GAPP Announcement No. 1, that are confirmed by the GAPP Communication.

Q5. With reference to para. 253 of the U.S. first written submission, what is the basis for the United States' view that Article 4 of the Several Opinions which refers to "foreign investors" applies to foreign-invested "enterprises" and that this includes foreign enterprises (i.e., enterprises not in China)?

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[14] Administrative Licensing Law, Article 2 (Exhibit US-63).

[15] *Announcement of the General Administration of Press and Publications of the People's Republic of China No. 1* ("GAPP Announcement No.1"), General Administration of Press and Publications, July 15, 2004 (Exhibit US-64).

[16] *Communication Regarding the Situation on the GAPP's Reform on the System of Administrative Examination and Approval* ("GAPP Communication"), General Administration of Press and Publications, September 3, 2004 (Exhibit US-65).

[17] GAPP Announcement No. 1, Announcement and Appendix 1 (Exhibit US-64).

[18] GAPP Communication, Article II(3) (Exhibit US-65).

18. Article 4 of the Several Opinions states: "[f]oreign investors are prohibited from engaging in the publication, master distribution and import of books, newspapers and periodicals, and publishing, production, master distribution, and import of audiovisual products and electronic publications . . . ."[19]

19. The corresponding term in Chinese for "foreign investor" is *Wai Shang*. Literally, this term translates as "foreign merchant," "foreign trader" or "foreign businessman." In the context of foreign investment, *Wai Shang,* refers to "foreign investor" which is understood to any entity that can invest, *i.e.*, foreign individuals and enterprises that invest. Indeed, since investors act through investments, the logical understanding of "foreign investor" would be any foreign individual or foreign enterprise acting through an investment. Similarly, a prohibition on an investor – *e.g.*, foreign investor – from engaging in certain commercial activity would have to apply to both individual investors and the investor's enterprises through which the foreign investor acts. Accordingly, the reference to "foreign investors" in Article 4 of the Several Opinions applies to foreign individuals and foreign enterprises. Because foreign-invested enterprises involve an entity in which a foreign individual or foreign enterprise is investing, foreign-invested enterprises are also covered by Article 4.

Q6. With reference to para. 254 of the U.S. first written submission, please explain the basis of the U.S. assertion that the Catalogue and Several Opinions deprive foreign individuals of the right to import.

20. As set forth in response to Question 5, the prohibition on foreign investors from engaging in the commercial activities listed therein applies to foreign individuals, foreign enterprises and foreign-invested enterprises.

21. With respect to the Catalogue, the title of the Catalogue is the "Catalogue of Industries Guiding Foreign Investment." The corresponding Chinese terms are *Wai Shang Tou Zi Chan Ye Zhi Dao Mu Lu*, which translates as follows. *Wai Shang* means "foreign investors"; *Tou Zi* means "investment" or "invest"; *Chan Ye* means "industries"; *Zhi Dao* means "guide" or "guiding" and *Mu Lu* means "catalogue." Accordingly, the full phrase is intended to capture the concept of "Catalogue of Industries for Guiding the Investment of Foreign Investors." As stated in response to Question 5, the term *Wai Shang*, referring to "foreign investors" is understood to refer to any entity that invests *i.e.*, foreign individuals and enterprises that invest.

22. In addition, the corresponding Chinese for the title "Catalogue of Prohibited Foreign Investment Industries" is *Jin Zhi Wai Shang Tou Zi Chan Ye Mu Lu*. The terms are the same as the overall title for the Catalogue discussed in the previous paragraph except for the inclusion of the term *Jin Zhi*, which means "prohibit" or "prohibited" at the beginning, and the deletion of the term *Zhi Dou*. The full phrase is intended to capture the concept of "Catalogue of the Industries in

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

Which the Investment of Foreign Investors is Prohibited." Again, the term *Wai Shang*, referring to "foreign investors" is understood to refer to any entity that invests *i.e.*, foreign individuals and enterprises that invest. In light of the meaning of the relevant Chinese terms, Article X:3 under the heading "Catalogue of Prohibited Foreign Investment Industries" prohibits foreign investors and enterprises from engaging in the activities listed therein.

Q7. With reference to paras. 255 and 256 of the U.S. first written submission, please elaborate on how the relevant provisions confer discretion.

23. Paragraphs 255 and 256 of the U.S. first written submission address Articles 41 and 42 of the Management Regulation. These two articles confer considerable discretion on GAPP in selecting importers of reading materials, AVHE products and sound recordings, in a manner that is inconsistent with China's trading rights commitments under the Accession Protocol and Working Party Report,[20] in the following ways.

24. First, Articles 41 severely limits which entities may import newspapers and periodicals. This article empowers GAPP to be the gate-keeper with significant discretion to decide who can and cannot import these products into China. As only GAPP-designated enterprises are permitted to import newspapers and periodicals, GAPP is authorized to select the entities of its own choosing to import these products, without the need for an application and approval process.

25. Second, Article 42, in further qualifying which entities may import reading materials (including newspapers and periodicals), AVHE products and sound recordings into China, bestows additional discretion on GAPP. Under this provision, GAPP is responsible for determining whether importers satisfy seven conditions as well as the "State plan for the total number, structure and distribution of publication import entities." Even if the apparently objective conditions set forth in Article 42 are met (such that approval is possible), the State has discretion in formulating and applying the plan. That, in turn, translates into discretion in terms of which and how many of the qualifying enterprises are selected to engage in importation.

Q8. With reference to paras. 38 and 261 of the U.S. first written submission, what is the basis for the United States' assertion that only Chinese wholly state-owned enterprises may be designated to import newspapers and periodicals, and is the United States suggesting that the same is true for finished AVHE?

26. Only Chinese wholly state-owned enterprises designated by GAPP are permitted to import newspapers and periodicals into China. Article 41 of the Management Regulation provides that entities must be designated in order to import these products, while Article 42 of the same measure states that importers of reading materials, including newspapers and periodicals, must be Chinese

[20] Exhibit US-7.

wholly state-owned enterprises. In other words, the wholly state-owned enterprise requirement applies to all importers of reading materials, but the designation requirement only applies to a sub-set of those importers, *i.e.*, importers of newspapers and periodicals.

27. Likewise, only MOC-designated Chinese wholly state-owned enterprises are allowed to import finished AVHE products and finished sound recordings into China. As the United States explained in its first written submission, the Management Regulation covers reading materials, AVHE products and sound recordings.[21] Pursuant to Article 42 of that measure, importers of AVHE and sound recordings must be Chinese wholly state-owned enterprises. This is confirmed by Chinese legal instruments submitted by the United States as evidence in its first written submission.[22] Article 27 of the Audiovisual Regulation and Article 8 of the Audiovisual Import Rule add the second element of this requirement, providing that importers of finished AVHE products and finished sound recordings must be designated by MOC. Additional legal instruments submitted by the United States as evidence confirm that only one Chinese wholly state-owned enterprise – CNPIEC – is designated to import finished AVHE products and finished sound recordings into China.[23]

Q9. With reference to paras. 256 and 261 of the U.S. first written submission, what are the applicable "designation requirements"? How does designation involve discretion?

28. Designation is a requirement imposed on importers of newspapers and periodicals, finished AVHE products, and finished sound recordings, which is fundamentally discretionary. This is the case as there are no independent criteria governing how government agencies designate importers other than the criteria applicable to the approval process for importers of these products. In other words, while entities are required to be designated in order to import, there are no "designation requirements," standards or objective criteria applicable to the relevant government agencies responsible for appointing importers.

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[21] U.S. First Written Submission, paras. 32-38.

[22] Imported Cultural Products Measure, Article 4 (stating that "[t]he business of importing cultural products such as books, newspapers, periodicals, electronic publications, audiovisual products, motion pictures, TV dramas, cartoons, and radio/TV programs shall be carried out by *state-owned cultural units designated or licensed* by the Ministry of Culture, [the State Administration of Radio, Film, and Television] SARFT, and the General Administration of Press and Publication.") (emphasis added) (Exhibit US-10); and Decisions on Non-Public-Owned Capital, Article 9 (providing that "non-public capital . . . may not engage in the import business of cultural products such as books, newspapers, periodicals, films, TV programs, and finished audiovisual products, etc.") (Exhibit US-11).

[23] Imported Cultural Products Measure, Article 5 (stating "Import of finished audiovisual products shall be exclusively handled by the China [National] Books Import and Export Corporation.") (Exhibit US-10); and Anti-Fake Logo Circular, Article I (providing "According to the State Council, China National Publications Import and Export Corporation (CNPIEC) is the only entity that is approved by the State to engage in the importation of finished audiovisual products.") (Exhibit US-19).

29. Thus, under the designation process, the relevant government agency – GAPP in the case of newspapers and periodicals and MOC in the case of AVHE products and sound recordings – is authorized to appoint based on its own discretion the entity or entities of its own choosing that is/are permitted to engage in importation. Interested entities are not even afforded the opportunity to submit applications for examination and approval. Designation is a discretionary "black box" that entails the government appointment of one or a limited number of Chinese wholly state-owned importers, and is therefore inconsistent with China's trading rights commitments.

Q10. With reference to para. 266 of the U.S. first written submission, please explain the basis of the United States' assertion that foreign individuals are explicitly banned from importing sound recordings into China.

30. As stated in response to Questions 5 and 6, Article 4 of the Several Opinions and Article X:3 of the Catalogue under the heading "Catalogue of Prohibited Foreign Investment Industries", which are referenced in paragraph 266 of the U.S. first written submission, prohibit foreign investors from engaging in the activities listed in those provisions. The term "foreign investors" refers to both foreign individuals and foreign enterprises that invest. The prohibited activities include importation of audiovisual products, which under Chinese laws incorporates sound recordings. Accordingly, these measures prohibit foreign individual investors from importing sound recordings into China.

Q11. With reference to paras. 268 and 269 of the U.S. first written submission, please indicate:

(a) the difference, if any, between "designation" and "approval" in, respectively, Article 30 of the Films Regulation and Article 16 of the Provisional Film Rule;

31. In the context of the importation of films for theatrical release, the designation process provided for in Article 30 of the Film Regulation and the approval process provided for in Article 16 of the Provisional Film Rule are the same, despite the different terminology.

32. The "approval" referred to in Article 16 of the Provisional Film Rule is unlike any other approval process provided for elsewhere in this or any other measure at issue in that no qualifications and procedures are provided. 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. Instead, the "approval" referred to in Article 16, like the designation process in Article 30 of the Film Regulation and every other measure at issue, is devoid of criteria or other conditions confining the relevant agency's discretion. The Imported Cultural Products Measure, which was issued after the Provisional Film

Rule, confirms that film importers are subject to designation and not approval in the normal sense of that word in Chinese law.[24]

33. Regardless of whether film importers are designated or approved, Article 30 of the Film Regulation and Article 16 of the Provisional Film Rule are both inconsistent with China's obligation to allow all foreign enterprises, all foreign individuals and all enterprises in China to import all goods except those listed in Annexes 2A and 2B of the Accession Protocol. The designation and approval requirements are more than mere administrative formalities. They serve a gate-keeping function to limit the number of enterprises selected by the SARFT to import films for theatrical release and introduce significant discretion into a process China committed would be non-discretionary.

(b) whether any Chinese rule prescribes that no more than one entity may be designated to import films;

34. Article II of the Film Distribution and Projection Rule provides that China Film Group is entrusted by SARFT to unify the importation of films for theatrical release into China. Although this measure does not explicitly state that only China Film Group is "designated" to import films, it does clarify how the designation requirement of Article 30 of the Film Regulation is to be fulfilled – *i.e.*, that China Film Group is the sole importer of films. Article 12 of the *Provisional Rules for the Administration of Digital Films* further demonstrates the exclusive position enjoyed by China Film Group, stating:

> The import of digital films shall be undertaken by the China Film Group Corporation. No other entity or individual may engage in the business of the import of digital films.[25]

In fact, China Film Group's monopoly right with respect to the importation of films is confirmed by China Film Group's own website and numerous other sources.[26]

(c) whether any Chinese rule prohibits the designation of foreign individuals or of enterprises which are not wholly state-owned Chinese enterprises (i.e., foreign enterprises and Chinese enterprises);

35. China maintains numerous measures which prohibit foreign enterprises, foreign individuals and privately-held Chinese enterprises from engaging in the importation of films for theatrical release in China. The process by which SARFT designated the single Chinese wholly state-owned film importer – China Film Group – is subject to the prohibitions contained in these measures,

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[24] Article 10 (stating, "[m]otion picture import business shall be exclusively run by import units designated by SARFT.") (Exhibit US-10).

[25] *Provisional Rules for the Administration of Digital Films*, issued by the State Administration of Radio, Film and Television on August 7, 2002 (Exhibit US-66).

[26] U.S. First Written Submission, fn. 53.

which fall into two general categories. The first category is comprised of measures that prohibit foreign-investors (whether in the form of an enterprise or an individual) from engaging in the importation of films. Measures in this category include the Catalogue,[27] the Foreign Investment Regulation,[28] the Several Opinions[29] and the Film Regulation.[30] The second category of measures include the Imported Cultural Products Measure[31] and the Decisions on Non-Public Owned Capital,[32] which provide that only Chinese wholly state-owned enterprises are allowed to engage in the importation of films.

(d) whether the specific measures identified give rise to inconsistencies with the Accession Protocol independently of any general measures;

36. The Film Regulation, the Film Distribution and Projection Rule, and the Provisional Film Rule give rise to inconsistencies with China's trading rights commitments under the Accession Protocol and Working Party Report independently of, as well as together with, the Catalogue, the Foreign Investment Regulation, and the Several Opinions. The Film Distribution and Projection Rule explicitly establishes China Film Group's monopoly on the right to import films into China to the exclusion of all foreign enterprises, all foreign individuals and all other enterprises in China.

37. The Film Regulation and the Provisional Film Rule are also inconsistent with China's trading rights commitments. Each measure impermissibly restricts the right to import films by authorizing SARFT to appoint the importer of films at its own discretion without any opportunity for interested entities to apply, let alone to be granted permission to engage in importation. Under these measures, SARFT is not merely automatically authorizing all foreign enterprises, all foreign individuals and all enterprises in China to engage in importation upon confirmation that certain administrative formalities are satisfied. Instead, the Film Regulation and the Provisional Film Rule empower this government agency to assign trading rights to only those importers of its own choosing on no basis other than its own discretion.

(e) whether the specific measures are being challenged separately or together;

38. The Film Regulation, the Film Distribution and Projection Rule, and the Provisional Film Rule are being challenged separately as well as together.

(f) which is the rule that deprives foreign individuals of the right to import films for theatrical release.

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[27] Catalogue, "Catalogue of Prohibited Foreign Investment Industries", Article X.3 (Exhibit US-5).
[28] Article 3 and 4 (Exhibit US-9).
[29] Article 4 (Exhibit US-6).
[30] Article 30 (Exhibit US-20).
[31] Article 4 (Exhibit US-10).
[32] Article 9 (Exhibit US-11).

39. The Film Regulation deprives foreign individuals of the right to import films for theatrical release. Article 30 of that measure states, "[t]he business of importing films shall be conducted by film importing entities designated by the radio, film, and television administration under the State Council; without being designated, no entity or individual shall engage in the business of importing films." Other Chinese measures confirm that only Chinese wholly state-owned enterprises are permitted to import films for theatrical release into China.[33] To date, only China Film Import and Export Corporation has been designated to import films for theatrical release into China. No individuals have been designated to engage in this business.[34]

Q12. In footnotes 22, 25, 39, and 75 you reference certain provisions of the Imported Cultural Products Measures (Exhibit US-10) in the context of your explanation of China's measures. Please confirm that the Imported Cultural Products Measure is not a challenged measure.

40. The United States is not challenging the Imported Cultural Products Measure in this dispute. The United States has submitted this measure as evidence further demonstrating that China's regime for the importation of films for theatrical release is inconsistent with its trading rights commitments under the Accession Protocol and Working Party Report.

Q13. *With reference to para. 46 of China's first written submission, please answer the following questions:

(a) When the United States refers to the hard copy cinematographic film in para. 11 of its first oral statement, is that different from what China calls the "master negative" in para. 46? If so, please explain how and whether it matters.

41. The term "hard-copy cinematographic film" used by the United States is different from what China calls the "master negative." Specifically, the term "hard-copy cinematographic film" is broader than the term "master negative." This is evidenced by the description of cinematographic film under the relevant heading of the Harmonized Commodity and Description Coding System (HS), 3706. The WCO explanatory note for this heading states that "this heading

[33] Imported Cultural Products Measure, Article 4 (Exhibit US-10); and Decisions on Non-Public-Owned Capital, Article 9 (Exhibit US-11).

[34] *See* China Film Group homepage, available at http://www.chinafilm.com/gzzy/index_image/20070204/2100.html (providing that China Film Group "is the sole importer of foreign theatrical movies in China . . . ." (Exhibit US-23). *See also* United Nations Educational, Scientific and Cultural Organization, "Trends in Audiovisual Markets: China, Mongolia & South Korea" (June 2007), page 32 (Exhibit US-12); Screen Digest and Nielsen NRG, "Cinema and Home Entertainment in China" (January 2007), pages 41-42 (Exhibit US-24); The Center for American Economic Studies, Chinese Academy of Social Sciences, "A Study of the Potential of the Chinese Film Industry" (July 2005), page 31 (Exhibit US-25); and China eCapital Corporation, "Chinese Media & Entertainment Research: The Chinese Film Market", March 18, 2005, pages 40,65, 79, and 107 (Exhibit US-26).

covers developed standard or substandard width cinematographic film for the projection of motion pictures, negative or positive . . ."[35] Thus, cinematographic film includes both positive and negative film.

42. China's statement in paragraph 46 of its first written submission regarding the "master negative" appears to provide a description of the distribution process for films. However, the United States considers that it is important to provide certain clarifications regarding the process for distributing films. First, the "master negative" is the term used to refer to the first copy of the film produced by the licensor, which is typically part of the materials retained by the licensor and is not sent to the distributor. Instead, a copy of the "master negative," or "internegative," is typically licensed by the licensor to the distributor (along with the distribution rights and access to materials used to distribute and promote the film). The internegative is part of the materials sent once the license agreement and license fee have been negotiated and executed between the licensor and distributor. The distributor uses the internegative to make prints for distribution to local cinemas for the theatrical exhibition of the film.

43. Specifically, the distributor takes the internegative, which is the visual part of the film without sound track, to a laboratory. The laboratory produces the "interpositive," which is the internegative with the addition of the sound track. This interpositive is then used to make the prints. The prints are part of the materials (along with promotional materials such as posters) which are distributed to local cinemas and ultimately loaded onto a projector, which produces the images exhibited and viewed by the public at a movie theater. The product that is sent to China is typically either an exposed and developed internegative or the interpositive. Again, the "master negative" to which China refers is typically not part of the materials licensed with the distribution rights to the film and imported by the distributor into China.

(b) Does trade invariably occur in fulfilment of the terms of a distribution agreement between a producer and one or more distributors? Might a foreign producer import its own film (master negative) into another WTO Member and distribute the film from there?

44. As a general matter, trade in films will involve a distribution agreement between a producer and one or more distributors. However, this need not always be the case. In some instances, the producer of the film also imports the film into other worldwide markets and distributes the films in those markets. In many instances, the producer and distributor are related corporate entities. In most worldwide markets, where the producer and distributor are wholly distinct entities or distinct but related corporate entities, the two parties would enter into an arrangement for the distribution of the film and the parties would be free to mutually decide on the most advantageous terms for the commercial success of the relationship.

[35] *See* Exhibit US-53.

45. In contrast, China does not allow producers of imported films to import or distribute their films in China. China also does not allow producers of imported films to choose distributors, a restriction that film producers do not face in most other markets. Instead, China only allows Chinese wholly state-owned entities to import films.[36] Similarly, imported films may only be distributed by two state-controlled enterprises in China, while domestic films face no such limitation.[37] Furthermore, because the state controls the distribution of imported films in China, the producer of imported films is often forced to accept disadvantageous terms for distribution.[38]

46. The United States takes this opportunity to clarify one aspect of the Panel's question. As stated in response to sub-question (a), the product that is imported is not typically what China refers to as the "master negative." The product that is imported into China is typically the internegative or interpositive.

Q14. *Do the United States' claims concerning films for theatrical release relate to exposed and developed cinematographic film or the "delivery medium" i.e., the film reel, or both together? What does the United States mean exactly when it refers to "film", or to the "hard copy cinematographic film"?

47. The U.S. claims concerning films for theatrical release relate to the cinematographic film used to exhibit motion pictures in a theater. The delivery medium or container that carries the film, *i.e.*, the film reel or any other container, is irrelevant to the U.S. trading rights claims. For example, a complaining Member could bring a claim regarding trade in breakfast cereal. The breakfast cereal would likely be sold in some delivery medium *e.g.*, a box. However, the product that is relevant to the claim is the breakfast cereal while its container is irrelevant.

48. The term "hard-copy cinematographic film" used by the United States refers to films, in any tangible form that can be used to project motion pictures onto a screen.

Q15. *Supposing that the "master negative/copy" was transmitted electronically, would the United States still consider that the "film for theatrical release" or the "unfinished" audiovisual products and sound recordings are subject to WTO disciplines on goods, such as the Accession Protocol and the GATT 1994?

49. The U.S. trading rights claims related to films for theatrical release and unfinished AVHE products and sound recordings only relate to hard-copy, tangible products. Specifically, the U.S. claims cover hard-copy film prints in the "films for theatrical release" category and CDs and DVDs in the sound recordings and AVHE products categories, respectively. Accordingly, the

[36] U.S. First Written Submission, paras. 268-69.
[37] U.S. First Written Submission, para. 398.
[38] U.S. First Written Submission, paras. 404-06.

United States submits that this dispute does not present the question posed by the Panel and the Panel need not resolve this question in order to resolve any of the U.S. trading rights claims.

Q16. Does the GATT 1994 or any other covered agreement, permit a Member to regulate trade by regulating trade in a manner which restricts the right of enterprises or individuals to trade?

50. The GATT 1994 does permit Members to regulate trade in a manner which restricts the right of enterprises or individuals to trade, at least in some circumstances. For example, Article XVII:4(b) of the GATT 1994 implicitly establishes that import monopolies are not prohibited *per se* by the GATT 1994; import monopoly by definition denies trading rights to others. Furthermore, the Ad Note to Articles XI, XII, XIII, XIV and XVIII implicitly establishes that Members may make trade restrictions through state trading enterprises (including those that act as import monopolies as foreseen in Article XVII:4(b)) – provided that such regulation is consistent, *inter alia*, with the provisions of the articles of the GATT 1994 mentioned in the Ad Note. The disciplines of other articles of the GATT 1994, such as Article XVII, would of course also have to be respected.

51. China, however, committed in the Accession Protocol and Working Party Report to provide all foreign enterprises, all foreign individuals and all enterprises in China the right to import and export all goods except for those listed in Annexes 2A and 2B of the Accession Protocol. Through its trading rights commitment, China agreed not to give its state trading enterprises the exclusive right to import and export goods (other than those goods listed in Annexes 2A and 2B).

Q17. *Could the United States comment on China's assertion that films for theatrical release are *not* audiovisual products within the meaning of China's laws and regulations? If not, why not?

52. China's assertion that films for theatrical release are not classified as audiovisual products under Chinese law conflicts with the express terms of the Catalogue.[39] Article VI.3 of the Catalogue, which is found under the heading "Catalogue of Industries with Restricted Foreign Investment", provides, "Sub-distribution of audiovisual products (excluding motion pictures) . . . ." Then, Article X.3 of the Catalogue, which is included under the subsequent heading "Catalogue of Prohibited Foreign Investment Industries", states in relevant part that foreign enterprises and individuals are prohibited from engaging in the importation of "audiovisual products", without any exclusion for motion pictures.

53. The exclusion of "motion pictures" from the restricted category of foreign investment in the distribution of audiovisual products, in conjunction with the corresponding absence of any

[39] *See* U.S. First Written Submission, para. 27.

exclusion for "motion pictures" from the prohibited category of foreign investment in the importation of audiovisual products, demonstrates that motion pictures are considered by China to be audiovisual products.

54. Although China disagrees with the United States that films for theatrical release qualify as "audiovisual products", presumably because this would be an acknowledgment that films are goods, China does not address the U.S. arguments with respect to the Catalogue.[40] In asserting that films for theatrical release are not audiovisual products under Chinese law, China cites only to Article 2 of the Audiovisual Regulation. It is true that Article 2 does not expressly mention films as among the products that it lists as audiovisual products, but Article 2 does not attempt to provide an exhaustive list. It uses the term "*etc.*", denoting that it is only providing illustrative examples.

Q18. With reference to para. 20 of the United States' first oral statement, please identify which of the goods in HS heading 8524 are "unfinished AVHE products" and "unfinished sound recordings".

55. The description for HS heading 8524[41] was as follows: "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37.[42] As the United States set forth in its first written submission, the term "AVHE products" is intended to capture *inter alia* videocassettes, VCDs, and DVDs.[43] In addition, "unfinished" AVHE products are intended to capture products that China distinguishes from "finished" AVHE products; therefore, the United States describes unfinished AVHE products as master copies to be used to publish and manufacture copies for sale in China.[44] The description for HS heading 8524 provided above is broad and covers any "records, tapes and other recorded media for sound or other similarly recorded phenomena." Master copies of videocassettes, VCDs, and DVDs to be reproduced and sold in China would be covered by this description because these copies of videocassettes, VCDs, and DVDs are "records, tapes and other recorded media for sound or other similarly recorded phenomena."

56. Similarly, the term sound recordings as used by the United States covers *inter alia* recorded audio tapes, records, and audio CDs.[45] The United States considers that "unfinished sound recordings" are master copies of sound recordings to be reproduced and sold in China such as

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[40] *See* China's First Written Submission, fn. 15.

[41] China's HS Schedule is still in HS nomenclature from 1996. In the most recent revisions to the HS in 2007, HS heading 8524 was deleted and the old description for HS heading 8524 was incorporated into the HS heading 8523.

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

[43] U.S. First Written Submission, para. 47.

[44] U.S. First Written Submission, para. 49.

[45] U.S. First Written Submission, para. 59.

master recording discs.[46] These products are also distinguished from finished sound recordings in the relevant Chinese measures. As with AVHE products, these master recording discs fit within the scope of the description, "records, tapes and other recorded media for sound or other similarly recorded phenomena."

Q19. With reference to para. 31 of the United States' first oral statement, is it possible to understand the "without prejudice" clause as applying to all those goods not excepted by the Annexes? If not, why not?

57. The "without prejudice" clause found in paragraph 5.1 of the Accession Protocol does not permit China to deny trading rights to all foreign enterprises, all foreign individuals and all privately-held enterprises in China with respect to an entire category of a particular good that is not contained in Annexes 2A and 2B of the Accession Protocol. Annexes 2A and 2B provide for an exception to China's trading rights commitments with respect to certain specified goods only, such that only state trading enterprises are allowed to import the goods enumerated in Annex 2A1 and only designated importers are permitted to import the goods enumerated in Annex 2B until December 2004.

58. As China did not list reading materials, AVHE products, sound recordings and films for theatrical release in either Annex, China cannot add to the list of goods to which its trading rights commitments categorically do not apply. Yet, this is precisely what China's measures do – *i.e.*, they permit only Chinese wholly state-owned enterprises to import these goods, while concomitantly denying trading rights to all foreign enterprises, foreign individuals and privately-held enterprises in China.

59. Whatever else the "without prejudice" clause provides for with respect to the goods not included in Annexes 2A and 2B, such as regarding certain shipments of goods or certain individual importers, it does not duplicate the exception contained in those Annexes, which is the *per se* exclusion of all foreign enterprises, foreign individuals and privately-held enterprises in China from importing a complete class of goods.

Q20. Is Article XX(a) of the GATT 1994 available as an affirmative defence to the obligations in paras. 1.2, 5.1 and 5.2 of the Accession Protocol? Please explain your answer for each of the relevant paragraphs.

60. The relationship, if any, between Article XX(a) of the GATT 1994 and the Accession Protocol is a question of broad systemic import. However, it is not necessary to determine the nature and scope of this relationship in order to resolve the present dispute. As China's measures fall considerably short of satisfying the requirements of sub-paragraph (a), and the application of these measures likewise does not satisfy the requirements of the *chapeau* of Article XX, there is no

[46] U.S. First Written Submission, para. 60.

need to determine definitively whether Article XX is available as an affirmative defense to the obligations in paragraphs 1.2, 5.1 and 5.2 of the Accession Protocol.

61. The Appellate Body took this approach in *U.S. – Shrimp Bonding*.[47] In that dispute, the Appellate Body was presented with an appeal concerning an affirmative defense under Article XX(d) of the GATT 1994 to justify a measure found to be inconsistent with the *Anti-Dumping Agreement*. Implicated in that appeal was the question of the availability of such an Article XX defense. The Appellate Body elected to first examine, on an *arguendo* basis, whether the measure at issue was justified under Article XX before turning to the question of whether Article XX was applicable. After finding that the measure was not "necessary" within the meaning of Article XX(d), the Appellate Body concluded that it did not need to express a view on the question of the availability of the Article XX defense.

Q21. With reference to para. 35 of the United States' first oral statement please identify a "reasonably available WTO-consistent alternative" way of conducting content review before, during, and after importation?

62. Paragraph 35 of the U.S. first oral statement explains that content review can be conducted before, during or after importation and that there are several "reasonably available WTO-consistent alternatives" for China to choose from. For example, a foreign-invested enterprise could develop the expertise, via training of existing personnel or hiring experts as employees, to conduct the content review process for a particular reading material, AVHE product, sound recording or film for theatrical release. The foreign entity could complete the review and then import the publication into China, as CNPIEC does today. The foreign entity could also perform the content review during the time that importation is underway and could likewise perform that review once the importation was complete, but before the good is released into commerce in China. Alternatively, the foreign-invested enterprise importing the good into China could hire domestic Chinese entities with the appropriate expertise to conduct the content review process before, during or after importation.

Q22. With reference to paras. 6 and 25 of Australia's oral statement, are any of the United States' claims based, or dependent, on the assumption that content is a good distinct from a carrier medium?

63. None of the U.S. claims are based or dependent on the assumption that content is a good distinct from a carrier medium. Different goods may be of interest to consumers for different reasons. For example, a bicycle is of interest to consumers because it allows them to go from one place to another. Steel is of interest to consumers because it allows them to construct *inter alia* buildings and cars. In addition, apparel is of interest to consumers both because it serves a functional purpose and because of its decorative and expressive characteristics. Consumers can

[47] *U.S. – Shrimp Bonding (AB)*, paras. 304-319.

select the apparel that suits their tastes. Similarly, the Products subject to the U.S. trading rights claims are of interest to consumers because of the content they carry; consumers can select the reading materials, movies, or music that suits their tastes. There is no basis for the argument that because these goods carry content, they are no longer goods.

64. With respect to Australia's statement, it is important to begin by putting the statement in context. China has argued in its first written submission and first oral statement that films for theatrical release and unfinished AVHE products and sound recordings are not goods and therefore not subject to China's trading rights commitments.[48] China has made a number of arguments in this regard. For example, with respect to films for theatrical release, China argues that the "delivery materials that 'carry' the motion picture are traditionally tangible items . . . [however,] the exploitation of a motion picture for theatrical release does not consist of the trade of the film reel, but in the exploitation of the intangible feature that it contains, *i.e.*, the motion picture to be finally projected in movie theatres."[49] Australia, in its oral statement, points out the flaws in China's arguments and appears to conclude that in fact films for theatrical release and unfinished AVHE products and sound recordings are goods.[50] Australia then states, however, that in the event the Panel finds that the products at issue in the dispute "are not necessarily physical goods", "Australia does not consider content separate from carrier media to be a good to which the right to trade would apply." In fact, all of the products at issue in the U.S. trading rights claims are physical goods.[51]

65. Second, it is important to point out that China's argument in this regard, to which Australia responds, also fails because of an internal inconsistency. All of the products at issue in the U.S. trading rights claims consist of a carrier medium carrying content. This is true of reading materials and finished AVHE products and sound recordings, not merely films for theatrical release and unfinished AVHE products and sound recordings. Despite this element common to all of these products, China has not argued that reading materials or finished AVHE products or sound recordings, which contain content are not physical goods. Accordingly, China's argument that films for theatrical release and unfinished AVHE products and sound recordings are not goods does not withstand scrutiny.

66. Finally, as the United States set forth in its first oral statement, China's arguments that these products are not goods fail on several bases.[52]

For both Parties:

[48] China's First Written Submission, paras. 38-107, 109-126.
[49] China's First Written Submission, paras. 62, 64.
[50] Australia's First Oral Statement, paras. 3-5.
[51] *See* U.S. First Oral Statement, paras. 8-22.
[52] U.S. First Oral Statement, paras. 8-22.

Q49. With reference to the Catalogue of Prohibited Foreign Investment Industries, Exhibits US-5 and CN-41 contain discrepancies, e.g., with regard to Article VI (see heading and first paragraph). At para. 27 of its first written submission, the United States refers to Article VI.3, yet neither Exhibit US-5 nor Exhibit CN-41 contain Article VI.3. Please explain the discrepancies and submit the complete text of Article VI if this has not already been done.

67. The *Catalogue of Industries for Guiding Foreign Investment* (the "Catalogue"), which was submitted by the United States as Exhibit US-5, contains three sub-headings: (1) "Catalogue of Industries Encouraged for Foreign Investment";[53] (2) "Catalogue of Industries with Restricted Foreign Investment";[54] and (3) "Catalogue of Prohibited Foreign Investment Industries".[55] Paragraph 27 of the U.S. first written submission refers to two articles of the Catalogue which are located under two separate sub-headings. Article VI.3 is located under the second sub-heading "Catalogue of Industries with Restricted Foreign Investment",[56] while Article X.3 is located under the third sub-heading "Catalogue of Prohibited Foreign Investment Industries".[57]

Q50. With reference to paras. 5.1 and 5.2 of the Accession Protocol, please answer the following questions:

(a) What is the meaning and effect of the opening clause ("Without prejudice … in a manner consistent with the *WTO Agreement*") in para 5.1? Could China restrict the right to trade pursuant to provisions of the *WTO Agreement* without committing a breach of para. 5.1? If yes, why?

68. The opening clause of paragraph 5.1 of the Accession Protocol emphasizes that China's trading rights commitment does not prejudice measures that apply to the goods being traded, rather than to who is conducting the trading, such that the trading rights commitment would not be misinterpreted as requiring China to allow all importers to import goods that are wholly prohibited, or as requiring China to allow all importers to import goods without the application of border measures such as tariffs. Thus, goods being imported into China would have to satisfy other requirements that are permitted under the WTO Agreement. Such requirements could include those concerning import licensing, TBT and SPS, which are identified in paragraph 84(b) of the Working Party Report.

69. Moreover, the opening clause underscores the distinction between the right to trade and the right to distribute imported goods. As explained in paragraph 84(a) of the Working Party Report,

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[53] Pages 2-41 (emphasis added) (Exhibit US-5).
[54] Pages 42-48 (emphasis added) (Exhibit US-5).
[55] Pages 49-51 (emphasis added) (Exhibit US-5).
[56] Page 46 (Exhibit US-5).
[57] Page 51 (Exhibit US-5).

trading rights relate to importation (and exportation) and not to establishing a new channel for distribution of imports. The national treatment provisions of the GATT 1994 and the Accession Protocol ensure that imports have access to existing channels of distribution on a non-discriminatory basis. China's commitments under the GATS govern the issue of whether a service provider of a WTO Member can engage in distribution.

70. As a general matter, 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 of the Accession Protocol). Therefore, whole categories of importers cannot be denied that right. As paragraph 84(b) of the Working Party Report states, "He [the representative of China] further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade." While China cannot restrict the right to trade, it can, for example, provide that importers have a tax number so that authorities can monitor the payment of taxes, or contact the importer if an issue arises with regard to the importation of particular shipments of goods. The restrictions imposed by the measures at issue, however, go well beyond that which was contemplated in paragraph 84(b).

(b) Why does para. 5.1 of the Accession Protocol refer to the "right to regulate trade" in a manner consistent with the WTO Agreement and not to the "right to regulate the right to trade" in such a manner?

71. The phrase "right to regulate trade" relates to the regulation of goods, whereas the phrase "right to regulate the right to trade" involves the regulation of the importers that import goods. Thus, as explained in the U.S. response to Panel question 50(a) above, China's trading rights commitment does not prejudice measures that apply to the goods being traded. This is confirmed by Article 84(b) of the Working Party Report, which provides that goods that are imported by importers exercising the right to trade must comply with WTO-consistent requirements.

(c) Does the phrase "all enterprises in China" in para. 5.1 include:

(i) partly or wholly foreign-owned Chinese enterprises registered in China;

72. The phrase "all enterprises in China" includes partly or wholly foreign-owned enterprises registered in China. "All enterprises in China" is a broad phrase covering a set of enterprises limited only to the extent that such enterprises are "in China". The phrase "in China" includes those enterprises "registered" in China.

(ii) such enterprises as mentioned in (i) which are not registered in China (if so, please explain how an enterprise could operate in China without being registered as such); and/or

73. The phrase "all enterprises in China" does not include enterprises which are not registered in China. By definition, to be an enterprise in China, the entity must be registered as such.

(iii) additional/other "foreign" enterprises?

74. To the extent that partially or wholly foreign-owned enterprises registered in China are distinct from partially or wholly foreign-invested enterprises registered in China, then the phrase "all enterprises in China" includes both types of enterprises.

(d) Does the phrase "all foreign enterprises" in para. 5.2 cover foreign-owned enterprises in China and/or foreign incorporated enterprises operating in China?

75. The phrase "all foreign enterprises" covers foreign-owned enterprises, including wholly or partially foreign-invested enterprises. In paragraph 5.2, the negotiators intended to address aspects of China's trading rights regime that discriminated against foreign-invested enterprises (as well as foreign individuals). With respect to "foreign incorporated enterprises operating in China", the meaning of "operating" is not entirely clear.

(e) Does the phrase "all foreign individuals" in para. 5.2 cover:

(i) Non-Chinese individuals in China, non-Chinese individuals outside China or both?

76. The phrase "all foreign individuals" includes both non-Chinese individuals in China and non-Chinese individuals outside of China. Paragraph 5.2 does not qualify the phrase "all foreign individuals" with the phrase "in China".

(ii) individuals importing for their own use (as opposed to commercial traders)?

77. The phrase "all foreign individuals" also includes individuals importing for their own use. Nothing in the text of paragraph 5.2 limits this phrase to "commercial traders". This interpretation is supported by the context of paragraph 5.2. The use of the phrase "direct access to end-users" in paragraph 5.1 suggests that China's trading rights commitment was also meant to ensure that end-users can import goods into China.

(f) Regarding the opening clause of para. 5.2 ("Except as …"), where does the Protocol provide otherwise?

78. The Accession Protocol contains an exception to China's commitment to provide all foreign individuals and enterprises treatment no less favorable than that accorded to enterprises in

China with respect to the right to trade under Annexes 2A and 2B of the Accession Protocol. These Annexes contain a list of goods that only state trading enterprises can import (Annex 2A1) and that only designated enterprises can import until December 2004 (Annex 2B). This exception is found in paragraph 5.1 of the Accession Protocol and confirmed by paragraph 84(a) of the Working Party Report. In other words, although "state trading enterprises" are also enterprises in China, foreign enterprises cannot claim treatment equivalent to the treatment available to state trading enterprises with respect to the goods listed in Annexes 2A and 2B.

(g) To what category of goods does the phrase "All such goods" in the third sentence of para. 5.1 refer – all goods or all goods listed in Annex 2A?

79. The phrase "All such goods" refers to all goods. This interpretation is confirmed by the preceding sentence of paragraph 5.1, which states, "Such right to trade shall be the right to import and export goods." The term "goods", as used in the second sentence of paragraph 5.1, is unqualified and thereby refers to all goods. In other words, all goods shall be accorded national treatment under Article III of the GATT 1994 regardless of which enterprise or individual has the right to import or export the particular good.

(h) Linked to the previous sub-question, would "such goods" be subject to Article III:4 of the GATT 1994 in the absence of the third sentence of para. 5.1?

80. Yes, "such goods" – which means all goods for the reasons explained above – are subject to Article III, including Article III:4, of the GATT 1994 in the absence of the third sentence of paragraph 5.1. Paragraph 5.1 and Article III:4 address two separate and free standing sets of disciplines. China's trading rights commitment includes the *right to import* reading materials, AVHE products, sound recordings, and films for theatrical release. This commitment does not detract from China's obligations to accord imported reading materials, AVHE products, sound recordings and films for theatrical release treatment no less favorable than that accorded to domestic reading materials, AVHE products, sound recordings and films for theatrical release in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution and use.

Q51. With reference to footnote 7 of China's Services Schedule (concerning Sector 4B), for background, please explain how mode 1 restrictions could undermine the rights of Members to the right to trade.

81. China left mode 1 of Sector 4B unbound, and thus reserved to itself the right to take measures inconsistent with Article XVI and Article XVII of the GATS with respect to non-Chinese suppliers of cross-border distribution services. However, footnote 7 qualifies that otherwise broad retention of rights by China. Footnote 7 states, "[t]he restrictions on mode 1 shall not undermine the rights of WTO Members to the right to trade . . . ." China thus agreed that its Article XVI- or Article XVII-inconsistent measures could not be inconsistent with its trading rights commitments.

82. For example, China could limit the number of cross-border distributors to, say, five. Such a measure would ordinarily be inconsistent with GATS Article XVI:2(a), but would nonetheless be permitted because of the "unbound" entry of China's Services Schedule. However, China could not administer that quantitative restriction by denying the right to import to all wholesalers other than the chosen five. Enterprises without the right to conduct cross-border wholesaling would have to rely on other enterprises to arrange merchandise distribution within China beyond customs clearance, but they could not be denied the right to import that merchandise.

Q52. With reference to para. 84(b) of the Working Party Report, please indicate:

(a) Whether the term "non-discriminatory" concerns discrimination as between (i) different "foreign enterprises and individuals" (for instance, United States enterprises and European Communities enterprises), (ii) foreign enterprises and individuals, on the one hand, and enterprises in China, on the other, or (iii) both.

83. The term "non-discriminatory" as used in paragraph 84(b) of the Working Party Report applies to both scenarios (i) and (ii). Nothing in the text of paragraph 84(b) limits the scope of the term "non-discriminatory" to either scenario (i) or scenario (ii).

(b) The type of requirements China is permitted to impose as a precondition for granting trading rights. Please indicate, *inter alia*, whether requirements relating to capitalisation, prior registration, business scope, business site, compliance with Chinese laws, etc. would be permissible.

84. As a threshold matter, the United States is not challenging requirements imposed by China on importers relating to capitalization, prior registration, business scope, business site, compliance with Chinese laws, *etc*. Without prejudice to whether such requirements would be permissible under paragraph 84(b), China committed to grant trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO Members, in a non-discriminatory and non-discretionary way. As explained in response to the Panel's question 52(a), China must grant the right to trade in a manner that does not discriminate between foreign importers as well as between foreign importers (enterprises and individuals) and importers (enterprises) in China.

85. Assuming *arguendo* that such requirements are permissible under paragraph 84(b), they would have to be imposed in a "non-discriminatory and non-discretionary" manner as described above. Moreover, as stated in the second sentence of Article 84(b), "any requirements for obtaining trading rights" would be limited to "customs and fiscal purposes only and would not constitute a barrier to trade". In this context, at least some of the examples provided in the Panel's question seem difficult to justify, such as requirements relating to business scope and business site.

(c) How are these requirements set forth in China's legislation?

86. The United States is not aware of any requirements other than those at issue in this dispute, and is interested in China's response to the Panel's question.

Q53. *With reference to the term "release" in the phrase "films (or motion pictures) for theatrical release" as it is used in this dispute, please answer the following questions:

(a) What is the meaning of the term "release"?

(b) Does this cover

(i) old films which have not been previously released in China?

(ii) films for which any copyright protection has expired?

(c) If a film is to be screened again several years after it has been first released in China (e.g., to make it available to a new generation of cinema-goers), would this film be subject to China's measures governing films for theatrical release?

87. The term "films for theatrical release" is intended by the United States to capture a particular good, which is regulated by the Chinese measures at issue in this dispute. As discussed in response to question 13 above, the good that is the subject of the U.S. trading rights claim with respect to films for theatrical release are hard-copy cinematographic films, in any tangible form, which can be used to exhibit films in a movie theater. The focus, therefore, is on the tangible good, rather than on the release of that good.

88. Accordingly, the term "films for theatrical release" covers both old films that have been previously released in China and films for which any copyright protection has expired as long as the good at issue is the cinematographic film that can be used to exhibit films in a movie theater.

89. Finally, with respect to sub-question (c), it is necessary to clarify whether the Panel's question refers to old films that are being re-imported and then exhibited in movie theatres or old films that have been imported previously into China and will be re-exhibited in movie theatres. The U.S. trading rights claims challenge Chinese measures that prohibit the importation of films for theatrical release by foreign-invested enterprises. If the Panel's question refers to films that have been imported previously and are merely being exhibited again in movie theatres, then the prohibition on importation of films for theatrical release by foreign-invested enterprises is not relevant. However, to the extent an old film is being imported into China to be exhibited in movie theatres, it would be subject to China's measures governing films for theatrical release and would be covered by the U.S. trading rights claims.

Q54. *Article II:2 of the Marrakesh Agreement states that the Multilateral Trade Agreements are "integral parts" of the *WTO Agreement*. China's Accession Protocol (para. 1.2) states that it is an "integral part" of the *WTO Agreement*. What does the

phrase "integral part" mean? Does it mean the same thing in both cases? In relation to the Protocol, please also indicate whether, in your view, the Accession Protocol is an integral part of the Marrakesh Agreement or of one of its Annexes.

90. The term "integral part" means that China's Accession Protocol and the Multilateral Trade Agreements are part of the WTO Agreement for legal purposes. One consequence of being a part of the WTO Agreement for legal purposes is that WTO dispute settlement is available, as the WTO Agreement is a "covered agreement" under Article 1.1 of the DSU.

91. Regarding whether "integral part" means the same thing in Article 1.2 of the Accession Protocol and Article II:2 of the Marrakesh Agreement, this term accomplishes the same result in both instances, namely making the Accession Protocol (and the commitments contained in the Working Party Report referred to in paragraph 1.2 of the Accession Protocol) and the Multilateral Trade Agreements legally a part of the WTO Agreement.

92. The Accession Protocol is an "integral part" of the WTO Agreement as set out in Article II:2 of that Agreement.

Q55. With reference to para. 72 of China's oral statement which is the measure that China must establish as being "necessary" to qualify under Article XX(a): is it the content review or the restrictions on the right to trade? If it is the content review, would the restrictions on the right to trade be the "application" of the content review?

93. Assuming *arguendo* (as the United States suggests in its reply to Panel Question 20) that Article XX(a) applies, the measure at issue is the failure to provide the right to import to all foreign enterprises, all foreign individuals and all enterprises in China with respect to reading materials, AVHE products, sound recordings and films for theatrical release. It is not the content review. Therefore, China must show that its restrictions on the right to trade are "necessary to protect public morals" and that the application of that measure is not "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

94. Despite China's efforts to mis-characterize the measure at issue, the U.S. consultation requests,[58] panel request,[59] first written submission,[60] and first oral statement[61] clearly provide that the measure at issue is China's restrictions on the right to trade. Moreover, the Appellate Body has consistently held that it is the measure at issue that must satisfy the requirements of one of the sub-

[58] U.S. Consultation Request, Part I, para.1, WT/DS363/1; and U.S. Consultation Request Addendum, para. 1, WT/DS363/1/Add.1.

[59] U.S. Panel Request, Part I, para. 1, WT/DS363/5.

[60] U.S. First Written Submission, paras. 5, 18-68, and 224-270.

[61] U.S. First Oral Statement, paras. 4, and 23-39.

paragraphs of Article XX as well as its *chapeau*.[62] As the Appellate Body stated in *U.S. – Gasoline*:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.[63]

GATS CLAIMS ON DISTRIBUTION AND AUDIOVISUAL SERVICES

For the United States:

Q56. With reference to para. 151 of the U.S. first written submission, what is the second provision of particular relevance?

95. Article 8 of the Network Music Opinions is the provision of "particular relevance" to the U.S. argument in paragraph 151 of the U.S. first written submission. The United States does not intend to point to any other provisions in particular with respect to this argument.

Q57. *With reference to paras. 288 and 291 of the U.S. first written submission, what is the basis for the U.S. assertion that "master distribution" and "master wholesale" fall within the definition of "wholesale trade services" as defined in China's *GATS* Schedule?

96. Master distribution and master wholesale fall squarely within the definition of "wholesale trade services" as contained in Sector 4B of China's Services Schedule. Annex 2 of that Schedule provides, "wholesaling consist of the sale of goods/merchandise to retailers to industrial, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services." As discussed in paragraphs 40 through 47 of the U.S. first oral statement, China concedes that master distribution is a form of distribution that is synonymous with master wholesale.[64] Chinese legal instruments and other sources define this form of distribution as "first level wholesale", which involves the right to organize the distribution of a particular reading material and to select "second-level wholesalers" to provide wholesale services for that reading material in a particular region.[65] Whether they are selling to regional second-level wholesalers or selling to retailers through regional second-level wholesalers, master distributors and master

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[62] *See e.g., U.S. – Gasoline (AB)*, p. 20; *U.S. – Shrimp (AB)*, para. 118; *Korea – Beef (AB)*, para. 156; *Dominican Republic – Cigarettes (AB)*, para. 64; *Brazil – Tires (AB)*, para. 64

[63] Emphasis added.

[64] China's First Written Submission, paras. 255 and 259.

[65] *See* Exhibits US-56, US-57, and US-58.

wholesalers are engaged in wholesale trade services of reading materials within the meaning of China's Services Schedule and Annex 2 therein.[66]

97. Moreover, China inscribed no limitations with respect to these particular types of wholesale trade services. As a result, Sector 4B of China's Services Schedule contains market access and national treatment commitments with respect to master distribution and master wholesale.

Q58. With reference to the alleged discriminatory prohibitions concerning reading materials as addressed at para. 288 et seq. of the U.S. first written submission, is the United States claiming that each of the identified measures causes an inconsistency?

98. Yes, the United States is challenging the discriminatory prohibitions contained in each of the following measures: the Catalogue, the Foreign Investment Regulation, the Several Opinions, the Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, and the Electronic Publications Regulation. Each of the measures identified in paragraphs 288 through 295 of the U.S. first written submission is inconsistent with China's obligations under Article XVII of the GATS, as each of them individually accords to services and service suppliers of other WTO Members treatment that is less favorable than that accorded to like domestic services and service suppliers.

Q59. With reference to the alleged discriminatory requirements concerning reading materials as addressed at para. 296 et seq. of the U.S. first written submission, is the United States claiming that the alleged requirements relating to registered capital, operating terms, compliance record each cause an inconsistency? Also, with respect to the procedures for approval as a reading materials wholesale distributor, is the United States making claims with respect to the two aspects, i.e., the number of examination steps (para. 301) and the alleged discretionary criteria (para. 302)?

99. Yes, the United States is claiming that each of the five discriminatory requirements – with respect to operating terms, pre-establishment legal compliance, registered capital, examination and approval process and GAPP decision-making criteria – is inconsistent with China's obligations under Article XVII of the GATS as each of them individually accords to services and service suppliers of other WTO Members treatment that is less favorable than that accorded to like domestic services and service suppliers.

Q60. With reference to para. 289 of the U.S. first written submission, please explain how Article 4 of the Imported Publication Subscription Rule (which deals with subscriptions which are defined in Article 2) affects wholesale trade services.

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[66] *See also* U.S. Anser to Panel Question 77.

100. The Imported Publication Subscription Rule affects wholesale trade services by allowing only Chinese wholly state-owned enterprises the right to engage in the distribution (including wholesale and retail) of reading materials in China. First, Article 3 of the Imported Publication Subscription Rule states that imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category may only be distributed in China by way of subscription. Second, China has further defined "distribution" to include wholesale and retail services.[67]

101. Finally, Article 4 of the Imported Publication Subscription Rule explains that only certain GAPP-designated importers are permitted to provide imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category to subscribers in China. As Article 42 of the Management Regulation states that only Chinese wholly state-owned enterprises are allowed to import reading materials,[68] the effect of Article 4 of the Imported Publication Subscription Rule is to reserve the distribution of imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category to Chinese wholly state-owned enterprises. Therefore, as it excludes foreign-invested enterprises from distributing (including wholesaling and retailing) these imported reading materials in China, Article 4 of the Imported Publication Subscription Rule affects wholesale trade services in a manner that is inconsistent with Article XVII of the GATS.

Q61. With reference to paras. 289 and 290 of the U.S. first written submission, please explain the basis for the assertion that FIEs have no right to engage in the wholesale distribution of any imported books, newspapers or periodicals.

102. China prohibits foreign-invested enterprises from engaging in the wholesale distribution of imported books, newspapers, periodicals and electronic publications through a series of measures.[69] China achieves this prohibition in the following three ways:

- *Imported Newspapers and Periodicals as well as Imported Books and Electronic Publications in the Limited Distribution Category*: As explained above in response to the Panel's Question 60, the Imported Publication Subscription Rule provides that subscription is the only distribution channel available to imported newspapers and periodicals and imported books and electronic publications in the limited distribution category. This measure further states that only enterprises designated by GAPP to *import* reading materials – *i.e.*, Chinese wholly state-owned enterprises pursuant to Article 42 of the Management Regulation – can engage in the *distribution*, including both wholesale and retail, of these products. Thus, foreign-invested enterprises are prohibited from engaging

[67] *See* Publication Market Rule, Article 2 (Exhibit US-27); and China's First Written Submission, paras. 252-253.

[68] Exhibit US-7.

[69] *See* U.S. First Written Submission, paras. 77-90.

in the wholesale distribution of imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category.

- *Imported Books in the Non-Limited Distribution Category*: Article 3 of the Imported Publication Subscription Rule explains that imported books in the non-limited distribution category can be distributed "by sales through the market", *i.e.*, these reading materials are not limited to distribution by subscription. However, several Chinese measures demonstrate that foreign-invested enterprises are prohibited from engaging in the wholesale and retail of imported books in the non-limited distribution category. Article 16 of the Publication Market Rule[70] specifies that the Foreign-Invested Sub-Distribution Rule[71] governs foreign-invested enterprises seeking to engage in the sub-distribution[72] – *i.e.*, wholesale and retail – of books. Article 2 of the Foreign-Invested Sub-Distribution Rule, however, limits foreign-invested enterprises to the sub-distribution of books *published in China*.[73] As China has promulgated no additional measures granting foreign-invested enterprises the right to engage in the distribution of reading materials in China, such enterprises have no authority to engage in the wholesaling of imported books.

- *Electronic Publications*: Article 62 of the Electronic Publications Regulation states plainly that foreign-invested enterprises may not engage in the master wholesale or wholesale of *any* electronic publications, whether imported or domestic.

Q62. With reference to paras. 301 and 303 as well as 337 and 340 of the U.S. first written submission, please indicate whether the alleged difference in the minimum time required for approval concerns a claim separate from that concerning the number of procedural steps needed before approval can be granted or whether the time argument serves to demonstrate the result of the alleged difference in the number of steps required.

103. The difference in the minimum time required for approval concerns the same claim concerning the number of procedural steps needed before approval can be granted. With respect to reading materials, paragraph 301 of the U.S. first written submission addresses the inconsistency arising out of China's discriminatory examination and approval process. Paragraph 303 and 304 provide evidence in support of the single claim concerning that examination and approval process. In addition to the administrative burdens and time disadvantages imposed on foreign-invested enterprises, the examination and approval process also exposes foreign-invested enterprises to six opportunities for rejection, while their domestic counterparts face only two, thereby significantly reducing the odds of market access approval for foreign-invested sub-distributors as compared to

[70] Exhibit US-27.
[71] Exhibit US-28.
[72] Foreign-Invested Sub-Distribution Rule, Article 2 (Exhibit US-28).
[73] *See* U.S. First Written Submission, para. 85.

wholly Chinese-owned sub-distributors. Paragraph 302, however, addresses a separate claim regarding the inconsistency arising from the additional GAPP decision-making criteria imposed exclusively on foreign-invested sub-distributors of reading materials.

104. With respect to AVHE products, paragraphs 337 through 339 of the U.S. first written submission provide evidence of the same claim, and demonstrate the discrimination resulting from the disparate examination and approval processes applicable to foreign-invested versus wholly Chinese-owned sub-distributors of AVHE products. These paragraphs include various examples of discrimination, *e.g.*, timing disadvantages, "other documents" requirements, and government-contact limitations. Paragraph 340 then turns to a separate claim concerning the inconsistencies arising out of the additional MOC decision-making criteria that apply only to foreign-invested sub-distributors of AVHE products.

Q63. *With reference to paras. 322 et seq., 326 et seq., and 349 et seq., of the U.S. first written submission, please specify the type(s) of foreign-invested entities with which the United States' claims under Articles XVI and XVII of the GATS are concerned.

105. With reference to these sections of the U.S. first written submission identified in the Panel's question, the U.S. claims under Articles XVI and XVII of the GATS are concerned with Chinese-foreign contractual joint ventures.[74]

106. In Sector 2D of its Services Schedule, entitled "Audiovisual Services," China undertook market access and national treatment commitments under mode 3 for the distribution of AVHE products. Specifically, China committed that upon accession, "foreign service suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products."[75] China inscribed no market access limitations on the contractual joint ventures that foreign-invested enterprises may establish with Chinese partners to engage in the distribution of AVHE products either in Sector 2D or in its horizontal commitments.[76] China also inscribed no national treatment limitations on its commitment with respect to the distribution of AVHE products by Chinese-foreign contractual joint ventures.

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[74] The sections of the U.S. first written submission identified in Panel Question 63 set forth the following U.S. claims respectively: (1) Chinese measures restricting foreign capital participation in Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products are inconsistent with Article XVI of the GATS; (2) China's measures treat foreign AVHE product distribution service suppliers less favorably than China's own like service suppliers and are inconsistent with Article XVII of the GATS; and (3) China's measures treat sound recording distributors of other Members less favorably than China's own like service suppliers and are inconsistent with Article XVII of the GATS.

[75] China's Services Schedule, Part II: Specific Commitments, WT/MIN(01)/3/Add. 2, p. 21 (Exhibit US-2).

[76] China's Services Schedule, Part II: Specific Commitments, WT/MIN(01)/3/Add. 2, p. 21 (Exhibit US-2); China's Services Schedule, Part I: Horizontal Commitments, WT/MIN/(01)/3/Add. 2, p. 2 (Exhibit US-2).

107. China's market access commitments with respect to the distribution of AVHE products allow China to limit foreign-invested commercial presence in this sector to Chinese-foreign contractual joint ventures. Accordingly, the U.S. claim under Article XVI of the GATS relating to AVHE product distribution services is concerned with Chinese-foreign contractual joint ventures.

108. Under Article XVII of the GATS, with respect to those foreign-invested enterprises that are permitted to supply the relevant services in China, China is required to accord no less favorable treatment to service suppliers of other Members than to its own like service suppliers. In the context of this dispute, the measures that the United States challenges under Article XVII of the GATS relate to Chinese-foreign contractual joint ventures.

Q64. *With reference to the discrepancy between paras. 117 and 323 of the U.S. first written submission, please explain which measures the United States is challenging under Article XVI.

109. With respect to the distribution of AVHE products, the measures challenged by the United States under Article XVI of the GATS are: (1) the Audiovisual Sub-Distribution Rule; (2) the Catalogue; (3) the Foreign Investment Regulation; and (4) the Several Opinions.[77]

110. Specifically, Article 8 of the Audiovisual Sub-Distribution Rule provides that the Chinese party to a Chinese-foreign contractual joint venture engaged in the sub-distribution of audiovisual products "shall hold no less than 51% equity in the contractual joint venture."[78] Second, Article VI:3 of the Catalogue under the heading "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."[79] The Foreign Investment Regulation provides guidance as to the meaning of this provision stating that a restriction that the Chinese partner holds majority share in the Catalogue means "the total proportion of investment of the Chinese investor in the foreign-invested project is 51% and above."[80] Finally, Article 1 of the Several Opinions states that "foreign investors are permitted to set up enterprises for the sub-distribution of audiovisual products, with the exception of motion pictures, in the form of Chinese-foreign contractual joint ventures where the Chinese partner holds a dominant position."[81]

111. These provisions establish a regime under which China restricts the foreign capital participation in Chinese-foreign contractual joint ventures engaged in the sub-distribution of AVHE products. Article XVI:2 of the GATS provides that "unless otherwise specified in its Schedule," Members may not maintain certain measures in sectors where market access

[77] The Audiovisual Regulation, identified, in paragraph 117 of the U.S. first written submission is not relevant to the U.S. claim under Article XVI of the GATS related to AVHE product distribution services.

[78] Exhibit US-18.

[79] Exhibit US-5.

[80] Exhibit US-9.

[81] Exhibit US-6.

commitments are undertaken. One of these types of measures, set forth in subparagraph (f) of Article XVI:2 are "limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment." China did not inscribe a market access limitation in its Services Schedule with respect to the participation on foreign capital in entities engaged in the distribution of AVHE products. However, the measures comprising the regime described above are the types of measures identified in Article XVI:2(f) of the GATS, which Members shall not maintain. Accordingly, these measures are inconsistent with Article XVI:2(f) of the GATS.

Q65. *With reference to para. 333 of the U.S. first written submission:

(a) At the first substantive meeting the United States indicated that it is challenging the four measures identified in para. 333 of its first written submission separately *and* together. Can the United States please explain how the measures operating together cause an inconsistency with Article XVII of the *GATS*?

(b) Can the United States please explain how the inability to control a foreign invested contractual joint venture modifies the conditions of competition in China between foreign enterprises and wholly domestic Chinese enterprises? Is the limitation on the foreign partner from exercising control over the joint venture *eo ipso* an impediment to effective competition with domestic Chinese enterprises?

112. With respect to sub-question (a), the measures identified in paragraph 333 of the U.S. first written submission together create a regime under which the foreign-invested distributors of AVHE products are accorded less favorable treatment than China's own like service suppliers in contravention of Article XVII of the GATS.[82] In order for China's measures to be consistent with Article XVII of the GATS, the relevant provisions of each of these measures would need to be withdrawn.

113. With respect to sub-question (b), one of the bases of the U.S. claim under Article XVII of the GATS related to the distribution of AVHE products is that the limitation under Chinese law on the foreign party to a Chinese-foreign contractual joint venture to a minority share of the enterprise accords less favorable treatment to these entities than to China's own like service suppliers. The relevant measures provide that the foreign party may never possess more than 49 percent of shares of the enterprise, while the Chinese party may possess 100 percent of the shares of such an

[82] *See* U.S. First Written Submission, paras. 326-41 setting forth the basis of the U.S. claim that China's measures regulating foreign-invested distributors of AVHE products are inconsistent with Article XVII of the GATS.

enterprise, and no less than 51 percent of the shares of the enterprise.[83] China's restrictions on foreign capital participation in joint ventures engaged in the distribution of AVHE products have the potential to restrict foreign investors' freedom to implement their strategic vision and realize their goals for the enterprise where the vision and goals are inconsistent with those of the Chinese party to the joint venture. This restriction can limit the success of the foreign investor's investment as well as inhibit the future development of the enterprise in China. Chinese like service suppliers do not face such a limitation because the Chinese party to a contractual joint venture engaged in the sub-distribution of AVHE products is always ensured the dominant position in the enterprise.

114. In a situation where the partners to a Chinese-foreign joint venture disagree about the goals for the enterprise or the best way for the enterprise to operate, the foreign party is restricted in its ability to set up an enterprise, which reflects its competitive vision and goals. This is a restriction on the ability to compete in the market. In contrast, in the same situation of a disagreement between the joint venture partners, the Chinese party is guaranteed the ability to realize its vision and goals for the enterprise because the Chinese party is guaranteed a dominant position.

115. The limitation on the foreign partner's ability to exercise control over the joint venture may not always serve as an impediment to effective competition. However, the restriction on the foreign investors' freedom to implement their vision and goals for an enterprise, which the Chinese party to a contractual joint venture does not face, provide China's own like service suppliers with greater competitive freedom and therefore a competitive advantage over foreign service suppliers. Accordingly, these measures accord less favorable treatment to foreign service suppliers engaged in the sub-distribution of AVHE products.

Q66. With reference to para. 337 of the U.S. first written submission, is the United States making a separate claim in relation to the requirement to "produce unspecified 'other documents'"?

116. The open-ended requirement in Articles 12.5 and 13.9 of the Audiovisual Sub-Distribution Rule faced only by foreign-invested enterprises to produce unspecified other documents is one element of the U.S. claim under Article XVII of the GATS relating to the distribution of AVHE products. The U.S. claim under Article XVII of the GATS with respect to AVHE product distribution service suppliers challenges China's discriminatory requirements that treat AVHE product distribution service suppliers of other Members less favorably than China's own like service suppliers. The U.S. claim is based on several measures maintained by China, which together establish a regime that accords less favorable treatment to foreign suppliers of AVHE product distribution services. In addition, these measures provide for several discriminatory requirements, which are each elements of the U.S. claim under Article XVII. The requirement identified in the Panel's question is one element of this claim.

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[83] *See* U.S. First Written Submission, para. 333.

Q67. With reference to para. 338 of the U.S. first written submission, is the United States making a separate claim in relation to the alleged requirement that only the Chinese party may engage with relevant government agencies?

117. As with Question 66, the requirement in Articles 11-13 of the Audiovisual Sub-Distribution Rule – that only the Chinese party to a Chinese-foreign contractual joint venture engaged in the distribution of AVHE products may engage with the relevant government agencies – is one element of the U.S. claim under Article XVII of the GATS relating to the distribution of AVHE products. The U.S. claim under Article XVII of the GATS with respect to AVHE product distribution service suppliers challenges China's discriminatory requirements that treat AVHE product distribution service suppliers of other Members less favorably than China's own like service suppliers. The U.S. claim is based on several measures maintained by China, which together establish a regime that accords less favorable treatment to foreign suppliers of AVHE product distribution services. In addition, these measures provide for several discriminatory requirements, which are each an element of the U.S. claim under Article XVII. The requirement identified in the Panel's question is one element of this claim.

Q68. With reference to para. 340 of the U.S. first written submission, the "additional approval conditions" mentioned in that paragraph include only those in Article 6 of the Several Opinions. Footnote 226 refers to additional provisions. Please clarify the U.S. claim.

118. The U.S. claim under Article XVII of the GATS regarding AVHE product distribution services challenges various measures maintained by China that provide for discriminatory requirements for foreign-invested entities engaged in the sub-distribution of AVHE products. One of the sets of measures sets forth the examination and approval process for foreign-invested enterprises seeking to engage in the sub-distribution of AVHE products, which requires these entities to go through more steps and administrative burden than like wholly Chinese-owned entities.[84] Article 5 of the Several Opinions, and Articles 11, 12.5 and 13.9 of the Audiovisual Sub-Distribution Rule, which are all listed in footnote 226 of the U.S. first written submission all relate to the examination and approval process. In addition, Article 6 of the Several Opinions sets forth an additional discriminatory requirement, namely that certain decision-making criteria apply to foreign-invested entities engaging in the sub-distribution of AVHE products that are not applicable to like wholly Chinese-owned entities.[85] This provision directs the relevant authorities engaged in approving applications for foreign-invested service suppliers to give priority to foreign-invested enterprises displaying the friendliness, capital strength, management standardization, and technological advancement of foreign-invested applicants in making their determinations.[86]

[84] U.S. First Written Submission, paras. 336-39.
[85] U.S. First Written Submission, para. 340.
[86] Several Opinions, Article 6 (Exhibit US-6).

119. Exhibit US-52 sets forth a list of all of the discriminatory requirements imposed on foreign-invested sub-distributors of AVHE products that are challenged by the United States.[87]

Q69. With reference to para. 345 of the U.S. first written submission, can the United States identify examples of Members who inscribed limitations as to the means of delivery of services into their Services Schedule? Of particular interest is Sector 2D.

120. Examples of Members who inscribed limitations as to the means of delivery of services into their services schedules are China, the Czech Republic, and the European Communities. All of these countries undertook market access commitments only with respect to "mail order" for Retailing Services in mode 1. All other means of supply are excluded.[88]

121. The Panel's question refers to paragraph 345 of the U.S. first written submission, which relates to the U.S. claim that China's measures regulating the electronic distribution of sound recordings are inconsistent with Article XVII of the GATS. Specifically, in paragraph 345 of our first written submission, the United States notes that China inscribed no limitations on its market access commitment under mode 3 regarding the means of supply used for sound recording distribution. Accordingly, restrictions on the means of supply that Chinese-foreign contractual joint ventures may use to distribute sound recordings are inconsistent with Article XVII of the GATS.[89]

122. The examples provided above of Members, including China, limiting their market access commitments to certain means of supply, demonstrate that Members can and have inscribed such limitations on the means of supply. Indeed, China has done so in its own Services Schedule. The failure of China to exclude electronic distribution from its market access and national treatment commitments for sound recordings distribution services means that China's commitments in this sector include the electronic distribution of sound recordings.

Q70. With reference to paras. 355 to 358 of the U.S. first written submission, is the United States claiming that the four identified measures are inconsistent with the *GATS* taken together or separately?

123. The United States challenges the four measures identified in paragraphs 355 to 358 of its first written submission[90] as inconsistent with the GATS taken together and taken separately. The four measures together establish a regime governing the electronic distribution of sound recordings in China under which foreign-invested enterprises are prohibited from engaging in any electronic distribution of sound recordings through commercial presence. All of these measures taken

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[87] Summary of WTO Inconsistencies (Exhibit US-52), p. 5.

[88] Services Schedule of China, Czech Republic, and the European Communities (Exhibit US-67).

[89] *See* U.S. First Oral Statement, paras. 48-76.

[90] Internet Culture Rule, Articles 2-4 (Exhibit US-32); Internet Culture Notice, Article II (Exhibit US-33); Network Music Opinions, Article 8 (Exhibit US-34); and Several Opinions, Article 4 (Exhibit US-6).

together are inconsistent with Article XVII of the GATS because by prohibiting foreign-invested entities from engaging in the electronic distribution of sound recordings, these measures modify the conditions of competition in favor of wholly Chinese-owned sound recording distributors. In order to be in compliance with its GATS obligations, China would be required to withdraw all of the measures that together create this regime.

124. It is important to clarify that as the United States set forth in the first written submission, the Catalogue and the Foreign Investment Regulation, which provides guidance regarding the meaning of terms in the Catalogue, are also part of this regime. Article X:7 of the Catalogue, under the heading "Catalogue of Prohibited Foreign Investment Industries," provides that foreign investment is prohibited in enterprises engaging in "news websites, network audiovisual program services, internet on-line service operation site, and *internet culture operation*."[91] Because these measures are also part of the regime governing the electronic distribution of sound recordings in China, the United States challenges these measures together with the other measures identified in paragraphs 355-58 of the U.S. first written submission.

Q71. With reference to footnote 235 of the U.S. first written submission, is it the view of the United States that the Catalogue and the Foreign Investment Regulation are part of the measures challenged in Section V.D of the U.S. first written submission?

125. As stated in response to Question 70, the United States considers that the Catalogue and the Foreign Investment Regulation are part of the measures challenged in Section V.D of the U.S. first written submission *i.e.*, part of the regime governing the electronic distribution of sound recordings in China. Article X.7 of the Catalogue, under the heading "Catalogue of Prohibited Foreign Investment Industries," provides that foreign investment is prohibited in enterprises engaging in "news websites, network audiovisual program services, internet on-line service operation site, and *internet culture operation*."[92] The Foreign Investment Regulation provides guidance regarding the meaning of provisions in the Catalogue.[93]

126. Accordingly, the Catalogue and the Foreign Investment Regulation, as part of the regime that prohibits foreign-invested entities from engaging in the electronic distribution of sound recordings, are also inconsistent with Article XVII of the GATS because it modifies the conditions of competition in favor of wholly Chinese-owned distributors.

Q72. With reference to paras. 154 and 357 of the U.S. first written submission, what is the basis for the assertion that the prohibition does not extend to wholly Chinese-owned sound recording distributors?

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[91] Catalogue, "Catalogue of Prohibited Foreign Investment Industries," Exhibit US-5 (emphasis added); Foreign Investment Regulation (Exhibit US-9).

[92] Catalogue, "Catalogue of Prohibited Foreign Investment Industries," Exhibit US-5 (emphasis added).

[93] Foreign Investment Regulation (Exhibit US-9).

127. The measures governing the electronic distribution services for sound recordings explicitly prohibit foreign-invested entities from providing such services. No such prohibition is provided for with respect to wholly Chinese-owned entities. It follows, therefore, that the prohibition challenged by the United States does not extend to wholly Chinese-owned sound recording distributors.

128. First, the Internet Culture Rule establishes the general requirements for certain entities approved by MOC and the Ministry of Information Industries ("MII") to engage in, *inter alia*, the electronic wholesale distribution of sound recordings.[94] The Internet Culture Notice reinforces and expands on the requirements in the Internet Culture Rule. The Internet Culture Notice also provides in Article II that the MOC "shall not accept applications to engage in Internet cultural activities from Internet information service providers with foreign investment."[95]

129. This prohibition is reinforced by Article 8 of the Network Music Opinions, which prohibits the establishment of foreign-funded "network cultural business units."[96] Moreover, Article 4 of the Several Opinions reiterates the prohibition by stating that "[f]oreign investors are prohibited from setting up and operating . . . business dealing with internet culture," which are enterprises approved by MOC and MII to engage in *inter alia* the electronic distribution of sound recordings.[97]

130. Because these measures do not provide for the same prohibition with respect to wholly Chinese-owned distributors of sound recordings, it follows that the prohibition does not extend to such entities.

Q73. With reference to Section VI.B.1 of the U.S. first written submission, why is there no such discussion for the U.S. claims under Article XVII of the *GATS*?

131. The United States understands the Panel to be asking why the United States did not include a discussion of whether the domestic service suppliers of reading materials, AVHE products, and sound recordings distribution services are "like service suppliers" within the meaning of Article XVII of the GATS. The United States submits that the facts relevant to this element of the U.S. Article XVII claim have been adduced in the U.S. first written submission and are sufficient for the Panel to conclude that the wholly Chinese-owned service suppliers of the relevant product distribution services are "like service suppliers" within the meaning of Article XVII. Specifically, the measures relevant to the U.S. claims under Article XVII of the GATS distinguish between foreign-invested and wholly Chinese-owned service suppliers solely based on origin.

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[94] U.S. First Written Submission, paras. 143-47 citing the Internet Culture Rule (Exhibit US-32).

[95] Internet Culture Notice (Exhibit US-33).

[96] *See* U.S. First Written Submission, paras. 150-52.

[97] *See* U.S. First Written Submission, para. 153.

132. In the context of a national treatment claim under Article III:4 of the GATT 1994, imported and domestic products are "like products" for the purposes of Article III:4 where the measures at issue make distinctions between products based solely on origin.[98] The United States considers that the same line of reasoning is applicable to determining whether domestic service suppliers are like foreign service suppliers in the context of a claim under Article XVII of the GATS.

133. The measures at issue with respect to the U.S. claims under Article XVII of the GATS distinguish between service suppliers solely based on their national origin. For example, in the context of reading materials, the Publications Market Regulation requires wholly Chinese-owned reading material wholesalers to have less registered capital than is required of foreign-invested reading material wholesalers.[99] In addition, foreign-invested wholesalers of reading materials are subject to a limitation on their operating term that does not apply to wholly Chinese-owned reading materials wholesalers.[100] Third, foreign-invested reading material wholesalers are subject to a pre-establishment legal compliance requirement that does not apply to wholly Chinese-owned suppliers.[101] Finally, foreign-invested reading materials wholesalers are subject to a more burdensome examination and approval process that involves greater administrative hurdles and costs than the examination and approval process applicable to wholly Chinese-owned service suppliers.[102] Because these measures distinguish between foreign service suppliers and wholly Chinese-owned service suppliers solely based on origin, *i.e.*, the type of requirement that applies depends solely on the national origin of the service supplier, these measures accord less favorable treatment to foreign service suppliers than to like service suppliers of China.

134. Similarly, with respect to AVHE product distribution suppliers, China imposes numerous requirements on foreign-invested AVHE product distribution suppliers that are not applicable to like wholly Chinese-owned service suppliers. First, foreign investors may never possess more than 49 percent of the shares of a contractual joint venture, while a Chinese investor faces no such limitation.[103] Second, China imposes an operating term limitation only on foreign-invested

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[98] *See* U.S. First Written Submission, paras. 366-67 citing *India – Autos (Panel)*, para. 7.174.

[99] U.S. First Written Submission, para. 297 citing Publications Market Regulation, Article 8 (Exhibit US-27).

[100] U.S. First Written Submission, para. 298 citing Foreign-Invested Sub-Distribution Rule, Article 7.5 (Exhibit US-28); Publication of Sub-Distribution Procedure (Exhibit US-29), Licensing Requirements, para. 5.

[101] U.S. First Written Submission, para. 299 citing Foreign-Invested Sub-Distribution Rule, Article 7.1 (Exhibit US-28); Publication of Sub-Distribution Procedure (Exhibit US-29), Licensing Requirements, para. 1; Several Opinions, Article 6 (Exhibit US-6).

[102] U.S. First Written Submission, para. 299 citing Foreign-Invested Sub-Distribution Rule, Articles 10-14 (Exhibit US-28); Publication Market Rule, Article 9 (Exhibit US-27).

[103] U.S. First Written Submission, para. 333 citing Audiovisual Sub-Distribution Rule, Article 8.4 (Exhibit US-18); Several Opinions, Article 1 (Exhibit US-6); Foreign Investment Regulation, Articles 3 and 4 (Exhibit US-9); and Catalogue, "Catalogue of Industries with Restricted Foreign Investment", Article VI.3 (Exhibit US-5).

distributors of AVHE products, and not wholly Chinese-owned distributors.[104] Third, foreign-invested distributors of AVHE products are subject to a pre-establishment legal compliance requirement that is not applicable wholly Chinese-owned distributors.[105] Fourth, China imposes a more burdensome administrative examination and approval process on foreign-invested distributors than on wholly Chinese-owned distributors.[106] As with reading materials, because these measures distinguish between foreign service suppliers and wholly Chinese-owned service suppliers solely based on origin, *i.e.*, the type of requirement that applies depends solely on the national origin of the service supplier, these measures accord less favorable treatment to foreign service suppliers than to like service suppliers of China.

135. The final U.S. claim under Article XVII of the GATS relates to the electronic distribution of sound recordings. The relevant measures prohibit foreign-invested entities from engaging in any electronic distribution of sound recordings through commercial presence[107] and therefore distinguish between foreign and domestic service suppliers solely based on origin.

Q74. With reference to para. 290 of the U.S. first written submission, please explain how the Foreign-Invested Sub-Distribution Rule supports the view that foreign-invested enterprises have no right to distribute any imported books, newspapers or periodicals.

136. China only permits foreign-invested enterprises to engage in the sub-distribution of books, newspapers and periodicals *published in China*, while reserving the right to distribute *imported* books, newspapers and periodicals to Chinese wholly state-owned enterprises or, in certain instances, wholly Chinese-owned enterprises.[108] The Publication Market Rule,[109] which regulates the distribution of reading materials by *wholly Chinese-owned enterprises*, provides that the Foreign-Invested Sub-Distribution Rule is its counterpart with respect to the distribution of reading materials by *foreign-invested enterprises*. According to Article 16 of the Publication Market Rule, the Foreign-Invested Sub-Distribution Rule governs foreign-invested sub-distributors of books,

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[104] U.S. First Written Submission, para. 334 citing Audiovisual Sub-Distribution Rule, Article 8.5 (Exhibit US-18).

[105] U.S. First Written Submission, para. 335 citing Audiovisual Sub-Distribution Rule, Article 7 (Exhibit US-18); Several Opinions, Article 6 (Exhibit US-6).

[106] U.S. First Written Submission, paras. 337-339 citing Audiovisual Sub-Distribution Rule, Article 11 (Exhibit US-18); Audiovisual Sub-Distribution Rule, Articles 12.5 and 13.9 (Exhibit US-18).

[107] U.S. First Written Submission, paras. 355-57.

[108] Only Chinese wholly state-owned enterprises are permitted to distribute imported newspapers and periodicals as well as imported books in the limited distribution category (*see* Article 4 of the Imported Publication Subscription Rule (Exhibit US-7) and Article 42 of the Management Regulation (Exhibit US-7)). Wholly Chinese-owned enterprises are permitted to distribute imported books in the non-limited distribution category (*see* Article 3 of the Imported Publication Subscription Rule (Exhibit US-7) and Article 2 of the Foreign-Invested Sub-Distribution Rule (Exhibit US-28). *See also* U.S. Answer to Panel Questions 60 and 61.

[109] Exhibit US-27.

newspapers and periodicals. No other Chinese measures authorize foreign-invested enterprises to engage in the distribution of books, newspapers and periodicals.

137. The Foreign-Invested Sub-Distribution Rule, therefore, represents the complete set of rights granted to foreign-invested enterprises, but only allows those enterprises to sub-distribute books, newspapers and periodicals *published in China*. Thus, while the Imported Publication Subscription Rule grants Chinese wholly state-owned enterprises the exclusive right to distribute imported newspapers and periodicals as well as imported books in the limited distribution category, the Foreign-Invested Sub-Distribution Rule confirms that foreign-invested enterprises are not permitted to sub-distribute *imported* books, newspapers and periodicals.

Q75. *Please confirm that the United States is not making claims under the *GATS* regarding "video, including entertainment software and (CPC 83202), distribution services" for products that do not take a physical form.

138. The United States confirms that it is not making claims under the GATS regarding "video, including entertainment software and (CPC 83202), distribution services" for products that do not take a physical form.

Q76. *Please confirm that the United States is not making claims under the *GATS* with respect to the distribution of sound recordings in physical form.

139. The United States confirms that it is not making claims under the GATS with respect to the distribution of sound recordings in physical form.

Q77. Does the United States consider that the initial sale from the producer of a good to a wholesaler, or retailer, is a wholesale trade service? In your answer, please refer to W/120 and China's Annex 2 to its *GATS* Schedule.

140. The United States does not generally consider that the initial sale from the producer of a good to a wholesaler or a retailer is a wholesale trade service. The sale by a producer of a good generally constitutes the first sale of that good. As such, the producer is not engaged in the "reselling" of that good and therefore is not engaged in "wholesaling" within the meaning of Annex 2 to China's Services Schedule or in "wholesale trade services" within the meaning of the relevant provisions of the CPC provisions referred to in Sector 4 of document W/120.

141. Master distribution, however, does involve "reselling" and includes activities that do constitute wholesaling/wholesale trade services. China itself concedes that master distribution is a type of distribution.[110] China also states that enterprises engaging in master distribution, that are

[110] China's First Written Submission, paras. 252-255.

not publishers, are providing retailing services,[111] explaining that "[r]etailing services covers the reselling of goods and merchandise to end-consumers, contrary to wholesaling services which covers the reselling to intermediaries in the distribution channel."[112] If master distributors engage in retailing by reselling reading materials to end-consumers, this confirms that the publisher has already made the first sale.

142. With this first sale incorporated into master distribution, master distributors also engage in wholesaling by reselling reading materials "to retailers to industrial, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services" within the meaning of Annex 2. Contrary to China's unsupported assertion that there are no intermediaries involved in master distribution,[113] the United States has provided evidence demonstrating that master distribution, also known as first-level wholesale, includes the right to designate which "second-level wholesalers" may distribute the reading materials in a certain region in China.[114] The master distributor therefore can engage in wholesaling by reselling the particular reading material to either a second-level wholesaler or to a retailer through the second-level wholesaler. Thus, master distribution includes "wholesaling" and "wholesale trade services" within the meaning of Annex 2 and Sector 4B of the W/120, respectively.

For both Parties:

Q110. *Article XXVIII(b) of the *GATS* distinguishes between the "distribution" of a service and its "delivery". In this regard, please answer the following questions:

(a) What is the meaning of the concept of "delivery" and how, if at all, does it differ from "distribution"?

(b) Is it possible for a service to be distributed and delivered electronically? If so, please provide examples.

143. Article XXVIII of the GATS sets forth definitions for various terms used in the GATS. Paragraph (b) of Article XXVIII provides that "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service." As a preliminary matter, the United States notes that paragraph (b) sets forth an illustrative list, not an exhaustive one, and thus signals that a broad range of activities falls within the scope of the term "supply" of a service. In that light, the United States does not consider that Article XXVIII(b) of the GATS is in fact intended to draw hard distinctions between individual concepts, such as the "distribution" of a service and its "delivery." Instead, Article XXVIII(b) sets forth a broad definition of "supply of a service" with

[111] China's First Written Submission, para. 283.
[112] China's First Written Submission, para. 284 (emphasis added).
[113] China's First Written Submission, para. 280.
[114] *See* Exhibits US-56, US-57, US-58.

an open list of examples of the supply of a service. The various types of "supply of a service" including "distribution" and "delivery" are not necessarily entirely separate concepts. There can be, and often is, overlap among the meaning of these terms.

144. Turning to sub-question(a), it is helpful to begin with a dictionary definition of the relevant terms. "Distribution" is defined as "The action of dealing out in portions or shares among a number of recipients; apportionment, allotment; *Econ*. the dispersal of commodities among consumers effected by commerce. "[115] The term "delivery" is defined as "[t]he action of handing over something to another; *esp.* a (scheduled) performance of the action of delivering letters, goods, etc."[116] In other words, in the case of a delivery, the deliverer intends to hand over an item to a specific party that the deliverer has in mind and that will receive the item. Accordingly, the United States considers that in the context of services, the concept of distribution is principally focused on ensuring that services move to the next step in the chain from production to consumption, while delivery appears to be principally focused on ensuring that the service is received by the next party in the chain from production to consumption. In some cases, these concepts may largely overlap, in others perhaps less so. For example, a retail chain could be said to "distribute" the services of various wireless companies. A customer who purchases a cell phone at the retail outlet can also often purchase the wireless services from that retail outlet who could be said to act as a "distributor" of the wireless services. When the customer uses the wireless services to make or receive telephone calls on that cell phone, it could be said that the wireless services are being "delivered" to the consumer.

145. The overlap of these terms is also apparent in many instances, however. In some instances delivery could be a component of distribution. Let us take the example of a company that supplies translation or interpretation services. The company may have many means of supplying that service such as sending a translator/interpreter to a meeting among individuals who do not speak the same language; translating a document into another language and sending the translated version of the document back to the customer; or setting up a telephone line in which a customer can speak words in one language and receive an interpretation of those words in another language. All of the elements that the company must manage in order to ensure that the services are dispersed to the consumer – such as administration, logistics, transport – might be considered elements of distribution of the service. The ways the translation service is received by customers whether at a meeting, by receiving the translated document, or receiving the interpretation by phone, might be considered types of delivery of the service. In this case, delivery of the service is not entirely distinct from the distribution of the service, rather delivery is a component of distribution. Indeed, the company is also selling the service, which is another aspect of supply of a service in Article XXVIII(b) of the GATS – and yet that, too, overlaps with delivery and distribution. It is important to reiterate that each of the company's models for getting the service

[115] *New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).
[116] *New Shorter Oxford English Dictionary*, p. 626 (Exhibit US-69).

to consumers – live interpreter, translated documents, and the telephone – are different means of supplying the same service *i.e.*, translation or interpretation services.

146. In sum, the term "supply of a service" in the GATS and the list of concepts used to define "supply of a service" in Article XXVIII(b) are broad. Moreover, the way the terms are presented in Article XXVIII(b) does not suggest that each term is a discrete and independent type of supply of a service that is entirely distinguishable from the other terms. Consequently, these terms can, and often do, overlap.

147. With respect to sub-question (b) of the Panel's question, it is possible to distribute and deliver a service electronically. Putting this in the context of the definitions set forth above, a service that is distributed electronically would entail the distributor using networks via the Internet or other electronic means through which the distributor disperses the service downstream. A service that is delivered electronically would entail the customer receiving the service electronically.

148. There are numerous relevant examples. For example, an online tax return preparation service would distribute its service electronically *i.e.*, use the necessary electronic infrastructure to disperse the tax preparation to consumers. The service is also delivered electronically because consumers receive the tax preparation advice or forms (including, perhaps, draft tax returns) via the Internet *i.e.*, electronically. Other services provided in a similar manner include online legal services or accountancy services; all of these online services distribute and deliver professional services electronically. Another example would be websites that supply news online. Such websites collect and report on news and post the service online in various forms such as articles or photographs and can require consumers to pay a fee to obtain the news service. Consumers can receive the service electronically when they enter the website by verifying their payment and then clicking on an article or photograph. In this example, also, the service is distributed and delivered electronically.

149. The example of the company supplying translation or interpretation services is also relevant here. The company could decide to set up a website in which customers can input words in one language and receive a translation of those words in a downloadable format (*i.e.*, electronically) in exchange for a fee. This would be a different means of supplying translation services; however, the service is the same.

Q111. With reference to the horizontal commitments in China's *GATS* Schedule, under what, if any, circumstances do Chinese-foreign equity joint ventures (minimum of 25 percent foreign capital) and Chinese-foreign contractual joint ventures (no pre-established equity participation of foreign party) providing the services relevant to this dispute qualify as "service suppliers of another Member" within the meaning of the GATS? Please discuss the relevance of the definitions set forth in Article XXVIII of GATS. Additionally, please answer this question against the background

of the relevant GATS claims (i.e., the claims concerning reading materials, AVHE and sound recordings).

150. Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures qualify as "service suppliers of another Member" where the entity is owned or controlled by natural persons of another Member or juridical persons of another Member. Article XXVIII of the GATS sets forth the relevant definitions.

151. First, Article XXVIII(g) defines "service supplier" as "any person that supplies a service." "Person" is defined as "either a natural person or a juridical person" in Article XXVIII(j). In addition, "natural person of another Member" is defined in Article XXVIII(k) as a national of that other Member or a permanent resident under certain circumstances. Article XXVIII(m) defines "juridical person of another Member" as (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by:1. natural persons of that Member; or 2. juridical persons of that other Member identified under subparagraph (i). Finally, Article XXVIII(n) states, in part: a juridical person is: (i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member; (ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

152. The horizontal commitments in China's Services Schedule set forth the types of foreign-invested enterprises that may supply services in China. These entities include *inter alia* Chinese-foreign equity joint ventures where the proportion of foreign investment is no less than 25 percent of the registered capital; and Chinese-foreign contractual joint ventures, for which China did not specify any minimum or maximum on the registered capital, amount of total investment, equity or shares that the foreign partner may contribute or hold. With respect to reading materials wholesalers, China committed in the market access column of Sector 4B that in mode 3 foreign-invested enterprises may engage in the wholesaling of reading materials. With respect to distribution services for AVHE products and sound recordings, China committed in the market access column of Sector 2D that in mode 3 foreign service suppliers may establish Chinese-foreign contractual joint ventures.

153. Whether a Chinese-foreign equity or contractual joint venture constitutes a service supplier of another Member depends on whether the joint venture is owned or controlled by a natural person of that other Member or a juridical person of that other Member. This must be determined on a case-by-case basis. Where the joint venture is not "owned" by a person of another Member, control will depend on how the joint venture at issue determines control. In other words, whether a joint venture constitutes a juridical person of another Member may not depend solely on the total percentage of equity, investment or shares held by the foreign partner, but will depend on how the joint venture determines control.

154. In the context of this dispute, whether a Chinese-foreign joint venture qualifies as a service supplier of another Member is only relevant for purposes of the U.S. claims under Article XVII of the GATS relating to reading materials, AVHE products, and sound recordings, and has no impact on the U.S. claim under Article XVI of the GATS relating to AVHE products.

155. Under Article XVI of the GATS, the United States challenges the limitation on the participation of foreign capital in Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products. China undertook market access commitments with respect to the distribution of AVHE products in mode 3 such that upon accession, foreign service suppliers would be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products. China did not inscribe any limitations on the participation of foreign capital in the Chinese-foreign contractual joint ventures; however, China maintains measures that limit the participation of foreign capital in these entities.[117] Article XVI:2(f) of the GATS provides that "[i]n sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt . . . unless otherwise specified in its Schedule, are defined as: . . . (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

156. Members may not restrict market access by maintaining the types of measures enumerated under Article XVI:2(f) of the GATS unless provided for in the Member's schedule. This market access obligation, unlike the national treatment obligation in Article XVII, is not framed in terms of "service suppliers of another Member." Accordingly, Members' Article XVI:2(f) obligations apply even with respect to equity percentages below those that automatically confer "ownership" (within the meaning of GATS Article XXVIII(n)(i)) to all foreign-invested entities, subject of course to any limitations in the Member's schedule. Indeed, a contrary approach would lead to an absurd result because it would suggest that while a Member could maintain measures that restrict market access in contravention of Article XVI:2(f), those same measures would be exempt from a market access challenge because there were no service suppliers of another Member.

157. With respect to Article XVII of the GATS, the United States has advanced several claims under Article XVII of the GATS involving reading materials wholesaling, and AVHE product and sound recording distribution services.[118]

158. In all of these sectors, China undertook national treatment commitments and placed no limitations on these national treatment commitments. Accordingly, in these sectors, China has

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[117] U.S. First Written Submission, paras. 319-25.

[118] U.S. First Written Submission, paras. 287-307 (sets forth the U.S. claims under Article XVII of the GATS relating to reading materials wholesaling); U.S. First Written Submission, paras. 326-41(setting forth the U.S. claims under Article XVII of the GATS relating to AVHE product distribution services); U.S. First Written Submission, paras. 349-58 (setting forth the U.S. claims under Article XVII of the GATS relating to sound recording distribution services).

national treatment obligations with respect to any foreign-invested service suppliers, which qualify as "service suppliers of another Member" under the GATS.

159. In the context of reading materials, the U.S. claims under Article XVII of the GATS specifically challenge Chinese measures that regulate foreign-invested service suppliers, and in the context of AVHE products and sound recordings, the U.S. claims under Article XVII of the GATS specifically challenge Chinese measures that regulate Chinese-foreign contractual joint ventures. As stated above, whether these entities qualify as "service suppliers of another Member" must be determined on a case-by-case basis. China's national treatment obligations extend to any entity that qualifies as a "service supplier of another Member." For example, where a Chinese-foreign contractual joint venture engaged in the distribution of AVHE products or sound recordings qualifies as a "service supplier of another Member" and is accorded less favorable treatment than like Chinese service suppliers, China's measure according such less favorable treatment is inconsistent with Article XVII of the GATS.

160. However, China's national treatment obligation goes even a step further. For example, China committed to allow Chinese-foreign *contractual* joint ventures to distribute AVHE products in China. If China unilaterally began permitting Chinese-foreign *equity* joint ventures to supply AVHE product distribution services, under Article XVII of the GATS, China would still be obligated to accord such entities – where they qualify as "service suppliers of another Member" – no less favorable treatment than like Chinese wholly-owned service suppliers.

Q112. With reference to Sector 2D of China's *GATS* Schedule, please answer the following questions:

(a) In the market access column, do the terms "audiovisual products" and "audio and video products" cover (i) goods, (ii) services or (iii) both? In answering this question, please address, *inter alia*, sub-heading "D. Audiovisual Services".

(b) In the first column, why was subclass "CPC 83202" included under Sector 2D of China's Schedule rather than another Sector (e.g., 1E)?

161. In regard to sub-question (a), Sector 2D of China's Services Schedule sets forth China's commitments with respect to audiovisual services, which include the supply of services involving audiovisual products. An "audiovisual product" or an "audio and video product" may involve a good or a service or both. However, the United States considers that the traditional dichotomy between goods and services, which arises in many other contexts, may not be particularly relevant in informing the understanding of the term "products" as it is used in Sector 2D of China's Services Schedule and as it relates to China's services commitments in this sector. Indeed, the location of distribution services for audiovisual products in the sector for Communications rather than the sector on Distribution Services generally, illustrates the unique nature of "audiovisual products."

162. In regard to sub-question (b), we should begin by noting that CPC sub-class 83202 refers to video tape rental and Sector 1E of the Schedule refers to rental services. While the reason for the cross-reference to CPC83202 in Sector 2D is unclear, the United States submits that it may suggest that services involving audiovisual products and services are addressed in Sector 2D even though certain of the services involving audiovisual products and services could theoretically be included elsewhere. Indeed, scheduling the rental and distribution of a particular product or service in the same sector of a Member's schedule seems logical given that the same items are involved.

163. For example, while Sector 4 deals with distribution services generally, the distribution of sound recordings and AVHE products is scheduled in the sector on Audiovisual Services, Sector 2D.[119] Similarly, while Sector 1E refers to rental services generally, Sector 2D is more specific to distribution services for AVHE products and sound recordings and serves to define the scope of China's commitments for such services.

Q113. With reference to the horizontal commitment section of China's *GATS* Schedule, does the entry on foreign-invested entities under market access limitations concerning mode 3 contain limitations that fall within the scope of Article XVI:2(e) of the *GATS*? If so, what types of entity ("corporate forms", etc.) are excluded? If not, is another sub-paragraph applicable?

164. The United States considers that the entry on foreign-invested entities under market access limitations concerning mode 3 in the horizontal commitments section of China's Services Schedule are limitations that fall within the scope of Article XVI:2(e) of the GATS.

165. Article XVI:2(e) prohibits Members, subject to limitations set out in the schedules, from maintaining "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service." The horizontal commitments section of China's Services Schedule concerning mode 3 provides that "[i]n China, foreign invested enterprises include foreign capital enterprises (also referred to as wholly foreign-owned enterprises) and joint venture enterprises and there are two types of joint venture enterprises: equity joint ventures and contractual joint venture . . . The proportion of foreign investment in an equity joint venture shall be no less than 25 per cent of the registered capital of the joint venture." Accordingly, this provision serves to limit the types of foreign-invested service suppliers with respect to which China has taken a commitment in mode 3.

166. With respect to the Panel's question regarding what types of entities are excluded, the United States understands the Panel to be asking what types of entities are not within the scope of China's Article XVI commitments in mode 3. All types of enterprises not listed would be

[119] U.S. First Oral Statement, para. 55.

excluded[120] from China's Article XVI commitments in mode 3 such as Chinese-foreign equity joint ventures where the proportion of foreign investment is less than 25 percent of the registered capital of the joint venture. Of course, these schedule entries merely limit China's obligations to allow certain kinds of enterprises to supply services in China; to the extent that China in fact goes beyond those market access commitments and allows other, unscheduled types of foreign-owned or controlled enterprises to supply scheduled services in China, those enterprises would be entitled to national treatment under Article XVII (subject to other limitations in China's Services Schedule).

Q114. The Parties have provided differing translations of Article 8(4) of the Measure for Administration of Sino-Foreign Distribution Contractual Joint Ventures of Audiovisual Products (Exhibits US-18 and CN-54). Please comment upon the other Party's translation.

167. China's translation of Article 8(4) of the Audiovisual Sub-Distribution Rule reads: "The rights and interests in the contractual joint venture held by the Chinese cooperator is no less than 51%."[121] The U.S. translation of Article 8(4) of the Audiovisual Sub-Distribution Rule reads: "The Chinese cooperator shall hold no less than 51% equity in the contractual joint venture."[122] In order to arrive at its translation, China translates the Chinese term (*Quan Yi*) as "rights and interests." The United States translates *Quan Yi* as "equity." The United States submits that China is incorrect in translating *Quan Yi* as "rights and interests." Literally, Quan Yi could be translated as "rights and interests," since *Quan* could mean "rights" and *Yi* could mean "interests." China translated each word separately. However, when *Quan Yi* are combined into one term (*Quan Yi*), the compound term has a meaning in accounting terminology distinct from the meaning of the individual words. In accounting terminology, *Quan Yi* refers to "equity," as the U.S. translation provides.

168. Given the context of Article 8, *Quan Yi* means "equity," because it refers to the equity owned by the Chinese cooperator in the contractual joint venture enterprise. First, because "rights and interests" appear to refer to concepts that are abstract and uncountable, it seems illogical that "rights and interests" can be calculated by percentage (51%).

169. However, given the concrete legal definition of "equity" under the Chinese legal regime, "equity" is something countable and substantive. According to Article 79 of the "Accounting

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[120] In the horizontal commitments section of its Services Schedule, China provides that representative offices of foreign enterprises are permitted to be established in China, but they shall not engage in certain profit-making activities.

[121] Measures for Administration of Sino-Foreign Distribution Contractual Joint Ventures of Audiovisual Products (Exhibit US-54).

[122] The United States refers to the measure as the Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products ("Audiovisual Sub-Distribution Rule") (Exhibit US-18).

System for Business Enterprise" (issued by the Ministry of Finance on December 29, 2000), "Owners' equity is the economic interest in the assets of an enterprise attributable to the owners. The amount is the balance of assets after deducting all liabilities."[123] This definition is confirmed in a more recent measure, Article 26 of the "Accounting Standards for Business Enterprises: Basic Standard" (issued by the Ministry of Finance on February 15, 2006), according to which "owners' equity is the residential interest in the assets of an enterprise after deducting all its liabilities."[124] Accordingly, "equity" refers to a concept that is countable, and the "51%" restriction can only apply to *Quan Yi* when the latter is translated as something countable *i.e.*, not "rights and interests."

170. In addition to mistakenly translating *Quan Yi* as "rights and interests," China argues that the "51%" restriction in Article 8(4) "refers to the rate of distribution of profit and allocation of loss in contractual joint ventures." However, China failed to provide any basis for such assertion. It remains unclear why "rights and interests" – which China claimed the "51%" restriction applies to – should be construed as "distribution of profit and allocation of loss." In contrast, the legal definition of "equity" (*Quan Yi*) clearly illustrates that "equity" is a term distinct from profit and loss. Under Article 79 of the "Accounting System for Business Enterprise," "equity" is defined to include "paid-in capital (or share capital), capital reserve, surplus reserve, and profits not yet appropriated."[125] This definition makes clear that the concept of "equity" is broader than profit incorporating many other elements. Moreover, there is no reference to the term "loss," in the definition of equity.

171. In short, China's translation of the term *Quan Yi* into "rights and interests" rather than "equity" is not supported by the context in which the terms are used. Moreover, China provides no basis for its assertion that "rights and interests" should be interpreted as a reference to "profit and loss." In contrast, the translation submitted by the United States accurately reflects the ordinary meaning of the terms used in their context.

Q115. With reference to Exhibits US-16 and -17 and CN-2 and -15, please comment on the other Party's translation of Articles 14(1) and 16 (US-17 and CN-15) and 28 (US-16 and CN-2), respectively.

172. Article 14(1) of the Audiovisual Import Rule (Exhibits US-17 and CN-15): China's translation of this provision reads as "In the event of importing the audiovisual products for publication, application shall be filed with and the following documents and materials submitted to the Ministry of Culture: (1) review application form for importing audio (video) products;". The U.S. translation reads: "In regard to audiovisual products imported for the purpose of publishing,

[123] Accounting System of Business Enterprises (Excerpt) (Ministry of Finance), Article 79 (December 29, 2000) (Exhibit US-70).

[124] Accounting Standard for Business Enterprises, Article 26 (February 15, 2006) (Exhibit US-71).

[125] Accounting System of Business Enterprises, Article 79 (Exhibit US-70).

application shall be made to the Ministry of Culture and the following documents and materials submitted: (1) Application form for the examination of imported audio (video) products;".

173. With respect to the chapeau of Article 14, the United States considers that China's translation is accurate. However, with respect to paragraph (1) of Article 14, the United States considers that the U.S. translation is accurate as provided in Exhibit US-17 and China's translation is inaccurate for the following reasons.

174. First, the corresponding Chinese language consists of three terms: *Jin Kou, Lu Yin (Xiang) Zhi Pin*, and *Bao Shen Biao*. In particular, the second term, *Lu Yin (Xiang) Zhi Pin*, means "audio (video) products." The first term, *Jin Kou* could mean "import," "importing" or "imported"; however, in context, "imported" is the only logical translation of this term because this term is an adjective, that modifies the noun "products." These two terms, if put together, thus mean "imported audio (video) products."

175. The issue turns to the last term, *Bao Shen Biao*. This term actually refers to a type of "*Biao*" (forms) used for "*Bao Shen*." Under the Contemporary Chinese Dictionary (5th Edition), *Bao Shen* means "to request/apply to the higher or relevant authority for its examination"; specifically, "*Bao*" means "request" or "apply to," and "*Shen*" means "examination." Thus, a form of *Bao Shen* refers to be an application form for the examination by the higher or relevant authority, and further, the term *Bao Shen Biao* is better translated as an "application form for the examination of [something]," as adopted in the U.S. translation.

176. China appears to have translated this term as "review application form." To the extent China intends the term "review" to mean "examination," then China's translation could be acceptable. To the extent China intends review to mean something other than examination, then the United States considers that the U.S. translation is more accurate. In addition, as a matter of English grammar, the phrase "review application form" does not appear to be a logical translation. Accordingly, the United States considers that its translation is accurate.

177. A preferred translation of this provision would be: "In the event of importing the audiovisual products used for publication, the application shall be filed with the Ministry of Culture, and the following documents and materials shall be submitted accordingly: (1) Application Form for the Examination of Imported Audio (Video) Products."

178. Article 16 of the Audiovisual Import Rule (Exhibit US-17 and CN-15): The United States considers that China's translation of this provision is correct. China's translation is "The importation of audiovisual products used for information network dissemination shall be handled by reference to Article 14 herein."

179. Article 28 of the Audiovisual Regulation (Exhibit US-16 and CN-2): China's translation of the first paragraph of this provision reads as follows: "Any importation of the audiovisual products used for publication or importation of the finished products used for wholesale, retail or leasing,

etc. shall be reported to the administrative department of cultural affairs under the State Council for content review." The U.S. translation of the first paragraph of this provision reads: "Audiovisual products imported for publication and finished audiovisual products imported for wholesale, retail or rental shall be submitted to the cultural administration under the State Council for review of their contents."

180. The United States considers that the U.S. translation is accurate for the following reasons. First, this provision sets forth the requirement that audiovisual products undergo content review, which is evidenced by the last part of both the U.S. and Chinese translations. However, China's translation suggests that the importation needs to be reported for content review. This is an illogical translation. Even if the importation were reported, China's translation does not convey that it is the products that need to be reviewed for their contents. Accordingly, China's translation is flawed.

181. This conclusion is supported by the use of the Chinese word *Bao* in this provision. The Chinese term, *Bao*, which the United States translated as "submitted," China translated as reported. *Bao* could refer to "report" or "reported." However, *Bao* could also mean "submit" or "submitted" as reflected in the U.S. translation. In the context of the overall provision, the translation of *Bao* as "submitted" rather than "reported" is logical given that the *products* must be *submitted* for content review. It is not logical to suggest that a product be "reported" for content review. Thus, China's translation fails to convey that the products must undergo content review.

182. In addition, both the Chinese and U.S. translations of the word "or" after "publication" is incorrect and should be translated as "and" since the corresponding Chinese word means "and."

183. In the U.S. view, a preferred translation of this provision is: "The importation of the audiovisual products used for publication, and the importation of finished audiovisual products used for wholesale, retail, leasing, etc., shall be submitted to the cultural administration under the State Council for content review."

184. With respect to paragraph 2 of Article 28 of the Audiovisual Regulation, there are few differences between the U.S. and Chinese translations and the United States considers that any differences do not affect the meaning or scope of the legal rule contained therein.

185. With respect to paragraph 3 of Article 28 of the Audiovisual Regulation, China's translation reads: "The entity which imports audiovisual products used for publication and the importation operation entity of finished audiovisual products shall go through the importation formalities with the customs with the approval documents by the administrative department of cultural affairs under the State Council for content review." The U.S. translation reads: "An entity which imports audiovisual products for publishing and a business entity which imports finished audiovisual products shall bring approval documents issued by the cultural administration under the State Council to process import procedures at Customs."

186. First, the United States considers that China's translation errs because it does not explicitly state that the entities referenced therein should "bring" approval documents to Customs. Instead, China merely translates the relevant Chinese term as "with" instead of "bring." The word *Chi* means "bring," "carry," or "hold." Given the context of the current provision, the obligation is to "bring" the approval documents. China's translation of the word *Chi* as "with" introduces uncertainty into the provision and is an inaccurate translation of the term.

187. Second, the United States considers that China omitted the word "issued" before "by the administrative department." "Issued by" is the correct translation of the relevant Chinese terms and in the context of this provision makes clear that the relevant administrative authority issues the relevant documents.

188. In the view of the United States, the remaining differences between the U.S. and Chinese translations do not affect the meaning or scope of the legal rule contained therein.

189. Finally, to the extent that the Panel's question is intended to refer to China's argument that these measures are "border measures" and therefore outside the scope of Article III:4 of the GATT 1994, the United States reiterates that China's arguments are misplaced. Moreover, China's differing translations of the relevant measures are of no avail as they do not transform these internal measures into border measures. As the United States stated in its first oral statement, the Ad Note to Article III of the GATT 1994 provides that internal measures applicable to both the imported and the domestic like products that are enforced for imported products upon importation are internal measures, not border measures.

190. In this case, regardless of whether the Panel accepts the U.S. or Chinese translation of these measures, the measures at issue impose content review-related legal requirements on both imported and domestic hard-copy CDs that they must fulfill before they can proceed through the chain from importation to consumption. The legal hurdles facing the imported hard-copy CDs are administered at the Chinese border, while domestic goods face the legal hurdles inside China. The fact that content review takes places for imports upon importation does not transform the relevant measures into border measures.

Q116. *Could the Parties provide their views on whether, according to W/120, the distribution of sound recordings and AVHE products in physical form would be covered under Sector 4, Sector 2D, or both?

191. As a threshold matter, we note that China's Services Schedule is authoritative for determining the scope of China's services commitments. While W/120 provided a structure that Members could use in scheduling their commitments, Members were not required to use the W/120 or to follow its structure. Instead, it is the actual schedule of the Member that must be examined in any given case. In addition, a service may only be classified in one sector in a

Member's schedule[126]; thus, the distribution of sound recordings and AVHE products in physical form can only be covered in either Sector 4 or Sector 2D.

192. China's Services Schedule explicitly includes AVHE products and sound recordings distribution services in Sector 2D.[127] Accordingly, such services are classified in Sector 2D and cannot also be classified in Sector 4.

Q117. Please explain the meaning of China's additional commitments under distribution services, which specify the following: "Foreign-invested enterprises are permitted to distribute their products manufactured in China, including the products listed in the market access or sector or sub-sector column, and provide subordinated services as defined in Annex 2."

193. China's additional commitment inscribed in Sector 4 on Distribution Services of its Services Schedule provides that foreign-invested enterprises are permitted to distribute *all* of their products *manufactured in China*. Significantly, this commitment applies to foreign-invested enterprises regardless of whether Chinese enterprises also have this right. The set of products covered by this additional commitment overlap with, but are not identical to, those contained in Sector 4. In other words, China's additional commitment extends beyond the products covered by Sector 4, yet is limited to those "Sector 4 plus" products that are manufactured in China. While China's additional commitment provides that foreign-invested enterprises are permitted to distribute these products manufactured in China, this does not restrict or otherwise affect China's market access and national treatment commitments under Sector 4 of its Services Schedule.

Q118. Could the Parties explain what, in their view, is the meaning and scope of the phrase "without prejudice to China's right to examine the content of audio and video products" in China's Services Schedule under "Limitations on Market Access" under "Audiovisual Services"?

194. The United States submits that the phrase "without prejudice to China's right to examine the content of audio and video products" in Sector 2D of China's schedule means that China may apply procedures to examine the content of "audio and video products."

195. This phrase does not provide guidance regarding the form those procedures may take and does not suggest that China may apply content review procedures in a manner that renders any of China's commitments in this or any other context inutile. In other words, this phrase could not be read to allow China to apply a measure that excludes a service from its services commitments that is otherwise within the scope of those commitments merely by linking the measure to content review.

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[126] *U.S. – Gambling (AB)*, para. 180.

[127] *See* Exhibit US-2.

Q119. Can the Parties please confirm China's statement at the first substantive meeting that they both agree that distribution of sound recordings *in physical form* is covered by China's commitments in Sector 2D of its *GATS* Schedule?

196. The United States confirms its agreement with China's statement that the distribution of sound recordings in physical form is covered by China's commitments in Sector 2D of its Services Schedule. However, the United States also takes this opportunity to note consistent with our response to Panel Question 76, that we are not making any claims under the GATS with respect to the distribution of sound recordings in physical form.

GATT 1994 CLAIMS ON PRODUCT DISTRIBUTION

For the United States:

Q120. Can the United States please respond to China's contention that the specific product group "electronic publications" within the claim on reading materials is not properly before the Panel? If you believe that the claim, products, and measure are properly before the Panel, please provide the basis for your conclusions.

197. The U.S. claim that China accords imported electronic publications less favorable treatment than that accorded to domestic electronic publications in a manner that is inconsistent with Article III:4 of the GATT 1994 is properly before the Panel. China raises two procedural objections with respect to electronic publications that each fail to demonstrate that the claim, products and measure are not properly before the Panel.

198. *First*, China contends that the U.S. *claim* under Article III:4 regarding different distribution opportunities afforded to imported reading materials, including imported electronic publications, is not within the Panel's terms of reference because it was not included in the U.S. consultation request.[128] China's argument, however, is unavailing. It assumes that a consultation request defines the claims that are within a Panel's terms of reference, and that the claims included in a panel request must be identical to those in the consultation request. Neither of these assumptions is accurate. As the Appellate Body explained in *Mexico – Rice*:

> A complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure – that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. . . . In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved

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

from the "legal basis" that formed the subject of consultations.[129]

199. Indeed, the Appellate Body's reasoning captures precisely the circumstances in the present dispute. During consultations, the United States and China discussed the Chinese distribution regime for reading materials at length. As a consequence of those detailed discussions, the United States revised the list of provisions with which the challenged measures are inconsistent to include Article III:4, so as to incorporate China's discriminatory treatment of imported electronic publications, while leaving the essence of the U.S. complaint the same.

200. In addition, the panel report in *Korea – Vessels* does not support the proposition for which it is cited by China.[130] China relies on a partial quote of a preliminary ruling by that panel to suggest that the scope of a panel request is circumscribed by the scope of the consultation request. In the context of that panel's full reasoning, however, the isolated excerpt quoted by China confirms the Appellate Body's reasoning in *Mexico – Rice*, *i.e.*, that "a precise and exact identity" between the consultation request and the panel request is not required.[131] As the panel fully stated in *Korea – Vessels*:

> We do not consider that the scope of the request for establishment need be identical to the scope of the request for consultations. Rather, the scope of the request for establishment is governed by, and may not exceed, the scope of the consultations that actually took place between the parties. Provided the request for establishment concerns a dispute on which consultations had been requested, there is no need for the matter [fn.11] identified in the request for establishment to be identical to the matter on which consultation were requested.[132]
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> [fn.11] We recall that the term "matter" was defined by the Appellate Body in *Guatemala – Cement I* to mean the specific measures at issue and the legal basis for the complaint (WT/DS60/AB/R, para. 72). Accordingly, there is no need for the measures and legal claims identified in the request for establishment to be identical to the measures and legal claims identified in the request for consultations.

201. The U.S. claim under Article III:4 does not alter the essence of the U.S. complaint and directly concerns the dispute on which consultations between the United States and China were held. That claim addresses the same measures and same products – *i.e.*, the discriminatory distribution of electronic publications – that were already included in the U.S. consultation request and that China was already well aware of.

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[129] *Mexico – Rice (AB)*, para. 138. The Unites States notes that the DSU nowhere refers to "reasonably evolved" nor is there any requirement that the "legal basis" in Article 4.4 of the DSU be related to the "legal basis" in Article 6.2. Accordingly, the basis in the text of the DSU for the Appellate Body's "reasonably evolved" approach is unclear.

[130] China's First Written Submission, para. 527.

[131] *Mexico – Rice(AB)*, para. 137-138.

[132] *Korea – Vessels(Panel)*, para. 7.2, sub-para. 10.

202. *Second*, China argues that its measures concerning electronic publications are not identified in the U.S. panel request and, therefore, are not measures included in the Panel's terms of reference. China's objection in this regard likewise does not withstand scrutiny. As required by Article 6.2 of the DSU and as confirmed by the Appellate Body,[133] a panel request must "identify the specific measures at issue" in order for a measure to be part of a panel's terms of reference. China, however, attempts to establish a new requirement, whereby provisions of a specific measure, rather than the measure itself, must be identified in a panel request. This interpretation of Article 6.2 is sustained neither by the text of that Article nor by the Appellate Body reports that have opined thereon. Rather, and consistent with Article 6.2, the discriminatory impediments imposed on imported electronic publications are identified in the U.S. panel request by way of the measures incorporating them.

203. The U.S. panel request explicitly identifies the Chinese measure that provides for the discriminatory treatment of imported electronic publications – the Imported Publications Subscription Rule. This measure limits imported electronic publications in the limited distribution category to be distributed only through subscription[134] by a select few GAPP-designated Chinese wholly state-owned enterprises.[135] Moreover, subscribers to these imported products are subjected to an onerous examination and approval process that either denies or delays subscribers from obtaining imported electronic publications.[136] In contrast, domestic electronic publications are not subject to the same discriminatory conditions, and are allowed to be distributed through multiple distribution channels by a larger set of wholly Chinese-owned distributors, without the same burdensome conditions on subscribers.

204. Moreover, China's reliance on the reports in *Japan – Film* and *U.S. – German Steel* are misplaced as these reports address circumstances fundamentally distinct from the one before the Panel here. In the present dispute, a specific and narrowly-defined measure – the Imported Publications Subscription Rule – has been explicitly identified in the U.S. panel request. This measure contains the discriminatory treatment of electronic publications that the United States is challenging. In *Japan – Film*, however, the panel addressed measures that were *not* identified in the panel request in question and examined whether measures not identified in a panel request could nonetheless be considered to be included in that panel request because of their relationship to measures that had been identified.[137]

205. The Appellate Body's reasoning cited to by China in *U.S. – German Steel* is also

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[133] *See Korea – Dairy (AB)*, para. 120; *U.S. – German Steel (AB)*; para. 125; and *Guatemala – Cement (AB)*, para. 69.

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

[135] Imported Publications Subscription Rule, Article 4 (Exhibit US-30).

[136] Imported Publications Subscription Rule, Articles 6-9 (Exhibit US-30).

[137] *Japan – Film (Panel)*, paras. 10.4-10.20.

inapposite.[138] In that dispute, the Appellate Body stated that the reference in the panel request in question to "certain aspects of the sunset review procedure" referred to a general body of law governing sunset review determinations, but did not refer to a distinct measure relating to the submission of evidence. As the specific measure at issue was not adequately identified, the Appellate Body agreed with the panel that the submission of evidence was not a measure within the panel's terms of reference. Again, this is not the case in the present dispute as the Imported Publication Subscription Rule is a distinct and specific measure that directly regulates the distribution of electronic publications and that was explicitly identified in the U.S. panel request. As opposed to the general body of law at issue in *U.S. – German Steel*, the Imported Publication Subscription Rule is a specific measure composed of three pages and eleven articles with a clear beginning and end.

206. For these reasons, China's objections regarding the inclusion of the U.S. claim under Article III:4 and the measures discriminating against imported publications in the Panel's terms of reference are without merit and should be dismissed by the Panel.

Q121. With reference to the U.S. claims under Article III:4 of the GATT 1994, can the United States please indicate whether each measure being challenged is a "law", "regulation" or "requirement"?

207. The following Chinese measures are inconsistent with Article III:4 of the GATT 1994: 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. Of these measures, the Audiovisual Regulation and the Film Regulation were promulgated by an Order of the State Council signed by the Premier of the State Council and constitute "administrative regulations" within the Chinese legal system.[139]

208. The Imported Publications Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Internet Culture Rule, the Audiovisual Import Rule, and the Provisional Film Rule are all "departmental rules" within the Chinese legal system, as each of these measures was promulgated by order signed by the head of the issuing agency.[140] Departmental rules are legally binding legal instruments issued by government agencies to enforce the laws, administrative regulations,

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[138] *U.S. – German Steel (AB)*, paras. 164-171.

[139] *Law of the People's Republic of China on Legislation* ("Law on Legislation"), Adopted at the 3rd Session of the Ninth People's Congress on March 15, 2000, promulgated under the Order of the President of the People's Republic of China No. 31 on March 15, 2000, and effective as of July 1, 2000, Article 61 (Exhibit US-72); *See also* Working Party Report, para. 66 (Exhibit US-3); and *Trade Policy Review of the People's Republic of China*, *Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, paras. 18-22 (Exhibit US-4).

[140] Law on Legislation, Article 76 (Exhibit US-72); *See also* Working Party Report, para. 66 (Exhibit US-3); and *Trade Policy Review of the People's Republic of China*, *Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, paras. 18-22 (Exhibit US-4).

decisions and orders of the State Council.[141]

209. Finally, the Network Music Opinions and the Film Distribution and Projection Rule are "other regulatory documents". As explained in the U.S. answer to Panel questions 2, 3 and 4, "other regulatory documents" bind the agencies that issue them and are used by their agencies to enforce laws, to implement administrative measures and to serve as the basis for administrative acts. "Other regulatory documents" are widely used in routine administration and are fully recognized in Chinese administrative law.

210. The above administrative regulations, departmental rules and other regulatory documents fall within the scope of "laws, regulations and requirements" within the meaning of Article III:4. The phrase "laws, regulations and requirements" has been interpreted broadly in both GATT and WTO dispute settlement proceedings to encompass a wide range of instruments,[142] whether substantive or procedural,[143] mandatory or voluntary.[144] The challenged measures fit comfortably within the boundaries of this phrase. Indeed, all of the challenged measures appear to constitute "regulations". At a minimum, the administrative regulations at issue constitute "regulations", while the departmental rules and other regulatory documents at issue constitute "requirements".

211. In addition, the term "requirements" encompasses the departmental rules and other regulatory documents at issue in the present dispute. As the panel explained in *Canada – Autos*:

> The word "requirements" in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken.[145]

Each of the challenged measures involve demands, requests or impose conditions on imported products, which must be complied with.[146] China's departmental rules and other regulatory documents are therefore "requirements" within the meaning of Article III:4.

Q122. With reference to the treatment of imported reading materials, please answer the following questions:

(a) Is para. 387 of the U.S. first written submission setting out one or more separate claims?

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[141] Law on Legislation, Article 71 (Exhibit US-72).
[142] *Japan – Film(Panel)*, para. 10.376.
[143] *U.S. – Section 337(GATT)*, para. 5.10.
[144] *EEC – Parts and Components(GATT)*, para. 5.21.
[145] *Canada – Autos(Panel)*, para. 10.107.
[146] *See* U.S. First Written Submission, paras. 156-223 and 363-411.

212. Paragraph 387 U.S. first written submission states elements of the U.S. claim described in paragraph 384 of that submission. The opaque nature of GAPP's administration is one element of the U.S. claim regarding the discriminatory distribution regime imposed on imported reading materials.

(b) What is the basis for the assertion at para. 388 of the U.S. first written submission that domestic publications are subject to neither a subscription requirement nor any limitations on who can distribute them?

213. The statement made in paragraph 388 of the U.S. first written submission is supported by the fact that the Imported Publication Subscription Rule applies only to imported reading materials, and that the measures regulating the distribution of domestic reading materials – the Management Regulation and the Publication Market Rule – provide for significantly broader distribution opportunities than those available to imported reading materials.[147] Moreover, none of the restrictions imposed on imported reading materials are found in these measures or any other Chinese measures.

214. The U.S. statement in paragraph 388 provides, "Domestic publications are subject to neither the subscription requirement nor the limitation on who can distribute them."[148] As discussed in the paragraphs preceding paragraph 388, the subscription requirement provides that imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category can only be distributed in China through subscription. While domestic reading materials may also be distributed through subscription, all of China's other distribution channels are also available to these domestic products. Moreover, the same onerous conditions on subscribers of these imported reading materials are not imposed on subscribers of domestic reading materials.

215. Likewise, the limitation on who can distribute imported reading materials refers to the requirement that imported newspapers and periodicals as well as imported books and electronic publications in the limited distribution category can only be distributed in China by GAPP-designated Chinese wholly state-owned enterprises. In addition, imported books and electronic publications in the non-limited distribution category can only be distributed by wholly Chinese-owned enterprises. Domestic reading materials, however, are not subject to this limitation. Domestic books, newspapers and periodicals can be distributed by Chinese wholly state-owned enterprises, wholly Chinese-owned enterprises and foreign-invested enterprises. Domestic electronic publications can be distributed by wholly state-owned enterprises and wholly Chinese-owned enterprises.

(c) What is the relevance of the provisions of Article 4, third paragraph, of the

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[147] *See* U.S. First Written Submission, paras. 158-180.

[148] Emphasis added.

Imported Publication Subscription Rule?

216. The third paragraph of Article 4 of the Imported Publication Subscription Rule provides that only GAPP-approved enterprises may engage in soliciting subscriptions and delivering imported publications on behalf of those "publication import business units". This approval process is subject to Articles 41 and 42 of the Management Regulation. Under this provision, only GAPP-approved wholly state-owned enterprises are permitted to import reading materials, AVHE products and sound recordings.

217. The third paragraph of Article 4, therefore, does not permit enterprises other than wholly state-owned enterprises to provide imported reading materials under subscription. This would be in direct conflict with the first and second paragraphs of Article 4 as well as Articles 41 and 42 of the Management Regulation. Rather, the third paragraph applies the GAPP approval requirements for importers to those wholly state-owned enterprises that have not been approved by GAPP, but that seek such approval in order to engage in soliciting subscriptions and delivering imported publications on behalf of a GAPP-approved "publication import business unit". This reading is confirmed by Article 10 of the Imported Publication Subscription Rule, which subjects enterprises that engage in providing subscriptions without approval to penalties pursuant to Article 55 of the Management Regulation.

(d) May foreign-invested enterprises distribute imported books in the non-limited distribution category? Please indicate the relevant provisions of Chinese law.

218. Foreign-invested enterprises may not distribute imported books in the non-limited distribution category. As explained in paragraphs 84 through 86, 180 and 290 of the U.S. first written submission as well as in the U.S. response to Panel Questions 61 and 74, foreign-invested enterprises are only permitted to engage in the sub-distribution of domestic books, newspapers and periodicals, pursuant to Article 2 of the Foreign-Invested Sub-Distribution Rule.

(e) May foreign-invested enterprises sub-distribute imported electronic publications?

219. Foreign-invested enterprises may not engage in the sub-distribution of imported electronic publications. Article 62 of the Electronic Publications Regulation expressly prohibits foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications. As wholesale services are one of the two constituent elements of sub-distribution,[149] foreign-invested enterprises are therefore not permitted to engage in the sub-distribution of imported electronic publications.

(f) May foreign-invested enterprises engage in master distribution of finished or

[149] *See* Foreign-Invested Sub-Distribution Rule, Article 2; and China's First Written Submission, para. 253.

unfinished AVHE and sound recordings?

220. According to Article 4 of the Several Opinions, "foreign investors are prohibited from engaging in the . . . master distribution . . . of audiovisual products."[150] As "audiovisual products" include finished and unfinished AVHE products and finished and unfinished sound recordings, China prohibits foreign-invested enterprises from engaging in the master distribution of all of these products. It is also the understanding of the United States that "master distribution" as mentioned in the Several Opinions is currently not permitted for Chinese enterprises either, and that therefore, to the extent that understanding is correct, the opportunity to engage in master distribution is denied to all enterprises on a nationality-neutral basis.

(g) With reference to para. 174 of the U.S. first written submission, please explain in which cases the "long time" conditions are applicable (i.e., foreign individuals; foreign-invested entities; both). Also, what is the basis for the assertion that subscription is possible for newspaper and periodicals in both the limited and non-limited distribution categories?

221. The "long time" requirement found in Article 8 of the Imported Publication Subscription Rule applies to "foreign nationals who have worked, studied or lived in China". Article 8 provides that only nationals who satisfy this nebulous standard, as well as foreign organizations in China, enterprises with foreign investment and Hong Kong, Macao and Taiwan personages, are permitted to subscribe to *imported newspapers and periodicals*. Neither this article nor any other in the Imported Publication Subscription Rule permit *imported books and electronic publications in the limited distribution category* to be subscribed to by any of these foreign parties.

222. The reference to "imported newspapers and periodicals" in Article 8 refers to imported newspapers and periodicals in both the limited and non-limited distribution categories. This is so as the phrase "imported newspapers and periodicals" is un-qualified in this Article, while the same phrase is qualified by either "in the limited distribution category" or "in the non-limited distribution category" in the preceding three Articles of this measure. While Article 5 provides requirements for Chinese enterprises and individuals seeking to subscribe to imported newspapers and periodicals in the non-limited distribution category, Articles 6 and 7 sets forth requirements for Chinese enterprises seeking to subscribe to newspapers, periodicals, books and electronic publications in the limited distribution category. Thus, as "imported newspapers and periodicals" is not likewise limited, the phrase includes both categories of products.

(h) With reference to para. 378 of the U.S. first written submission, please confirm that you are not claiming that the Foreign-Invested Sub-Distribution Rule is a "law, regulation or requirement" affecting the distribution of reading materials within the meaning of Article III:4 of the GATT 1994.

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[150] *See* U.S. First Written Submission, nn. 93 and 211.

223. The United States is claiming that the Foreign-Invested Sub-Distribution Rule is a measure affecting reading materials that is inconsistent with Article III:4 of the GATT 1994.[151] This measure was explicitly identified in the U.S. panel request and is included in the Panel's terms of reference. Moreover, the U.S. claim with respect to the measure satisfies the three elements identified by the Appellate Body that are required to establish a breach of Article III:4: (1) the imported and domestic products are "like products"; (2) the measure is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products; and (3) the imported product is accorded less favorable treatment than the domestic like product.[152]

224. First, the U.S. claim with respect to the Foreign-Invested Sub-Distribution Rule satisfies the "like product" requirement of Article III:4. As the panel found in *India – Autos*, where "origin [is] the sole criteria distinguishing the products, it is correct to treat such products as like products within the meaning of Article III:4."[153] Pursuant to Article 2 of the Foreign-Investment Sub-Distribution Rule, this measure applies only to books, newspapers and periodicals published in China, providing that only these products may be sub-distributed by foreign-invested enterprises. Imported books, newspapers and periodicals, however, may not be sub-distributed by foreign-invested enterprises, whether pursuant to this or any other Chinese legal instrument. Foreign origin is therefore the sole criterion used by China to restrict foreign books, newspapers and periodicals, but not domestic books, newspapers and periodicals, to the more limited set of Chinese distributors.

225. Second, the Foreign-Invested Sub-Distribution Rule is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported reading materials and domestic like reading materials. As discussed in the U.S. answers to Panel Question 121, this measure is a "departmental rule" within the Chinese legal hierarchy and constitutes a "requirement" within the meaning of Article III:4 of the GATT 1994. Moreover, this measure fulfills the "affecting" requirement as it regulates and governs the distribution of domestic books, newspapers and periodicals by foreign-invested enterprises.[154]

226. Finally, this measure provides imported books, newspapers and periodicals less favorable treatment than that accorded to domestic books, newspapers and periodicals. As explained in the U.S. answers to Panel Questions 61, 74 and 122(d), this measure modifies the conditions of competition to the detriment of imported books, newspapers and periodicals by significantly reducing the categories of distributors available to these products *vis-à-vis* domestic books, newspapers and periodicals, which enjoy access to a much broader array of distributors, including foreign-invested enterprises. The Foreign-Invested Sub-Distribution Rule denies these imported

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[151] *See* U.S. First Written Submission, paras. 180, 378, and 417 (sub-para. 4), and the chart on p. 42; Summary of WTO Inconsistencies, p. 7 (Exhibit US-52).

[152] *Korea – Beef (AB)*, para. 133.

[153] *India – Autos (Panel)*, para. 7.174.

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

products equality of competitive opportunities as they have fewer and less diverse distributors to choose from. This measure is inconsistent with Article III:4.

Q123. *With reference to the treatment of imported sound recordings, please answer the following questions:

(a) When the United States refers to the hard-copy media containing sound recordings that are intended for electronic distribution after importation in para. 78 of its first oral statement, is that different from what China refers to as the "master copy" in paras. 570 of its first written submission? If so, please explain how and whether it matters.

227. The United States considers that hard-copy sound recordings intended for electronic distribution – that are the subject of the U.S. claim under Article III:4 of the GATT 1994 – are not different from the term "master copies" used by China in its first written submission. However, the United States submits that the implications that China draws from the term "master copy" are without merit.

228. China states that the hard-copy sound recordings intended for electronic distribution are not for transmission for users but are "'master copies' intended for the reproduction of content to be subsequently offered through network music services . . . They are, in fact mere accessories to what is essentially an intellectual property transaction consisting in the granting of the right to transmit music works to users via the internet."[155] However, as explained below, China's discussion in this regard fails to distinguish trade in hard-copy sound recordings intended for electronic distribution from trade in other hard-copy sound recordings. In addition, China's discussion of trade in these products has no bearing on the U.S. claims in this dispute.

229. The distribution of copyrighted materials – whether for hard-copy sound recordings sold in hard copy or distributed electronically – always involves the granting of intellectual property rights to use the copyrighted material. This fails to distinguish the transactions relevant to the U.S. GATT 1994 claim from other types of transactions. Second, China inserts this discussion of "master copies" in a section of its submission addressing the rationale behind its discriminatory content review system, stating that the rationale is to ensure that there is no alteration of content in the conversion into digital format. As the United States set forth in its first oral statement, China's contention in this regard is wholly ineffective in validating China's discriminatory content regime for imports of hard-copy sound recordings intended for electronic distribution.[156]

230. Finally, while China does not make this clear, China appears to be arguing in paragraph 570, that because these hard-copy sound recordings are "master copies" and mere accessories to

[155] China's First Written Submission, para. 570.
[156] U.S. First Oral Statement, paras. 81-82.

services, they are not goods subject to the GATT 1994 disciplines. For the reasons set forth in the U.S. first oral statement China's arguments do not withstand scrutiny.[157]

(b) With reference to para. 373 of the U.S. first written submission, is the United States claiming that the Internet Culture Rule distinguishes between imported and domestic products solely based on origin?

231. In paragraph 373 of its first written submission, the United States sets forth that China's content review regime for hard-copy sound recordings intended for electronic distribution distinguishes between imported and domestic products solely based on origin. Specifically, the Network Music Opinions subject imports of these products to a much more onerous content review regime than domestic products, which only need to be registered with MOC.[158] In addition, the Audiovisual Regulation makes clear that imported products must be submitted to MOC for approval while domestic sound recordings are subject to their publisher's own editorial responsibility system.[159] In short, the content review regime that applies to a sound recording depends solely on its origin. Accordingly, these measures distinguish between imported and domestic products solely based on origin.

(c) With reference to Article 28 of the Audiovisual Regulation and para. 395 of the U.S. first written submission, what is the basis for the U.S. assertion that Article 28 applies to imported sound recordings intended for electronic distribution?

232. Article 28 of the Audiovisual Regulation provides that "Audiovisual products imported for publication and finished audiovisual products imported for wholesale, retail or rental shall be submitted to the cultural administration under the State Council for review of their contents."[160] Article 14 of the Audiovisual Import Rule sets forth the content review procedures applicable to audiovisual products and Article 16 of the Audiovisual Import Rules provides that "In regard to audiovisual products imported for use in information network transmission, refer to the provisions of Article 14 of these Rules. [161] Because these content review procedures in the Audiovisual Import Rule are applicable to sound recordings distributed in hard copy and hard-copy sound recordings intended for electronic distribution, Article 28 of the Audiovisual Regulation, which establishes the content review requirement for imports of sound recordings applies to all sound recordings whether distributed electronically or in hard-copy.

(d) Is it correct that paras. 389, 392, 393, 394 and 395 of the U.S. first written submission each set out separate claims?

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[157] U.S. First Oral Statement, para. 78.
[158] U.S. First Written Submission, para. 370-71.
[159] U.S. First Written Submission, para. 372.
[160] Exhibit US-16.
[161] Exhibit US-17.

233. Paragraphs 389, 392, 393, 394, and 395 of the U.S. first written submission are intended to set out various elements of the U.S. claim, rather than separate claims, that China's discriminatory content review regime for imports of hard-copy sound recordings intended for electronic distribution are inconsistent with China's national treatment obligations under Article III:4 of the GATT 1994.

(e) With reference to para. 393 of the U.S. first written submission, please explain how the requirement that sound recordings already in digital format and being distributed over the Internet must be reviewed for content "affects" the distribution of "sound recordings *intended* for electronic distribution".

234. To the extent that the discriminatory content review regime is applied to the sound recordings in hard-copy format, such a discriminatory content review regime "affects" their distribution within the meaning of Article III:4 of the GATT 1994 because the relevant measures impose an administrative and legal hurdle on imports of sound recordings that they must overcome before distribution, while Chinese sound recordings do not face this hurdle. Accordingly, these measures "affect" the distribution of sound recordings by modifying the conditions of competition to the detriment of imports.[162]

(f) Could the United States please explain the meaning of the last paragraph of section II.A of its Panel Request? In your answer please respond to paras. 529-536 of China's first written submission.

235. The last paragraph of section II.A of the U.S. panel request addresses the U.S. claim under Article III:4 of the GATT 1994 with respect to the measures identified in section II of that request, which accord to imported reading materials treatment that is less favorable than that accorded to domestic reading materials. In the U.S. response to Panel Question 120, the United States provided a detailed discussion of China's procedural objections raised in paragraphs 523-536 of its first written submission regarding the inclusion in the Panel's terms of reference of the U.S. claim under Article III:4 and of China's measure that discriminates against electronic publications – *i.e.*, the Imported Products Subscription Rule.

236. The following will address China's objections contained in paragraphs 529-536 that its measures concerning the restrictive subscription regime imposed on imported reading materials and the onerous conditions imposed on subscribers of imported reading materials are not identified in the U.S. panel request and, therefore, are not measures included in the Panel's terms of reference. Contrary to China's contention that each and every provision of a challenged measure must be identified in a panel request, Article 6.2 of the DSU and the Appellate Body's reports that

[162] *See Canada – Autos (Panel)*, para. 10.80.

have addressed that Article,[163] require the panel request to "identify the specific measures at issue" for a measure to be included in a panel's terms of reference. As the United States has explicitly identified in its panel request the measures that set forth the restrictive subscription regime and the onerous conditions on subscribers, these provisions are properly before the Panel and within its terms of reference.

237. The measures that contain these discriminatory provisions are the Imported Publications Subscription Rule and the Foreign-Invested Sub-Distribution Rule. The Imported Publications Subscription Rule mandates that imported newspapers and periodicals and imported books and electronic publications in the limited distribution category are restricted to a single distribution channel (*i.e.*, subscription) and are confined to only Chinese wholly state-owned distributors. Moreover, this measure subjects subscribers of imported reading materials to a burdensome examination and approval process administered by GAPP which delays and possibly denies access by subscribers to these imported products. The Foreign-Invested Sub-Distribution Rule provides that domestic books, newspapers and periodicals may be sub-distributed by foreign-invested enterprises while imported books, newspapers and periodicals may not.

238. Domestic reading materials, however, are free of these restrictions and may be distributed through a variety of channels (including but not limited to subscription) by a broader array of distributors (including foreign-invested enterprises). Furthermore, where domestic reading materials are distributed by subscription, subscribers are not subjected to the onerous government-administered examination and approval regime.

239. Moreover, for the reasons provided in the U.S. response to Panel Question 120, China's reliance on the panel's reasoning in *Japan – Film* and the Appellate Body's reasoning in *U.S. – German Steel* is unavailing.

Q124. With reference to para. 106 of the U.S. first oral statement, please explain the basis for your view that the Audiovisual Regulation and Audiovisual Import Rule are "closely and directly related" to the other measures specifically listed. Also, why did the United States mention these measures in sections I and II of its Panel Request, but not section IV?

240. The Audiovisual Regulation and the Audiovisual Import Rule are "closely and directly related" to the Network Music Opinions and the Internet Culture Rule in that all of these measures contain a discrete set of regulatory requirements governing a single issue for a common set of products – *i.e.*, MOC's content review of hard copy sound recordings. Pursuant to each of these measures, imported sound recordings must be submitted to MOC for formal content review and

[163] *See Korea – Dairy (AB)*, para. 120; *U.S. – German Steel (AB)*, para. 125; and *Guatemala – Cement (AB)*, para. 69.

approval.[164] In contrast, these measures permit domestic sound recordings to be reviewed in-house by their producers.[165]

241. Although the Audiovisual Regulation and the Audiovisual Import Rule were not identified by name in section IV of the U.S. panel request, these legal instruments nonetheless fall within the scope of the measure described by the narrative found in the second paragraph of section IV. Moreover, for the reasons outlined above, the Audiovisual Regulation and the Audiovisual Import Rule are "related measures" that are encompassed by the phrase "any amendments, related measures, or implementing measures" following the list of specifically identified measures in that section of the U.S. panel request.

242. Finally, the Panel may also wish to consider the reasoning of the panel in *Japan – Film*.[166] In that dispute, the panel found that measures that were not explicitly described in the panel request at issue were nonetheless included in the panel's terms of reference because they were "subsidiary or closely related to" other measures that were specifically identified in that request. The Audiovisual Regulation and the Audiovisual Import Rule contain content review requirements for imported and domestic sound recordings that are nearly identical to those contained in the Network Music Opinions and the Internet Culture Rule, which were specifically identified in section IV of the U.S. panel request. The Audiovisual Regulation and the Audiovisual Import Rule are therefore closely related to measures specifically identified in section IV of the U.S. panel request, such that they can be said to be included in the measures, including those that fall within the scope of the term "amendments, related measures, or implementing measures" in the panel request). Thus, China had adequate notice that the Audiovisual Regulation and the Audiovisual Import Rule were included in the U.S. claim under Article III:4 with respect to sound recordings.

Q125. With reference to the treatment of imported films for theatrical release, please answer the following questions:

(a) With reference to paras. 374-376 and paras. 382, 397 of the U.S. first written submission are you alleging that the three identified measures *together* or *individually* are laws, regulations or requirements affecting the distribution of films for theatrical release which provide for less favourable treatment of imported films? Also, is the United States claiming that Articles 5 and 44 of the Films Regulation and Article 16 of the Provisional Film Rule give rise to inconsistencies with Article III:4?

243. The United States is claiming that the Film Regulation, the Provisional Film Rule and the

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[164] Audiovisual Regulation, Article 28 (Exhibit US-16); Audiovisual Import Rule, Articles 11-18 (Exhibit US-17); Internet Culture Rule, Article 16 (Exhibit US-32); and Network Music Opinions, Article 9 (Exhibit US-34).

[165] Audiovisual Regulation, Article 16 (Exhibit US-16); Internet Culture Rule, Articles 16 and 19 (Exhibit US-32); and Network Music Opinions, Article 9 (Exhibit US-34).

[166] *Japan – Film (Panel)*, para. 10.8

Film Distribution and Projection Rule together are laws, regulations or requirements affecting the distribution of films for theatrical release which provide less favorable treatment of imported films in a manner inconsistent with Article III:4 of the GATT 1994. Article III of the Film Distribution and Projection Rule provides that imported films may only be distributed by two state-controlled enterprises. Articles 5 and 30 of the Film Regulation and Article 16 of the Provision Film Rule provide the legal framework that underpins China's dual distribution regime for films for theatrical release.

244. The United States is not claiming that Article 44 of the Films Regulation is inconsistent with Article III:4. With respect to Article 5 of the Film Regulation and Article 16 of the Provisional Film Rule, the United States is claiming that these provisions operate together with Article 30 of the Film Regulation and Article III of the Film Distribution and Projection Rule in a manner that is inconsistent with Article III:4. These provisions severely restrict the distribution opportunities available to imported films as compared to the distribution opportunities afforded to domestic films and therefore accord imported films treatment less favorable than that accorded to domestic films.

(b) Are imported films outside the revenue-sharing category subject to an import quota?

245. The United States is not aware of any such import quotas. We look forward to China's reply to the Panel's question.

(c) With reference to para. 405 of the U.S. first written submission, what is the basis for the U.S. assertion that the two state-controlled distributors get to "dictate" the release date and screening duration?

246. China's two state-controlled distributors of imported films for theatrical release dictate the release date and screening duration of imported films pursuant to the Master Contract. Article 3(a) of the Master Contract provides that the distributor shall "organize and administer the revenue sharing exhibition in Theatres".[167] In contrast to the terms of distribution contracts for domestic films that are subject to commercial negotiation, the Master Contract governing the distribution of imported films on a revenue-sharing basis contains fixed terms that may not be altered.

(d) With reference to para. 407 of the U.S. first written submission, please provide further explanation of why and how the requirement to support domestic films results in less favourable treatment of imported films in respect of distribution in China. What form does the support take? Also, what is meant by the reference to a limited number of screening opportunities?

[167] Exhibit US-37.

247. China requires that the two state-controlled distributors of imported films support the production, distribution and projection of domestic films.[168] The requirement treats imported films less favorably than domestic films because the distribution opportunities available to foreign films are directly tied to, and constrained by, how well these two distributors promote the interests of domestic films. For example, Article III of the Film Distribution and Projection Rule states, "the number of imported films distributed will be determined based on the previous year's achievements in distribution and projection of domestically produced films."

248. The Distribution and Exhibition of Domestic Films Measure further provides that if both distributors of imported films fail to satisfy the criteria for the distribution and projection of domestic films,[169] one film for theatrical release on a revenue-sharing basis will be deducted from each distributor from the total of 20 such films.[170] In other words, should China Film Group and Huaxia fail to meet their domestic film distribution requirements, only 18 of the 20 imported films that China committed to allow for distribution on a revenue-sharing basis will actually be distributed.

249. The fate of the distribution opportunities available to imported films is therefore directly tied to that of domestic films. This in turn modifies the conditions of competition to the disadvantage of imported films. If domestic films do well, imported films face greater competition. Yet, if domestic films do poorly, imported films are penalized. For imported films, this is a "lose-lose" situation. In contrast, domestic films can be distributed by any of the approximately 50 distributors in China, which are permitted to maximize the distribution of such films on a commercial basis, without distribution limitations based on distribution performance of other films. Thus, while domestic films can be distributed without such conditions, the distributors of imported films are constrained by the success of the distribution of domestic films.

250. Requiring the distributors of imported films to support domestic films is particularly problematic in a market where there are a limited number of screening opportunities. Here, the phrase "screening opportunities" refers to the number of cinemas in China. Thus, as there is significant competition between films for access to cinemas, imported films are disadvantaged by the fact that their own distributors must get domestic films into those limited number of cinemas in order to meet the requirements imposed on these two distributors by law. With a finite supply of cinemas, China Film Group and Huaxia face additional pressure to satisfy their obligations to support the interests of domestic films at the expense of promoting the interests of imported films.

251. Finally, the requirement that the two state-controlled distributors of imported films support the production, distribution and projection of domestic films is not limited to China's screening quota. China requires that domestic films be screened for two-thirds of the total amount of annual

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[168] Film Distribution and Projection Rule, Article III (Exhibit US-21); and Distribution and Exhibition of Domestic Films Measure, Articles III-V (Exhibit US-40).

[169] Distribution and Exhibition of Domestic Films Measure, Article III (Exhibit US-40).

[170] Distribution and Exhibition of Domestic Films Measure, Article V (Exhibit US-40).

screening time.[171] Separate from this screening quota, China also requires that China Film Group and Huaxia support domestic films more generally. This support includes a minimum annual box office threshold, which these two distributors must meet, as well as financial awards for box office receipts for "recommended" domestic films that reach certain other thresholds.[172]

(e) In relation to the additional commitments column of Sector 2D of China's *GATS* Schedule, which contains a commitment with regard to the number of films for theatrical release in the revenue-sharing category that are to be imported per year, is this a commitment relating to trade in goods or relating to services? If the latter, what is the service in relation to which a commitment is taken?

252. With its additional commitment inscribed in Sector 2D of its Services Schedule, China committed to permit at least 20 films for theatrical release to be imported and distributed on a revenue sharing basis annually. Much to the regret of foreign distributors of films, China did not take a commitment to allow foreign service suppliers to distribute films imported for theatrical release themselves (or on a joint venture basis). Instead, China's additional commitment provides that foreign enterprises will share in the revenue of a certain number (at least 20) of imported films. As this revenue-sharing commitment relates to the supply of distribution services, it was inscribed as an additional commitment in Sector 2D of China's Services Schedule. Of course, this commitment also relates indirectly to goods, because films for theatrical release are goods.

(f) Also, with respect to China's limitation on film imports does the phrase "China will allow the importation of motion pictures for theatrical release on a revenue-sharing basis and the number of such imports shall be 20 on an annual basis" mean:

(i) that 20 different film titles may be distributed on a revenue-sharing basis,

(ii) or that 20 copies of every film title distributed may be distributed on a revenue-sharing basis?

253. China's additional commitment contained in Sector 2D of its Services Schedule provides that China will allow at least 20 films for theatrical release to be distributed on a revenue-sharing basis annually. Item (i) therefore more accurately describes the scope of this additional commitment inscribed by China pursuant to Article XVIII of the GATS. Item (ii) does not capture China's additional commitment as the text of China's inscription does not use the term "copies".

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[171] Film Regulation, Article 44 (Exhibit US-20).

[172] Distribution and Exhibition of Domestic Films Measure, Articles III-IV (Exhibit US-40).

Q126. With reference to paras. 570 and 578 of China's first written submission, how do the measures challenged by the United States affect the "distribution", within China, of sound recordings imported in physical form (as opposed to the distribution of the content subsequently transmitted in digital form via the Internet)? Are the physical copies supplied by their producers to entities in China which "digitalize" them and then distribute them via the Internet? If so, is such supply by the producers "distribution" of physical copies?

254. The United States understands the Panel to be asking whether the relevant measures "affect" the distribution of sound recordings within the meaning of Article III:4 of the GATT 1994. This provision states that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their *internal sale, offering for sale, purchase, transportation, distribution or use*."[173] Accordingly, a measure challenged under III:4 may be "affecting" a variety of elements in the chain from importation to consumption including sale, offering for sale, purchase, distribution or use. Distribution is only one of the elements that a measure can "affect" in order to fall within the scope of Article III:4 of the GATT 1994.

255. In the context of hard-copy sound recordings intended for electronic distribution, the hard-copy sound recording is often provided to an Internet Culture Provider ("ICP") or Mobile Content Provider ("MCP") who makes an additional copy in hard-copy format of the sound recording, transforms the sound recording into a format that can be transmitted electronically, and then transmits the reformatted sound recording electronically. The United States is challenging the discriminatory content review regime that China maintains that requires imports of hard-copy sound recordings intended for electronic distribution to undergo a more onerous content review than like domestic products.[174] Thus, before distributing a sound recording electronically, the ICP or MCP must go through the delay and administrative burden of a content review process before electronic distribution that the ICP or MCP need not go through for domestic like products. These measures, therefore, affect the movement of these imports through the process from importation to consumption. Accordingly, the relevant Chinese measures affect the "sale, offering for sale, purchase, distribution or use" of such products within the meaning of Article III:4.

256. The Panel's question appears to be focused on whether the distribution of the physical copy of the sound recording is "affected" by the relevant Chinese measures because the sound recording is ultimately transformed into a form that can be distributed electronically. However, for the reasons set forth above, the United States considers that this is not the situation presented by this dispute because the relevant measures affect the "use" of the hard-copy sound recordings intended for electronic distribution. Moreover, the term "affecting" in Article III:4 of the GATT 1994

[173] Emphasis added.

[174] U.S. First Written Submission, paras. 369-73, 379-81.

should not be construed to permit measures, which accord less favorable treatment to imports merely because the imported product is used to make a downstream product. Such a result would appear to create a loophole in the discipline afforded by Article III:4.

257. For instance, in *Mexico – Taxes on Soft Drinks*, the panel was presented with a tax on sweeteners imported and used in producing soft drinks. The panel noted that the requirement that a measure "affect" the internal sale, offering for sale, purchase, distribution or use of the product has a "broad scope" and "it cover[s] 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."[175] The panel went on to find that the tax on imported sweeteners, that was not imposed on domestic sweeteners, affected the use of the imports because soft drink producers faced a greater tax burden if they used imported rather than domestic sweeteners.[176] The same reasoning applies to China's measures discriminating against imports of hard-copy sound recordings intended for electronic distribution. The more burdensome content review requirements for imported products modifies the conditions of competition in favor of domestic products. Consequently, the relevant Chinese measures "affect[] their internal sale, offering for sale, purchase, transportation, distribution or use" within the meaning of Article III:4 of the GATT 1994.

Q127. With reference to page 4 of the European Communities' oral statement, could the United States please comment on the European Communities' statement that, in the case of film distribution, the "tangible good" is merely "the 'vehicle' to transport essentially a bundle of intellectual property rights" and thus a mere accessory to a service which consists in the public showing of films in theatres, and that measures affecting trade in such goods should not be assessed in the light of Article III:4 of the GATT 1994?

258. The United States disagrees with the EC's statement on page 4 of its oral statement and submits that films for theatrical release are goods subject to the GATT 1994 disciplines. There are services associated with the distribution and exhibition of films that are subject to the GATS disciplines as the EC points out; however, these services components do not somehow transform the good into a service.

259. First, Articles III:10 and IV of the GATT, which only covers trade in goods, explicitly deal with imports of cinematographic film. These provisions demonstrate that there is a long history of dealing with films as goods in the multilateral trading context. In its response to Question 6 from the Panel to the third parties, the EC contends that the existence of Articles III:10 and IV of the GATT is not decisive for determining whether films are goods notwithstanding the fact that the

[175] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.
[176] *Mexico – Taxes on Soft Drinks (Panel)*, paras. 8.107-8.113.

GATT 1994 is a Multilateral Agreement on Trade in Goods.[177] The United States considers that the EC's argument is illogical. The EC also states, in response to Question 18 from the Panel to the third parties, that because films are commercially exploited through a series of associated services, trade in films should be analyzed under the GATS because "it is only the basic physical support ("inter-negative" or "master video") that crosses the borders in physical terms."[178] What the EC's statement betrays is that trade in films does constitute trade in goods. Accordingly, measures affecting the distribution of films for theatrical release can be analyzed under the GATT 1994 and other goods disciplines.

260. Moreover, the EC's conclusion is premised on the notion that measures can only be challenged under the GATS or the GATT 1994 even where those measures regulate both trade in services and trade in goods. As the United States set forth in its first oral statement, the Appellate Body has rejected this line of reasoning, including when the EC offered it in the past.[179]

261. Finally, the fact that films are goods is supported by their treatment in the customs regimes of Members including China. The Harmonized Commodity Description and Coding System (HS), which only covers goods, describes products under heading 3706 as follows: "cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track."[180] China's own customs regime incorporates the HS description of these products under heading 3706.[181] Finally, China's first written submission conceded that a film must go through "customs clearance" for the "purpose of the distribution of motion pictures to Chinese distributors and theatres."[182] These facts support the proposition that films are goods.[183]

Q128. With reference to para. 374 of the U.S. first written submission and paras. 609-610 of China's first written submission, please explain further what is meant by the "*distribution* of *films* for theatrical release" (emphasis added). In particular:

(a) What is the relevant good being distributed? Is it the exposed and developed cinematographic film, the film reel, or something else?

262. As stated in response to Question 13(a), the good that is imported into China is typically

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[177] Responses of the European Communities to the Panel's Questions to the Third Parties, Question 6, p. 8.

[178] Responses of the European Communities to the Panel's Questions to the Third Parties, Question 18, p. 15.

[179] *Canada – Periodicals (AB)* (while a periodical may be comprised of elements that have services attributes i.e., editorial content and advertising content, "they combine to form a physical product – the periodical itself."), p. 17; *EC – Bananas (AB)*, para. 221 (with respect to "measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good, . . . the same measure could be scrutinized under both [the GATT and GATS] agreements. . . .").

[180] World Customs Organization, Explanatory Notes, VI-3706-1, (4th Ed. 2007) (Exhibit US-53).

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

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

[183] *See also* Australia's Oral Statement, para. 4.

the internegative or interpositive, which both qualify as exposed and developed cinematographic film. This product is sent to a licensor who provides the internegative or interpositive to the distributor. The distributor works with the laboratory to turn the internegative/interpositive into film prints that can be provided to local cinemas for exhibition in movie theatres. These film prints also fit within the meaning of the phrase "exposed and developed cinematographic film."

263. The container that contains the film *i.e.*, film reel, or any other container, is irrelevant, as set forth in response to Question 14.

(b) If the exposed and developed cinematographic film is the good being distributed, please elaborate on why providing the exposed and developed cinematographic film to the distributor amounts to "distribution" within the meaning of Article III:4.

264. As set forth in response to sub-question (a), the good that is provided to the distributor is typically an internegative or interpositive, which fits within the meaning of the phrase "exposed and developed cinematographic film"; the good that is distributed to cinemas for exhibition is film prints made from the interpositive, and these prints also qualify as "exposed and developed cinematographic film."

265. The internegative or interpositive is provided to the distributor by the licensor. However, the United States considers that whether the provision of the film in this form 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. The measures at issue in the U.S. claim under Article III:4 of the GATT 1994 provide that only two state-controlled enterprises – China Film Distribution Group and Huaxia – can distribute imported films in China, while domestic films have access to a far more open distribution system.[184]

(c) If the exposed and developed cinematographic film is the good being distributed, how do the measures at issue (e.g., Article III of the Film Distribution and Projection Rule) regulate or affect the "distribution" of the exposed and developed cinematographic film?

266. Article III:4 provides that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

267. The measures at issue affect the distribution of films within China because the measures govern the distribution of films in China and they adversely modify the conditions of competition

[184] U.S. First Written Submission, paras. 201-02.

between domestic and imported products.[185] As stated above, the measures restrict which entities may distribute imported films in China, and the measures govern the distribution of the products. In addition, the measures adversely modify the conditions of competition between domestic and imported products. As set forth in the U.S. first written submission, the highly restrictive regime for distribution of imported films means that producers of imported films lose control of many aspects of the distribution process that have a significant impact on the commercial success of the film, such as release dates, screening times, marketing, dubbing and subtitling, and disadvantageous fee-sharing arrangements.[186]

268. Article III of the Film Distribution Rule governs the distribution of imported films by setting up the duopoly for the distribution of imported films. Accordingly, this measure affects the distribution of the products in China.

269. To the extent the Panel's question is focused on the nature of the product that is imported (typically internegative or interpositive) and subsequently distributed (film prints for exhibition in a cinema), as the United States set forth in response to Question 126, the requirement that a measure "affect" the internal sale, offering for sale, purchase, distribution or use of the product has been interpreted broadly. 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."[187] In addition, in *Mexico – Taxes on Soft Drinks*, the panel found that a discriminatory tax on imported sweeteners affected the use of the imports because soft drink producers faced a greater tax burden if they used imported rather than domestic sweeteners.[188]

270. The same reasoning applies to the U.S. claims under Article III:4 of the GATT 1994 involving films. First, the restrictions on which entities may import films (whether in the form of internegative, interpositive, or film prints) and the restrictions on which entities may distribute imported films affects the distribution of the product because it adversely modifies the conditions of competition in favor of domestic films (whether in the form of internegative, interpositive, or film prints). Moreover, a finding that a measure that accords less favorable treatment to imports does not "affect" the distribution of the downstream product made from those inputs because there is further processing before distribution would undermine the discipline afforded by Article III:4 by allowing a loophole in the national treatment obligation under the GATT 1994.

For both Parties:

Q138. Can the Parties please provide their interpretation of the term "distribution" as used in Article III:4 of the GATT 1994? As argued by China in para. 29 of its first oral

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[185] *See Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.
[186] U.S. First Written Submission, paras. 203-09; 397-409.
[187] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.108.
[188] *Mexico – Taxes on Soft Drinks (Panel)*, paras. 8.107-8.113.

statement, is distribution within the context of Article III:4 of GATT 1994 limited to the supplying of goods to on-sellers or consumers?

271. In order to understand the meaning of the term "distribution" in Article III:4 of the GATT 1994, let us begin with the dictionary definition of the term. The term "distribution" is defined as "The action of dealing out in portions or shares among a number of recipients; apportionment, allotment; *Econ*. the dispersal of commodities among consumers effected by commerce. "[189] The United States considers that the concept of 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.

272. China states that distribution is "the supplying of goods to on-sellers or consumers."[190] The United States submits that the term "distribution" can be broader than this phrase and there is nothing in the text of Article III:4 that would limit "distribution" to the definition provided by China. Indeed, in *Canada – Wheat*, the panel stated based on the dictionary definition of "distribution," that "We take this to mean that "distribution" entails, *inter alia*, the supply of goods to consumers or to on-sellers."[191] The use of "*inter alia*" reveals the panel's understanding of the term "distribution" as broader than the definition provided by China.

273. Even if China were correct, however, the next step in China's reasoning is flawed. China concludes based on its definition of "distribution" that because distribution of motion pictures "does not involve the sale of goods," there is no distribution under Article III:4. This is based on China's contention that "what is ultimately purchased by movie-goers is the right to attend the screening and all that they retain are memories of the show."[192]

274. However, as the United States has set forth in its first oral statement, films for theatrical release are goods.[193] First, without prejudice to the question of whether goods must be tangible items, the items that are the subject of the U.S. claim under the GATT 1994 for films for theatrical release are tangible cinematographic film. In addition, these goods are imported, sold, and distributed, contrary to China's contention. Moviegoers may be purchasing the right to attend the screening of a show; however, the tangible film must be provided by the distributor to local cinemas who can exhibit the film. Accordingly, the films are tangible goods that are distributed *i.e.*, they are moving through the various steps in the chain from production to consumption.

275. Finally, China's argument that distribution only involves the sale of goods to consumers or on-sellers appears to be premised on the notion that there is no good involved unless the consumer ultimately consumes the good as opposed to the good being used to provide a service. The examples of other businesses that use goods to provide services illustrate the illogic of China's

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[189] *New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).
[190] China's First Oral Statement, para. 29.
[191] *Canada – Wheat (Panel)*, para. 6.171.
[192] China's First Oral Statement, para. 30.
[193] U.S. First Oral Statement, paras. 9-18.

argument. For example, a rental car service uses a car to provide a service. In the end, the customer does not retain the car; the business uses the car to provide the rental service. However, we hope that China would agree that cars are goods. Similarly, a laundry service uses a washing machine to provide a service. The laundry service does not supply or sell the washing machine – or any good – to a consumer, and the consumer does not retain or consume any good. However, the washing machine is still a good. In short, the fact that a business uses a good to provide a service does not mean that the good is not a good.

Q139. Please confirm your statements at the first substantive meeting that the content criteria applicable to relevant domestic and imported products are the same?

276. Based on China's measures that are publicly available, it is the understanding of the United States that the same categories of content are prohibited for domestic and imported products.

277. While the content that is prohibited may be the same, the content review regimes applicable to the imported and domestic products at issue are different and discriminate against imported products, despite China's assertions to the contrary.[194] Imported products face mandatory government review procedures. For imported reading materials, GAPP is required to review the catalogue of proposed imports and is authorized to intervene in the day-to-day content review of these imports.[195] With respect to AVHE products and sound recordings, importers must submit these products directly to MOC for content review.[196] Domestic products, however, may be reviewed in-house by their producers

PROTOCOL CLAIMS ON PRODUCT DISTRIBUTION

For the United States:

Q140. With reference to the measures identified at paras. 412 and 413, please indicate whether they are claimed to be inconsistent with the Accession Protocol separately or jointly.

278. The United States is challenging the measures identified in paragraphs 412 and 413 of the U.S. first written submission as inconsistent with the Accession Protocol separately as well as jointly.

Q141. *If the Panel were to find that the U.S. claim under Article III:4 of the GATT 1994 with respect to reading materials was not properly before it, what would be the legal implications of such a finding for the U.S. claims under paras. 5.1 and 1.2 of the

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[194] *See* China's First Written Submission, para.231.

[195] Management Regulation, Articles 44-45 (Exhibit US-7).

[196] Audiovisual Regulation, Article 28 (Exhibit US-16); Audiovisual Import Rule, Articles 6 and 11-18 (Exhibit US-17); and Network Music Opinions, Article 9 (Exhibit US-34).

Protocol?

279. As discussed in paragraphs 98-100 of the U.S. oral statement and as elaborated upon in the U.S. response to Panel Question 120, China's objection to the inclusion of the U.S. claim under Article III:4 of the GATT 1994 with respect to reading materials is unavailing.

280. However, should the Panel conclude that the U.S. claim under Article III:4 with respect to reading materials is not within its terms of reference, the U.S. claims under paragraphs 5.1 and 1.2 of the Accession Protocol with respect to reading materials would likewise fall outside of the Panel's terms of reference.

TABLE OF EXHIBITS

U.S. Exhibit No.	Description
US-62	Minute of Meeting on Issues Related to the Application of Legal Norms in the Hearings of Administrative Cases (Excerpt) (2004)
US-63	Administrative Licensing Law of the People's Republic of China (Excerpt) (2003)
US-64	Announcement of the General Administration of Press and Publications of the People's Republic of China No. 1 (Excerpt) (2004)
US-65	Communication Regarding the Situation on the GAPP's Reform on the System of Administrative Examination and Approval (Excerpt) (2004)
US-66	Provisional Rules for the Administration of Digital Films (2002)
US-67	Services Schedule of China, Czech Republic, and the European Communities (Excerpts)
US-68	*The New Shorter Oxford English Dictionary* (4th ed., 1993), p. 709
US-69	*The New Shorter Oxford English Dictionary* (4th ed., 1993), p. 626
US-70	Accounting System of Business Enterprises (Excerpt) (2000)
US-71	Accounting Standard for Business Enterprises (2006)
US-72	Law of the People's Republic of China on Legislation (2000)