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

Report of the Panel

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TABLE OF WTO CASES CITED IN THIS REPORT

Short Title	Full case title and citation
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
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Dominican Republic – Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
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India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
Italy – Agricultural Machinery	GATT Panel Report, Italian Discrimination Against Imported Agricultural Machinery, adopted 23 October 1958, BISD 7S/60
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
Korea – Various Measures on Beef	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, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
Mexico – Anti-Dumping Measures on Rice	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, DSR 2005:XXII, 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675

Short Title	Full case title and citation
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and Corr. 2, adopted 23 August 2001, DSR 2001:XI, 5767
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663, and Corr.1
US – Gambling	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 Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Section 337	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345

Short Title	Full case title and citation
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

LIST OF ABBREVIATIONS

1993 Scheduling Guidelines	1993 Guidelines for the Scheduling of Specific Commitments under the GATS (Document MTN.GNS/W/164)
AVHE	audiovisual home entertainment
CD	compact disc
CNPIEC	China National Publications Import and Export Corporation (Group)
CPC	1991 United Nations Provisional Central Product Classification
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DVD	digital video disc
EC	European Communities
GAPP	General Administration of Press and Publication
GATS	*General Agreement on Trade in Services*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
HS	Harmonized Commodity Description and Coding System
ICP	Internet Culture Provider
MCP	Mobile Content Provider
MOC	Ministry of Culture
MOFCOM	Ministry of Commerce
SARFT	State Administration on Radio, Film and Television
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNOG	United Nations Office at Geneva
UNON	United Nations Office at Nairobi
US	United States
VCD	video compact disc
W/120	Services Sectoral Classification List (Document MTN.GNS/W/120)

I. INTRODUCTION

1.1 On 10 April 2007, the United States requested consultations with the Government of China pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article XXII of the General Agreement on Trade in Services ("GATS") with respect to (1) certain measures that appear to restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products, sound recordings, and publications, and (2) certain measures that appear to restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. The request was circulated on 16 April 2007.[1]

1.2 On 25 April 2007, the European Communities requested to join in the consultations requested by the United States.[2] China accepted the European Communities' request.[3]

1.3 Consultations were held on 5-6 June 2007. Those consultations did not resolve the dispute.

1.4 On 10 July 2007, the United States requested supplemental consultations with China pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, and Article XXII of the GATS with respect to certain market access concerns related to the distribution of imported films for theatrical release and the distribution of imported sound recordings, as well as sound recording distribution services, specifically, (1) certain measures that appear to provide less favourable distribution opportunities for imported films for theatrical release than for like domestic films, and (2) certain measures that appear to provide less favourable opportunities for foreign suppliers of sound recording distribution services and for the distribution of imported sound recordings in physical form than are provided to like service suppliers and like products. This request supplemented the request for consultations circulated as WT/DS363/1. It was circulated on 16 July 2007.[4]

1.5 On 20 July 2007, the European Communities requested to join in the supplemental consultations requested by the United States.[5] Further consultations were held on 31 July 2007, but these did not resolve the dispute.

1.6 On 10 October 2007, the United States requested that the Dispute Settlement Body ("DSB") establish a panel to examine the matters raised in the consultation requests, pursuant to Article 6 of the DSU, with the standard terms of reference as set out in Article 7.1 of the DSU.[6] At its meeting of 27 November 2007, the DSB established a Panel with the following terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS363/5, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[7]

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[1] WT/DS363/1.
[2] WT/DS363/2.
[3] WT/DS363/3.
[4] WT/DS363/1/Add.1.
[5] WT/DS363/4.
[6] United States' panel request WT/DS363/5.
[7] WT/DS363/6, para. 2.

1.7 On 17 March 2008, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 27 March 2008, the Director-General accordingly composed the Panel as follows:[8]

Chairman: Mr. Florentino P. Feliciano

Members: Mr. Juan Antonio Dorantes
Mr. Christian Häberli

1.8 Australia, the European Communities, Japan, the Republic of Korea ("Korea"), and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei") reserved their rights to participate in the Panel proceedings as third parties.[9]

1.9 The Panel met with the United States and China (the "parties") on 22 and 23 July 2008. It also met with the third parties on 23 July 2008. The Panel met again with the parties on 23 and 24 September 2008.

1.10 The European Communities, Korea, and Japan presented third-party submissions before the first substantive meeting of the Panel. Australia, the European Communities, Japan, and Korea made oral statements during the first substantive meeting of the Panel.

1.11 The Panel issued its Interim Report to the parties on 20 April 2009. The Panel issued its Final Report to the parties on 23 June 2009.

II. FACTUAL ASPECTS

A. MEASURES AT ISSUE

2.1 This dispute concerns China's obligations under the *WTO Agreement* with respect to goods and services relating to reading materials (e.g. books, newspapers, periodicals, electronic publications), audiovisual home entertainment (AVHE) products (e.g. videocassettes, video compact discs, digital video discs), sound recordings (e.g. recorded audio tapes), and films for theatrical release.

2.2 The dispute arises over certain measures that affect (i) the importation into China of relevant goods, (ii) the distribution within China of relevant goods, and (iii) services and service suppliers in relation to certain of the above mentioned products.

2.3 More specifically, this dispute involves the US claims of violation with respect to:

(a) Chinese measures that are alleged to unjustifiably restrict the right of enterprises in China and foreign enterprises and individuals to import into China reading materials, AVHE products, sound recordings, and films for theatrical release by limiting trading rights to Chinese state-owned enterprises;

(b) Chinese measures relating to the distribution of reading materials, AVHE distribution services, and sound recording distribution services. More specifically, the United States is challenging Chinese measures that allegedly:

[8] WT/DS363/6, para. 4.
[9] *Ibid.*, para. 5.

- prohibit foreign-invested enterprises from engaging in the master distribution of reading materials, the master wholesale and wholesale of electronic publications, and the distribution of imported reading material;

- impose, on foreign-invested enterprises permitted to engage in the sub-distribution of reading materials, requirements that are more burdensome than those applicable to wholly Chinese-owned distributors. Such requirements relate to registered capital, operating terms, pre-establishment legal compliance, examination and approval process, and decision-making criteria;

- limit commercial presence for the distribution of AVHE products to Chinese-foreign contractual joint-ventures with majority Chinese ownership;

- as regards the sub-distribution of AVHE products, discriminate against Chinese-foreign contractual joint ventures by imposing on them certain requirements that are more burdensome than those that apply to wholly Chinese-owned enterprises. These requirements relate to operating terms, pre-establishment legal compliance, examination and approval process, and decision-making criteria;

- prohibit foreign-invested enterprises, but not wholly Chinese-owned enterprises, from engaging in the electronic distribution of sound recordings, e.g. through the Internet and mobile telecommunications networks.

(c) Chinese measures that allegedly do not provide national treatment for imported reading materials, sounds recordings intended for electronic distribution, and films for theatrical release. More specifically, the United States is challenging Chinese measures that allegedly:

- restrict distribution channels for certain imported reading materials by requiring their distribution to be conducted exclusively through subscription, by Chinese wholly state-owned enterprises, and only to subscribers that have been examined and approved by the Chinese government; unlike the situation for similar domestic reading materials;

- limit the distribution of certain imported reading materials (which can be distributed other than through subscription) to wholly Chinese-owned enterprises, while the distribution of similar domestic reading materials can be effected by other types of enterprises, including foreign-invested ones;

- discriminate against imported sound recordings intended for electronic distribution by subjecting them to more burdensome content review regimes than similar domestic products;

- discriminate against imported films for theatrical release by limiting their distribution to two state-owned enterprises, while similar domestic products can be distributed by any distributor operating in China.

B. TRANSLATION OF CHINA'S MEASURES

2.4 Regarding China's measures at issue, the United States put forward its translations of the measures into English as part of the exhibits it submitted with its first written submission. China also submitted translations of some provisions as part of its exhibits attached to its first written submission.

2.5 At the second substantive meeting with the parties, the Panel identified a variety of provisions where the parties had provided different translations of China's measures or disputed the meaning of particular terms. The Panel requested the parties to attempt to bilaterally agree on a single translation of the provisions, and to provide, should the parties not be able to agree on the translation of all provisions, a joint suggestion as to the procedures that could be used to arrive at a single definitive translation of these provisions.

2.6 On 9 and 20 October 2008, the parties jointly communicated to the Panel that they had resolved a number of the translation differences by either agreeing on a translation or by agreeing that the differences in translation were not significant and therefore suggesting that the Panel might choose either one for the purpose of its work. With regard to the translation differences that could not be agreed, the parties jointly suggested, on 20 October 2008, that each party provide the Panel with a concise rationale explaining its views on each translation difference and that the Panel then seek translation of the outstanding provisions from an independent source.

2.7 On 22 October 2008, the Panel proposed to approach the United Nations Office at Geneva (UNOG) to assess its availability to serve as an independent translator in this dispute.[10] This course of action was agreed to by the parties. On 14 November 2008, the Panel informed the parties that, due to current workload and resource constraints, UNOG would be unable to finalize the translations in the near future. On 20 November 2008, the US expressed concerns regarding delays to the Panel's work that might result from the use of translation services provided by UNOG. Should UNOG be unable to provide a revised, shorter timeframe, the US proposed that a private translation company be contracted to perform the relevant translations. On 24 November 2008, China expressed concerns with respect to the alternative put forward by the US.

2.8 On 12 December 2008, the Panel informed the parties that the United Nations Office at Nairobi (UNON) was able and willing to undertake the assignment sooner than UNOG. The Panel suggested that this avenue be pursued, and the parties did not object. On 19 December 2008, the Panel asked the translation services of UNON to provide the relevant translations.

2.9 The Panel and the parties received the translations from UNON on 10 February 2009. The parties then provided comments on the translations performed by UNON, and subsequently commented on each others' comments. Throughout this Report, the Panel will refer to UNON as the Panel's "independent translator". Annex A-1 summarizes the translation issues arising in these proceedings.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The **United States** requests the Panel to find that:

(a) With respect to China's trading rights obligations, the following measures are inconsistent with paragraphs 5.1 and 5.2 of the Accession Protocol, as well as paragraph 1.2 of the Accession Protocol to the extent that it incorporates the commitments referred to in paragraphs 83 and 84 of the Working Party Report: the *Publications Regulation*; the *Importation Procedure*; the *Catalogue*; the *Foreign*

[10] Both the United States and China are members of the United Nations.

Investment Regulation; the *Several Opinions*; the *1997 Electronic Publications Regulation*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rule*; the *Audiovisual (Sub-)Distribution Rule*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*;

(b) The following measures are inconsistent with Article XVI of the GATS: the *Audiovisual (Sub-)Distribution Rule*; the *Catalogue*; the *Foreign Investment Regulation*; and the *Several Opinions*;

(c) The following measures are inconsistent with Article XVII of the GATS: the *Publications Regulation*; the *Publications Market Rule*; the *Publications (Sub-)Distribution Rule*; the *Sub-Distribution Procedure*; the *Imported Publications Subscription Rule*; the *1997 Electronic Publications Regulation*; the *Internet Culture Rule*; the *Circular on Internet Culture*; the *2001 Audiovisual Products Regulation*; the *Audiovisual (Sub-)Distribution Rule*; the *Network Music Opinions*; the *Catalogue*; the *Foreign Investment Regulation*; and the *Several Opinions*;

(d) The following measures are inconsistent with Article III:4 of the GATT 1994: the *Imported Publications Subscription Rule*; *Publications (Sub-)Distribution Rule*; the *Network Music Opinions*; the *Internet Culture Rule*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rules*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*.

(e) With respect to China's national treatment obligations for products, the following measures are inconsistent with paragraphs 5.1 of the Accession Protocol as well as paragraph 1.2 of the Accession Protocol to the extent that it incorporates the commitments referred to in paragraph 22 of the Working Party Report: the *Imported Publications Subscription Rule*; the *Publications (Sub-)Distribution Rule*; the *Network Music Opinions*; *Internet Culture Rule*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rules*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*.

3.2 The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its obligations under the Accession Protocol, the GATS, and the GATT 1994.

3.3 **China** asks the Panel to reject the claims raised by the United States. It argues that the measures at issue are consistent with its WTO obligations. In addition, China argues that certain measures challenged by the United States in its first written submission are outside the Panel's terms of reference because they were not identified in the panel request. China also argues that the US claim under Article III:4 of the GATT 1994 is outside the Panel's terms of reference because it was not included in the consultations request. Finally, China asks the Panel not to examine certain measures because they are only internal guidance and cannot serve as the basis for administrative acts.

IV. ARGUMENTS OF THE PARTIES

4.1 This section is based on executive summaries of the parties' submissions and statements and does not include summaries of the parties' answers to questions posed by the Panel in the context of the first and second substantive meetings or summaries of the parties' comments on each other's answers to those questions.

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

4.2 China's accession to the WTO offered real promise for the producers and distributors of books, newspapers, periodicals, DVDs, music and theatrical films. China's commitments to significantly enhance access to the Chinese market for these goods and services opened the prospect of more liberal and efficient markets, greater educational exchange, and stronger commercial opportunities for highly successful global competitors.

4.3 Unfortunately, China has failed to fulfil its WTO commitments in numerous respects. The Chinese measures at issue in this dispute affect four sets of industries, their services and their products. These products include reading materials (including books, newspapers, periodicals and electronic publications); audiovisual home entertainment products ("AVHE products") (including videocassettes, video compact discs (VCDs) and digital video discs (DVDs)); sound recordings (including songs, "ringtones" and "ringback tones"); and films for theatrical release (collectively, the "Products"). The affected service suppliers include AVHE products and sound recording distributors, as well as reading material wholesalers.

4.4 China acts inconsistently with its WTO obligations in the following three areas: (1) China prohibits foreign companies and individuals, as well as private enterprises inside China, from importing reading materials, AVHE products, sound recordings and films for theatrical release; (2) China places unfair restrictions on foreign distributors of reading materials and AVHE products and prevents foreign distributors from engaging in the electronic distribution of sound recordings in China; and (3) China uses an array of restrictive measures to discriminate against imported reading materials, sound recordings, and films for theatrical release in China.

2. Factual background

(a) China's measures addressing trading rights

4.5 China limits the right to import reading materials, AVHE products, sound recordings, and films for theatrical release to certain Chinese state-owned enterprises, prohibiting foreign-invested enterprises and privately-owned Chinese enterprises from engaging in these import activities. To import some of these Products, Chinese state-owned importers are required to obtain approval from the relevant regulatory agency. For other Products, the Chinese state-owned importer must be "designated" by the Government of China, a process whereby the relevant regulatory agency appoints one state-owned enterprise or an exclusive set of state-owned enterprises – of that agency's own choosing in the exercise of its discretion – to import a particular type of product or products.

4.6 China maintains its regime for the importation of reading materials, AVHE products, sound recordings, and films for theatrical release through numerous measures. Some of these measures apply broadly to all (or almost all) of the Products, and other measures apply more specifically to particular categories of the Products. The broadly applicable measures include: the *Catalogue*, the *Foreign Investment Regulation*, the *Several Opinions*, the *Publications Regulation*, and the *Importation Procedure*.

4.7 The general measures establish overarching rules governing, *inter alia*, the right to import the Products into China. They do so in two respects. First, two of these measures – the *Catalogue* and the *Several Opinions* – forbid foreign investment in enterprises engaging in the importation of any of the Products. Second, the two other general measures – the *Publications Regulation* and the *Importation Procedure* – which cover all of the Products except films for theatrical release, further limit the importation of reading materials, AVHE products, and sound recordings to certain Chinese

wholly state-owned enterprises. Other film-specific measures impose parallel restrictions on who is entitled to import films for theatrical release.

4.8 China maintains one additional measure focused on only one subset of reading materials – i.e. the *1997 Electronic Publications Regulation* – which controls the right to import certain reading materials known as electronic publications. The United States understands that electronic publications include only books, periodicals, newspapers, and audio books saved as digital codes on the media forms set out above, but do not include AVHE products and sound recordings. The *1997 Electronic Publications Regulation* implements the restrictive approval and licensing requirements contained in the *Publications Regulation* and the *Importation Procedure*, and reconfirms the prohibition on any foreign-invested enterprise or foreign individual, or any privately-owned Chinese enterprise, engaging in the importation of electronic publications.

4.9 Chinese measures also strictly control the importation of AVHE products. Several sector-specific measures provide for trading rights restrictions on AVHE products: the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, and the *Audiovisual (Sub-)Distribution Rule*.

4.10 China regulates imported audiovisual products, including AVHE products, according to whether they are finished or unfinished. Finished AVHE products are legitimately produced and replicated outside of China and require no additional production or replication in China before being made available to consumers. Unfinished AVHE products are master copies to be used to publish and manufacture copies for sale in China. China has designated only one enterprise to import finished audiovisual products: CNPIEC, which is a wholly state-owned enterprise. Likewise, with respect to unfinished audiovisual products, only Chinese wholly state-owned enterprises are permitted to engage in their importation.

4.11 Rather than providing for a *sui generis* system of trading rights for sound recordings, China includes sound recordings within the legal regime governing the importation of AVHE products, i.e., the *Catalogue*, the *Several Opinions*, the *Publications Regulation*, the *Importation Procedures*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, and the *Audiovisual (Sub-)Distribution Rule*. In all of these measures, China defines the term "audiovisual products" to encompass sound recordings – e.g., recorded audio tapes, records, and audio CDs.

4.12 The *Catalogue* and the *Several Opinions* forbid foreign investment in the importation of sound recordings. In addition, the *Publications Regulation* and the *Importation Procedure* provide that only wholly state-owned enterprises are allowed to import audiovisual products, and thus, sound recordings into China. For finished sound recordings, CNPIEC (a Chinese wholly state-owned enterprise) is the only entity designated to engage in the importation of finished sound recordings in physical form (e.g., CDs). For unfinished sound recordings (e.g., master recording discs) only wholly state-owned enterprises are permitted to import such sound recordings.

4.13 In addition to the *Catalogue* and the *Several Opinions*, the measures that maintain the trading rights restrictions applicable to films for theatrical release include: the *Film Regulation*, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule*.

4.14 Under this Chinese regime, China has designated only a single wholly state-owned entity – the China Film Import and Export Corporation, a subsidiary of China Film Group – to import films for theatrical release. This monopoly applies to all films for theatrical release, regardless of whether a film is imported on a revenue-sharing basis or a flat-fee basis.

(b) China's measures addressing distribution

4.15 Distribution activities are identified and segmented in numerous ways by the Chinese measures. Key activities that are covered by these measures and that are relevant to this dispute are: master distribution (*Zong Fa Xing*), the sale of, e.g. a reading material, exclusively by a single distributor; distribution (*Fa Xing*), which includes master distribution, wholesale, retail, leasing, and exhibition for sale; sub-distribution (*Fen Xiao*), which includes wholesale and retail; master wholesale (*Zong Pi Fa*), which is synonymous with master distribution; wholesale (*Pi Fa*), i.e. the sale of products to businesses that are not ultimate consumers; and retail (*Ling Shou*), i.e. the sale of products to ultimate consumers.

4.16 China prohibits foreign-invested enterprises from engaging in, *inter alia*, the master distribution of all reading materials as well as the master wholesale and wholesale of electronic publications. China also prohibits foreign-invested enterprises from engaging in the distribution of any imported reading materials. In addition, where foreign-invested enterprises are permitted to engage in the distribution of reading materials, the measures at issue impose requirements on those foreign-invested enterprises that are more burdensome than those applicable to wholly Chinese-owned distributors of reading materials.

4.17 China maintains its regime for the distribution of reading materials through measures including: the *Publications Market Rule*, the *Publications (Sub-)Distribution Rule*, the *Sub-Distribution Procedure*, the *Imported Publications Subscription Rule*, the *1997 Electronic Publications Regulation*, the *Several Opinions*, the *Foreign Investment Regulation*, and the *Catalogue*.

4.18 China permits foreign-invested enterprises to engage in only one type of reading materials distribution – i.e., the sub-distribution of books, newspapers and periodicals published in China. To engage in such sub-distribution, foreign-invested enterprises must satisfy requirements different from those applicable to wholly Chinese-owed enterprises also engaged in the same distribution activities. These differential requirements apply with respect to registered capital, operating terms, pre-establishment violations, and approval processes.

4.19 China's regulatory regime governing the distribution of AVHE products in China imposes a number of restrictions on distribution by foreign-invested enterprises, including the form of the enterprise (i.e., only be Chinese-foreign contractual joint ventures) and the share of foreign investment (i.e., majority Chinese owned). As a result, Chinese-foreign contractual joint ventures, in which the Chinese party owns the majority of the shares, are the only foreign-invested enterprises permitted to engage in audiovisual distribution services. In addition, China discriminates against even Chinese-foreign contractual joint ventures by imposing on them certain requirements that are different from those that apply to wholly Chinese-owned enterprises engaging in the sub-distribution of AVHE products.

4.20 With respect to China's limitations on corporate form and on foreign participation in audiovisual product sub-distribution enterprises, there are four relevant measures: (1) the *2001 Audiovisual Products Regulation*; (2) the *Audiovisual (Sub-)Distribution Rule*; (3) the *Catalogue*; and (4) the *Several Opinions*.

4.21 Even after limiting the sub-distribution of AVHE products only to Chinese-foreign contractual joint ventures, China then imposes numerous other requirements not applicable to wholly Chinese-owned enterprises. These requirements come in the form of operating term limitations, pre-establishment violation conditions, and approval process obligations.

4.22 China greatly limits the ability of foreign-invested enterprises to engage in the distribution of sound recordings by prohibiting these enterprises from engaging in their electronic distribution – i.e. the distribution of sound recordings using any electromagnetic means, (i.e. not physical copies), including distribution to other distributors or to end users over, e.g. the Internet or mobile telecommunications networks. China maintains these restriction through four measures: (1) the *Internet Culture Rule*; (2) the *Circular on Internet Culture*; (3) the *Network Music Opinions*; and the *Several Opinions*. This prohibition does not extend to wholly Chinese-owned enterprises.

(c) China's treatment of imported products compared to domestic products

4.23 China maintains requirements for the distribution of imported reading materials, sound recordings, and films for theatrical release that disadvantage these products relative to their domestic counterparts. First, China's subscription regime operates as the sole distribution channel for a large proportion of reading materials imported into China. Domestic reading materials are free of these restrictions. Second, imported sound recordings intended for electronic distribution must receive prior approval from MOC before distribution. Domestic sound recordings, in contrast, require no such approval from MOC; they need only be registered with MOC.

4.24 Third, China requires the distribution of imported films for theatrical release to occur through one of two Chinese state-controlled distributors assigned by the Chinese Government. These two distributors use identical form contracts and allow no negotiation of key terms. By contrast, domestic films for theatrical release can be distributed by the full range of film distributors in China, with that distribution occurring on the basis of commercially negotiated terms covering all relevant aspects of the film's technical preparation, as well as its marketing and distribution. Moreover, domestic films for theatrical release may be distributed by their production studios, as is common throughout the rest of the world.

4.25 China restricts distribution channels for many kinds of imported reading materials by requiring their distribution to be conducted exclusively through subscription and then imposing requirements on subscribers to these imported publications that do not apply to those that subscribe to equivalent domestic reading materials.

4.26 The *Imported Publications Subscription Rule* is a key measure implementing this restricted distribution system. Under this measure, all imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, can only be distributed through subscription by Chinese wholly state-owned enterprises. While imported books and electronic publications in the non-limited distribution category can be distributed through sales on the market, these reading materials may only be distributed by wholly Chinese-owned enterprises.

4.27 Domestic books, newspapers and periodicals, on the other hand, can be sub-distributed by foreign-invested enterprises, and distributed by wholly Chinese-owned enterprises (including Chinese privately-owned enterprises), and Chinese state-owned enterprises, through a variety of channels, including but not limited to subscription. The *Publications (Sub-)Distribution Rule* authorizes foreign-invested enterprises to engage in the sub-distribution of books, newspapers and periodicals published in China.

4.28 China requires all sound recordings, including sound recordings intended for electronic distribution, to undergo content review. The nature of that review, however, varies substantially depending on whether the sound recording is imported or domestic. China's measures require imported sound recordings to undergo content review and approval by the Chinese Government prior to their electronic distribution. In contrast, domestic sound recordings do not have to receive prior approval from the Chinese Government. Instead, they undergo internal company content review, and they simply are registered with the Ministry of Culture. Measures including the *Network Music*

Opinions and the *Internet Culture Rule* give specific effect to this two-tier regime for sound recordings intended for electronic distribution. In addition, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, make clear that imported and domestic sound recordings are subject to different content review regimes.

4.29 China maintains a dual distribution system for imported and domestically produced films for theatrical release. Imported films can be distributed only by two state-owned enterprises – China Film Distribution Company, a subsidiary of China Film Group, and Huaxia Film Distribution Company ("Huaxia"). Furthermore, commercial negotiations do not determine the terms for the distribution or which of these two distributors will handle the imported film. Rather, China Film Group determines both the distributor and the basic distribution conditions for all imported films.

4.30 Domestic films, by contrast, have access to a far more open distribution system. The two state-controlled enterprises authorized to distribute imported films, as well as many other enterprises, including the film's producer, and many other distributors, both private and state-owned, operating on a local, provincial or national basis, all can compete to distribute a domestic film on commercial terms. Several measures implement this dual distribution regime, including: the *Film Regulation*, the *Film Enterprise Rule*, and the *Film Distribution and Exhibition Rule*.

3. China's measures regarding trading rights are inconsistent with China's obligations under the Accession Protocol and the Working Party Report

4.31 During its accession to the WTO, China committed to provide all enterprises in China and all foreign enterprises and foreign individuals the right to trade in all goods except those listed in Annex 2A or Annex 2B of China's Accession Protocol. These commitments extend to all of the Products, as none of the Products is listed in either Annex. China's "trading rights" commitments are expressed in Part I, paragraphs 5.1 and 5.2 of the Accession Protocol, as well as in Part I, paragraph 1.2 of the Accession Protocol, to the extent that it incorporates the commitments referred to in paragraphs 83 and 84 of the Working Party Report.

4.32 Through a variety of measures, however, China refuses to permit any foreign enterprises or foreign individuals to import the Products, and likewise only allows a subset of enterprises in China – i.e. wholly state-owned Chinese enterprises approved or designated by the Chinese Government – to import the Products. The measures establishing China's current trading rights regime for the Products are, therefore, inconsistent with China's obligations contained in Part I, paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol, as well as in paragraphs 83 and 84 of the Working Party Report.

4.33 Read together, these provisions establish that all enterprises in China, all foreign enterprises and all foreign individuals shall have the right to import the Products into China following a transition period. That transition period ended on December 11, 2004, more than three years ago. Moreover, none of the Products is among those goods listed in Annex 2A of the Accession Protocol that are excluded from China's trading rights commitments.

4.34 China first committed to providing all enterprises in China the right to trade in the Products via paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report.

4.35 Paragraph 83(d) confirms the obligation contained in paragraph 5.1 of the Accession Protocol – i.e. that China committed to provide trading rights to all enterprises in China by December 11, 2004. Paragraph 84(a) likewise confirms China's obligations with respect to trading rights, as set forth in paragraph 5.1 of the Accession Protocol.

4.36 As a result of paragraph 5.2 of the Accession Protocol and paragraphs 84(a) and 84(b) of the Working Party Report, China further committed to extend to all foreign enterprises and all foreign individuals, including sole proprietorships of other WTO Members, the same right to import all goods into China as is accorded to all enterprises in China.

4.37 Paragraph 84(a) of the Working Party Report confirms and elaborates on paragraph 5.2 of the Accession Protocol. It provides expressly that China shall permit all foreign enterprises and all foreign individuals, including sole proprietorships, to import goods, including the Products, into China. Paragraph 84(b) of the Working Party Report also confirms and elaborates on paragraph 5.2 of the Accession Protocol. Paragraph 84(b) explains that not only are trading rights to be granted to foreign individuals and enterprises, but that these rights shall be granted in a "non-discriminatory and non-discretionary" way.

4.38 Despite China's trading rights commitments, China permits only wholly state-owned Chinese enterprises approved or designated by the Chinese Government to import into China reading materials, AVHE products, sound recordings, and films for theatrical release. Underscoring this restriction, China expressly prohibits any foreign-invested enterprises from engaging in the importation of any of the Products. Thus, under Chinese law, any foreign-invested enterprise in China – whether the enterprise is wholly-foreign owned or is a Chinese-foreign joint venture – as well as any foreign enterprise and any foreign individual is denied the right to import the Products.

4.39 There are four measures broadly applicable to the importation of the Products: (1) the *Catalogue*; (2) the *Several Opinions*; (3) the *Publications Regulation*; and (4) the *Importation Procedure*. Each of these is inconsistent with China's trading rights commitments. The *Catalogue* and the *Several Opinions* prohibit foreign-invested enterprises from importing any of the Products into China. Article X of the *Catalogue* bans foreign-invested enterprises from engaging in the importation of the Products. Likewise, the *Several Opinions* definitively forbids foreign-invested enterprises, whether or not they are in China, from engaging in the importation of the Products.

4.40 These measures are inconsistent with China's trading rights commitments in two ways. First, by depriving foreign-invested enterprises in China, as well as foreign enterprises and individuals, of the right to import the Products, the *Catalogue* and the *Several Opinions* limit the trading rights of these entities, which China's trading rights commitments do not permit. Second, the *Several Opinions* and the *Catalogue* also restrict trading rights in a discriminatory manner, as they insulate certain wholly Chinese-owned enterprises from any competition from foreign sources.

4.41 The *Publications Regulation* and the *Importation Procedure* are similarly inconsistent with China's trading rights commitments. First, these measures mandate that only wholly state-owned enterprises satisfying specified criteria, including the State plan for the total number, structure, and distribution/deployment of these enterprises, may import reading materials, AVHE products, and sound recordings into China, giving rise to the same two inconsistencies with China's trading rights commitments discussed above with regard to the *Several Opinions* and the *Catalogue*. Second, the importation of certain reading materials, i.e., newspapers and periodicals, is further restricted to wholly state-owned enterprises specially designated by the Chinese Government, pursuant to Article 41 of the *Publications Regulation*. These measures inject further qualifying criteria and government discretion into a process that China committed to be "non-discretionary" and are therefore inconsistent with China's trading rights commitments.

4.42 The *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments by imposing limits on which enterprises may import electronic publications into China. Articles 50 and 51 limit which enterprises may engage in the importation of electronic publications according to Chinese Government plans for "total number, structure and deployment" of such enterprises. Articles 52-55 further require approval by multiple layers of Chinese Government

decision-makers before an enterprise may import electronic publications. By conditioning trading rights on Chinese Government plans for structuring these activities and on successfully obtaining Chinese Government approvals, the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments. It injects qualifying criteria and government discretion into a process that China committed to be "non-discretionary".

4.43 China uses a number of measures specific to the audiovisual sector to place restrictions on the right to import AVHE products into China that are inconsistent with China's trading rights commitments. The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rules* provide that only enterprises designated by the Chinese Government may import finished audiovisual products, and it provides that importers of unfinished audiovisual products must be approved by the Chinese Government. Under these requirements, only CNPIEC (a Chinese wholly state-owned enterprise) has been designated to import finished audiovisual products, and only Chinese wholly state-owned enterprises may be approved to import unfinished audiovisual products.

4.44 The *Audiovisual (Sub-)Distribution Rule*, which governs the activities of foreign-invested distributors of audiovisual products, specifically provides in Article 21 that Chinese-foreign contractual audiovisual product distribution enterprises are prohibited from engaging in the importation of audiovisual products. Article 21 is therefore inconsistent with China's trading rights commitments, because it denies these enterprises the right to import AVHE products.

4.45 China's trading rights regime with respect to sound recordings is also heavily restricted and is also inconsistent with China's trading rights commitments. This restrictive sound recordings trading rights regime is incorporated into the general measures governing the importation of the Products as well as the specific measures governing the importation of AVHE products. Accordingly, only Chinese state-owned enterprises are permitted to import sound recordings into China, with foreign-invested enterprises and individuals explicitly banned from these activities.

4.46 Furthermore, only the state-owned enterprises specifically "designated" by the Chinese Government are allowed to import finished sound recordings. As for unfinished sound recordings, only enterprises that have been approved by the Chinese Government are permitted to import such products. In practice, as is the case with AVHE products, China reserves the exclusive right to import finished sound recordings to CNPIEC, while permitting only Chinese Government-approved Chinese state-owned enterprises to import unfinished sound recordings into China.

4.47 China's measures granting China Film Group a monopoly on the right to import films for theatrical release are inconsistent with China's trading rights commitments. The basis for this monopoly is established through such general measures as the *Several Opinions* and the *Catalogue*, which forbid foreign-invested enterprises from importing films into China. The restriction is further detailed in the following specific measures: the *Film Regulation*, the *Film Enterprise Rule*, the *Film Distribution and Exhibition Rule*.

4.48 The *Film Distribution and Exhibition Rule* explicitly establishes China's film importation monopoly, designating China Film Import and Export Corporation as the exclusive importer of foreign films into China. Article 30 of the *Film Regulation* provides the legal basis for this monopoly, providing that only enterprises designated by the Chinese Government are permitted to import films for theatrical release. Article 16 of the *Film Enterprise Rule* confirms this restriction. This monopoly not only deprives enterprises in China (other than China Film Group) as well as foreign enterprises and individuals of the right to import films for theatrical release. It also discriminates against foreign-invested enterprises and foreign individuals, in contravention of China's trading rights commitments.

4. China's measures regarding distribution services are inconsistent with China's obligations under the GATS

4.49 In its Accession Protocol, China made market access and national treatment commitments in the distribution services and audiovisual services sectors of its Services Schedule to open China's market in substantial fashion to foreign service suppliers, including distributors of reading materials, AVHE products and sound recordings. Despite these commitments, China's measures impose discriminatory restrictions and requirements on foreign service suppliers seeking to engage in the distribution of reading materials, AVHE products, and sound recordings. Those restrictions and requirements are inconsistent with China's obligations under the GATS.

4.50 In Sector 4B, under the Distribution Services heading of its Services Schedule, China undertook market access and national treatment commitments with respect to wholesale trade services ("wholesaling") through commercial presence (mode 3) of, *inter alia*, reading materials (including books, newspapers, periodicals and electronic publications).

4.51 China committed to permit foreign service suppliers to engage in wholesale trade services via mode 3 with respect to books, newspapers and periodicals within three years after China's accession. After December 11, 2004, therefore, China's Services Schedule provides for no market access limitations under mode 3 for wholesaling services with respect to any reading materials. Having inscribed "None" in mode 3 under the national treatment column in Sector 4B, China provided for no conditions or qualifications on its national treatment commitment with respect to wholesaling services through commercial presence. Moreover, China's inscriptions under mode 3 of its horizontal commitments do not create any limitations on China's commitments in Sector 4B of its specific commitments that would justify the measures at issue.

4.52 The discriminatory limitations on foreign-invested reading materials wholesalers imposed by China's measures are inconsistent with Article XVII of the GATS. In examining a claim under Article XVII, three distinct elements are relevant to establishing a breach: (1) the Member whose measure(s) is at issue has made a commitment in its services schedule in the relevant sector and mode of supply, and has not inscribed any relevant limitation to that commitment; (2) the Member has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (3) the measure accords to any other Member's service suppliers treatment less favourable than that accorded to its own like service suppliers. China's measures regarding foreign reading material wholesalers are inconsistent with China's GATS Article XVII commitments, since they treat foreign suppliers of these services far less favourably than their domestic counterparts.

4.53 China maintains numerous measures affecting the supply of reading material wholesaling services under mode 3. These measures include the *Publications Regulation*, the *Publications Market Rule*, the *Publications (Sub-)Distribution Rule*, the *Sub-Distribution Procedure*, the *Imported Publications Subscription Rule*, the *1997 Electronic Publications Regulation*, the *Catalogue*, the *Foreign Investment Regulation*, and the *Several Opinions*. These measures affect the supply of reading material wholesaling services in mode 3 within the meaning of Article XVII, because they directly regulate the wholesale distribution of reading materials in China.

4.54 On their face, these measures treat foreign-invested wholesalers of reading materials operating under mode 3 less favourably than wholly Chinese-owned wholesalers. First, China prohibits foreign-invested enterprises from engaging in several forms of reading material wholesaling. Further, where China has made a limited exception to this general ban, as it did for foreign-invested enterprises engaging in the sub-distribution of books, newspapers and periodicals published in China, foreign service suppliers are subjected to requirements – governing registered capital, operating terms, pre-establishment violations, and examination and approval procedures – that are more onerous than those applicable to their wholly Chinese-owned competitors. This treatment is less favourable

because it modifies the conditions of competition in favour of wholly Chinese-owned reading material wholesalers compared to like foreign-invested reading material wholesalers.

4.55 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 a range of products, including AVHE products such as videocassettes, VCDs, and DVDs.

4.56 In the first column of Sector 2D, China inscribed "Videos, including entertainment software and (CPC 83202), distribution services" under "audiovisual services", which covers the distribution of, *inter alia*, videocassettes, VCDs, DVDs, video games, computer games as well as the leasing or renting services concerning videocassettes.

4.57 Under the market access column for Sector 2D, China inscribed the following : "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)." China's horizontal market access commitment under mode 3 describes three forms of foreign-invested enterprises – i.e., foreign capital enterprises (also referred to as wholly foreign-owned enterprises), equity joint ventures and contractual joint ventures. Foreign investment in equity joint ventures must account for a minimum of 25 per cent of total registered capital; no maximums for foreign investment participation in equity joint ventures are established.

4.58 For contractual joint ventures, China inscribed no limitations – whether minimums or maximums – on foreign equity participation, either in its horizontal commitments or in Sector 2D. China's horizontal market access commitment under mode 3 provides that the level of equity participation in contractual joint ventures is to be determined by the parties as memorialized in the terms of the contract.

4.59 Returning to the second column of Sector 2D, China excluded the distribution of "motion pictures" from its market access inscription under mode 3. "Motion picture" is defined as a "cinema film" and means in this context a film for theatrical release as opposed to an AVHE product, such as a videocassette, VCD or DVD.

4.60 Reading China's market access commitment under mode 3 in Sector 2D together with its horizontal commitments, China scheduled no market access limitations on the contractual joint ventures that foreign-invested enterprises may establish with Chinese partners to engage in the distribution of audiovisual products, excluding films for theatrical release, without prejudice to China's right to examine the content of audio and video products. In particular, China did not schedule any limits on the level of foreign equity participation in such contractual joint ventures; rather, it expressly acknowledged that this level is to be negotiated and agreed by the parties to the contractual joint venture. Turning to national treatment, China inscribed "None" – i.e., no limitations – in the national treatment column of Sector 2D.

4.61 The foreign equity participation restrictions imposed by China on foreign-invested AVHE product distributors are inconsistent with Article XVI of the GATS. Article XVI:2, sub-paragraph (f) provides that where a Member has made a market access commitment in its Services Schedule, that Member is prohibited from imposing limitations on the participation of foreign capital, whether in terms of maximum shareholder percentage limits or in terms of the total value of foreign investment (on either an individual or aggregate basis), unless the Member included that limitation in its Services Schedule.

4.62 Thus, in order to show that a Member's measure is inconsistent with Article XVI:2(f), it is necessary to demonstrate: (1) that the Member made a market access commitment in the relevant

sector or sub-sector and mode of supply in its Services Schedule; (2) that the Member did not include a limitation on the participation of foreign capital in that sector or sub-sector and that mode of supply in its Services Schedule; and (3) that the measure at issue imposes such a limitation.

4.63 As discussed above, China committed to permit foreign service suppliers to establish contractual joint ventures with Chinese partners to engage in the distribution of AVHE products. China, however, maintains numerous measures limiting the percentage of shares foreigners may own in contractual joint ventures engaged in the distribution of AVHE products. These measures include the *Audiovisual (Sub-)Distribution Rule*, the *Catalogue*, the *Foreign Investment Regulation* and the *Several Opinions*.

4.64 China's measures at issue are also inconsistent with Article XVII of the GATS. In the market access column under mode 3 of Sector 2D of its Services Schedule, China committed to permit foreign service suppliers to establish contractual joint ventures with Chinese partners to engage in the distribution of AVHE products through commercial presence. In addition, China scheduled no limitations on its national treatment commitment under mode 3.

4.65 The measures at issue affect the supply of video distribution services under mode 3 of Sector 2D of China's Services Schedule by directly regulating audiovisual distribution services, including distribution services regarding AVHE products in China.

4.66 China's measures fail to meet the obligations of Article XVII: they treat AVHE product distribution services and service suppliers of other Members less favourably than China's own like services and service suppliers. The measures at issue limit the operations of foreign-invested enterprises wishing to engage in AVHE product distribution services by imposing more stringent requirements – governing equity participation, operating terms, the existence of pre-establishment legal violations, examination and approval processes, and decision-making criteria – on foreign-invested enterprises engaged in these services compared to their wholly Chinese-owned competitors.

4.67 In Sector 2D of its Services Schedule, China undertook market access and national treatment commitments under mode 3 with respect to sound recordings distribution. China has also inscribed "sound recording distribution services" under the audiovisual services sector of its Services Schedule. Thus, the market access and national treatment commitments that China has included in the second and third columns under mode 3 of Sector 2D also apply to sound recordings distribution in China.

4.68 In addition, China inscribed no limitations on its market access commitment under mode 3 regarding the means of delivery used for sound recordings distribution. That is, China did not identify any means of delivery – whether by mail, Internet, mobile telecommunications networks, or any other means – that Chinese-foreign contractual joint ventures were precluded from using to distribute sound recordings.

4.69 As the panel noted in *US – Gambling*, "the GATS does not limit the various technologically possible means of delivery under mode 1", which is reflected in the principle of "technological neutrality" espoused in the Work Programme on Electronic Commerce – Progress Report to the General Council and relied on by the panel in *US – Gambling*.

4.70 China's measures do not provide national treatment to foreign-invested enterprises engaged in sound recording distribution under mode 3 and thus are inconsistent with Article XVII of the GATS.

4.71 China's measures affect the supply of sound recording distribution services via mode 3. The *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions* and the *Several Opinions* dictate how certain types of electronic distribution are to be conducted through commercial presence within China, and they likewise dictate who may engage in these activities. These measures

likewise accord less favourable treatment to foreign-invested enterprises by prohibiting them from engaging in any electronic distribution of sound recordings through commercial presence.

5. China's measures regarding product distribution are inconsistent with China's obligations under Article III:4 of the GATT 1994

4.72 Imported copyright-intensive products face numerous disadvantages in the Chinese marketplace and are deprived of national treatment vis-à-vis their domestic counterparts. China significantly limits the distributors and distribution channels that are available to imported reading materials; they impose a restrictive subscription regime on a large portion of these imported products. China also discriminates against imported sound recordings intended for electronic distribution by imposing more burdensome content review requirements prior to distribution. Finally, China confines imported films for theatrical release to two Chinese state-controlled distributors. In each instance, China accords treatment to imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release that is less favourable than that accorded to like domestic products.

4.73 China's measures governing the distribution of imported reading materials (the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule*), hard copies of imported sound recordings intended for electronic distribution (the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the *Internet Culture Rule*, the *Network Music Opinions*), and imported films for theatrical release (the *Film Regulation*, the *Film Enterprise Rule*, and the *Film Distribution and Exhibition Rule*) are inconsistent with Article III:4 of the GATT 1994.

4.74 The Appellate Body has identified three distinct elements 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 favourable treatment than the domestic like product.

4.75 For each product, imports are "like" those made in China within the meaning of Article III:4. The question of whether imported and domestic products are "like products" for the purposes of Article III:4 is readily answered where the measures at issue make distinctions between products based solely on origin. 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."

4.76 Whether they are reading materials, sound recordings intended for electronic distribution, or films for theatrical release, the imported and domestic products share the same physical characteristics and commercial uses. However, Chinese measures discriminate against imported reading materials, imported sound recordings intended for electronic distribution, and imported films for theatrical release on the basis of national origin through measures that favour the purchase and use of their domestic counterparts.

4.77 The second prerequisite to a finding of an Article III:4 inconsistency requires a showing that the measures at issue "affect [the] internal sale, offering for sale, purchase, transportation, distribution, or use" of like products. The term "affecting" in Article III:4 has been understood to have a "broad scope of application", and to cover measures even beyond those which directly regulate or govern the sale of imported and domestic like products. The measures at issue here all regulate at least the internal sale, offering for sale, purchase, distribution or use of imported and domestic like products, and thus readily qualify as "affecting" these activities within the meaning of this term in Article III:4.

4.78 The last element in an Article III:4 analysis is whether the measures at issue accord less favourable treatment to imported products than to domestic products. The Appellate Body has found this to be the case when, for example, the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products. The panel in *Canada – Wheat* found that "the imposition of additional, or extra, requirements on imported products as compared to like domestic products constitutes less favourable treatment". The measures at issue systemically distort competition between imported and like domestic products. These regulatory constraints, from which competing Chinese products are exempt, create major disadvantages for imported products in the Chinese market place.

4.79 China's *Imported Publications Subscription Rule* accords less favourable treatment to imported reading materials than that accorded to domestic reading materials by modifying the conditions of competition in the Chinese marketplace to the detriment of imported reading materials. This measure only permits distribution of imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category via a highly restrictive subscription regime that does not apply to domestic reading materials.

4.80 Imported reading materials suffer further competitive disadvantage from the fact that they may only be distributed by a limited set of distributors in China, i.e., wholly Chinese-owned distributors. Domestic reading materials are subject to neither the subscription requirement nor the limitation on who can distribute them, as clarified by the *Publications (Sub-)Distribution Rule*. As a result, China accords less favourable treatment to imported reading materials than it accords to domestic reading materials in contravention of Article III:4.

4.81 China's measures modify the conditions of competition in its sound recordings market to the detriment of imported sound recordings. Specifically, Article 9 and Appendix 2 of the *Network Music Opinions* provide that imported sound recordings intended for electronic distribution must be subjected to a formal content review and approval process run by the Ministry of Culture (MOC) that must be successfully completed before the imported products can be distributed. The like products at issue – domestic sound recordings intended for electronic distribution that have Chinese copyright owners – are not covered by this mandatory regulatory process as a precondition to their distribution. The measure provides that employees of the domestic sound recording's publisher can review the content in-house, and then simply register the recording with MOC at the time the recording is ready for distribution.

4.82 The Internet Culture Rule further perpetuates this disparate treatment by providing for asymmetrical content review requirements that decidedly favour domestic over imported sound recordings intended for electronic distribution. In contrast, Article 19 of the *Internet Culture Rule* states that domestic Internet cultural products are to be reviewed by their domestic distributor's internal content examination system. Article 16 further provides that such domestic products only need to be registered with MOC within 60 days after being distributed.

4.83 The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* echo this discriminatory content review requirement. These two measures impose additional content review requirements on imported products as compared to like domestic products resulting in distorted competitive conditions that disadvantage imported sound recordings vis-à-vis domestic like products.

4.84 China's regime for the distribution of films for theatrical release also creates discriminatory competitive conditions that harm imported products. First, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule* only permit imported films for theatrical release to be distributed by two state-controlled enterprises, China Film Group and Huaxia. In contrast, domestic films can be

distributed by these two enterprises as well as by any of the other film distributors established in China.

4.85 Second, the two state controlled distributors that are the only option for distributing imported films are explicitly required by law to support the distribution and exhibition of domestic films. These requirements treat imported films less favourably than domestic films. The distribution opportunities afforded to domestic films are radically different, involving access to the complete range of distribution channels.

6. China's measures regarding product distribution are inconsistent with China's obligations under the Accession Protocol

4.86 The *Imported Publications Subscription Rule*, the *Publications (Sub-)Distribution Rule*, the *Network Music Opinions*, the *Internet Culture Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the *Film Regulation*, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule* are also inconsistent with paragraph 5.1 of Part I of the Accession Protocol with respect to imported publications, imported hard copies of sound recordings intended for electronic distribution, and imported films for theatrical release. As these measures are all inconsistent with Article III:4 of the GATT 1994, they are likewise in breach of Section 5.1 of Part I of the Accession Protocol.

4.87 These measures are also inconsistent with China's obligations under paragraph 1.2 of Part I of the Accession Protocol, to the extent that it incorporates commitments in paragraph 22 of the Working Party Report. As these measures are inconsistent with China's obligations under Article III:4 of the GATT 1994 regarding national treatment with respect to imported and domestic products, they are consequently inconsistent with Section 1.2 of Part I of the Accession Protocol and paragraph 22 of the Working Party Report.

7. Conclusion

4.88 For the foregoing reasons, the United States respectfully requests that the Panel find that China's measures, as set out in the US panel request are inconsistent with China's obligations under the Accession Protocol, the GATS, and the GATT 1994. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its obligations under the Accession Protocol, the GATS, and the GATT 1994.

B. FIRST WRITTEN SUBMISSION OF CHINA

1. Introduction

4.89 The United States is essentially attempting to justify its complaint against alleged trade restrictions in China for cultural products in the hope of obtaining enhanced market access, prospect of more liberal markets and stronger commercial opportunities. However, the United States is feigning to ignore the unique nature of the goods and services concerned by this proceeding. Cultural goods and services have in common the fact of being vectors of cultural identity and values and, as such, of justifying the implementation of specific, yet WTO compliant, regulatory measures.

4.90 The United States further attempts to unduly extend China's commitments beyond that which was negotiated and agreed upon at the time of its accession to the WTO. Such commitments, however, have been clearly defined at the time of China's WTO accession and reflect China's intention to implement a sustainable liberalization consistent with its legitimate policy objectives in the cultural sector.

4.91 The present dispute concerns (i) reading materials (books, newspapers, periodicals and electronic publications) and their corresponding distribution services, (ii) audiovisual products, including so-called "audiovisual home entertainment products" and "sound recordings" and their corresponding distribution services, (iii) network music services (inaccurately described as "electronic distribution services" by the United States) consisting in the dissemination of music via the Internet and (iv) motion pictures for theatrical release.

4.92 With regard to trading rights in the sector of motion pictures for theatrical release, the United States is unjustified to base its claim on an alleged violation by China of its commitments in the area of trade in goods, insofar as it ignores the fact that motion pictures for theatrical release cannot be qualified as goods. The same is true for the importation of audiovisual products used for publication. For reading materials and audiovisual products, the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT.

4.93 In the same vein, concerning distribution services, the United States fails to present to the Panel the true scope and nature of China's WTO commitments applicable to services involving cultural products and is further unjustified in arguing that China is violating GATS Article XVII concerning reading material distribution services, as well as GATS Articles XVI and XVII, concerning audiovisual product distribution services. Its claim under GATS Article XVII in respect to the so-called "electronic distribution of sound recordings" is based on an unjustified extension of the scope of China's GATS commitments in an attempt to include new and distinct services, i.e. network music services.

4.94 For product distribution, the United States is unjustified in arguing that China is violating Article III:4 of the GATT since the US claim fails to take account of the fact that the regulation relevant to certain sectors (motion pictures for theatrical release and network music services) cannot be scrutinized under the rules applicable to trade in goods, or, for reading materials, is based on a misrepresentation of China's measures and/or the competitive situation between the products.

2. Trading rights

(a) Motion pictures for theatrical release

4.95 The United States based its claim with regard to trading rights in the sector of motion pictures for theatrical release *inter alia* on the *Film Distribution and Exhibition Rule*. Since these rules were not explicitly, or even implicitly, referred to in the US panel request, they cannot be considered to have been adequately identified in the meaning of Article 6.2 DSU and are thus outside the Panel's terms of reference.

4.96 The US claim is based on Paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report, which only cover trade in goods. However, the United States fails to establish that motion pictures for theatrical release are goods. In fact, the commercial exploitation of motion pictures through theatrical release consists of the organization of public projections involving three main service providers, i.e. producers, distributors, and movie theatres.

4.97 The importation and distribution of foreign motion pictures is organized on the basis of copyright licensing agreements where the producer grants the distributor the right to use copies of the motion picture in order to organize its distribution for the period of time and in the territories agreed with the producer.

4.98 Motion pictures are imprinted on cinematographic film. The distributor will receive copies of materials (including prints, soundtracks, and advertising materials) in order to organize the distribution of the motion picture within its licensed territory. At the end of the period of release, the distributor will either (i) return all delivered materials as well as all materials created by the distributor or (ii) destroy all materials.

4.99 A motion picture, consisting of a sequence of pictures that is projected on to a screen in rapid succession and accompanied by a soundtrack, is *per se* intangible and cannot be possessed. Motion picture distributors do not buy the motion picture as such. Likewise, movie-goers do not buy the motion picture as such, but only the right to attend the projection. The commercial value of the motion picture lies in the revenue generated by the services provided for its exploitation, and not in the fixed revenue generated by the sale of goods. Motion pictures for theatrical release cannot therefore be considered as goods, i.e. "items that are tangible and capable of being possessed", as specified by the Appellate Body.

4.100 While the delivered materials that "carry" the motion picture are traditionally tangible items (motion pictures, however, are increasingly stored and transmitted digitally and no longer "carried" in reels), the existence of these materials, that are merely accessories to a service, does not allow treating motion pictures as goods.

4.101 The above qualification of the motion picture business as a service is confirmed by the main relevant international classification instruments. The activities involved in the exploitation of motion pictures for theatrical release are classified as services, and the only "goods" category relating to motion pictures is the film reel, which is described as an accessory to such services.

4.102 While the claim by the United States is only about trade in goods, the Chinese regulations challenged by the United States, i.e. the *Film Regulation*; the *Film Enterprise Rule*, do not treat the importation of motion pictures as the importation of goods, but as a licensing service for the exploitation rights of motion pictures for their theatrical distribution.

4.103 It should further be recalled that in its Schedule to the GATS China made an additional commitment concerning the "importation of motion pictures for theatrical release". This commitment confirms that (i) the concept of "importation" used by China in the context of the regulation of the motion picture business refers to services, and that (ii) measures affecting the importation of motion pictures do not fall under WTO provisions relating to the importation of goods.

4.104 Because motion pictures for theatrical release are not goods, the challenged measures cannot be scrutinized under paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report which refer only to trade in goods.

(b) Audiovisual products used for publication

4.105 The United States is basing its claim on paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report that only cover trade in goods, wrongly assumes that the importation of improperly called "unfinished" audiovisual products is importation of goods. As the United States itself specifies, "unfinished audiovisual products are master copies to be used to publish and manufacture copies for sale in China". These master copies carry an audiovisual content that is subject to a copyright licensing agreement between the foreign rights holder and a Chinese publisher. Consequently, the importation of audiovisual products used for publication does not correspond to the importation of goods, but to copyright licensing.

4.106 In other words, the "right to import" audiovisual products used for publication consists of the right to enter into a copyright agreement for the publication of copies of an audiovisual content, and

not of the right to import goods. Consequently, the measures governing trade with audiovisual products used for publication cannot be scrutinized under paragraphs 5.1, 5.2 and 1.2 as well as paragraphs 83 and 84 of the Working Party Report of China's Accession Protocol, the legal basis of the US claim, which only refer to trade in goods.

(c) Reading materials and audiovisual products, including sound recordings

4.107 China's regime for the importation of the above cultural goods is designed to guarantee an effective and efficient application of the content review decided by China and is in full compliance with China's WTO rights and obligations.

4.108 The cultural goods have a major impact on societal and individual morals as emphasized in particular in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

4.109 It is of vital interest for China to impose a high level of protection of public morals through an appropriate content review mechanism that prohibits any cultural goods with a content that could have a negative impact on public morals.

4.110 Since the review on imported cultural goods needs to be carried out at the border, but also because the administrative authorities are not in a position to carry out a comprehensive and thorough content review by themselves without creating undue delays, there is an allocation of tasks, for the exercise of the content review, between the relevant administrative authorities and selected importation entities. The first are responsible for administering and supervising the content review process. The second are required by the challenged measures to conduct content review and are selected, based on their capacity relating to content review to avoid the importation of cultural products with content having a negative impact on public morals. The importation entity shall review the content of reading materials envisaged for importation and decide whether or not the reviewed goods shall be imported in the case of reading materials or be submitted to the relevant administrative authority for final approval in the case of electronic publications and audiovisual products.

4.111 The selection process allows the relevant administrative authority to ensure that (i) each selected entity has an appropriate organizational structure, (ii) each selected entity has a reliable, competent and capable personnel, (iii) the entities finally selected ensure an appropriate geographical coverage, and that (iv) the number of selected entities remains limited.

4.112 Paragraph 5.1 of China's Accession Protocol requires China to liberalize the right to trade, but nevertheless allows China to limit the right to trade through its right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT. The challenged selection process is justified by Article XX of the GATT and thus consistent with the WTO Agreement. Paragraph 5.1's right to regulate trade is the expression of the WTO general exception to Members' obligations, which leaves room for the implementation of public policies and is crucial for the preservation of China's sovereignty. Paragraph 5.2 of China's Accession Protocol as well as paragraphs 83 and 84 of the Working Party Report on China's Accession, which are closely linked to paragraph 5.1 of China' Accession Protocol, shall also apply "without prejudice" to China's right to regulate trade in a manner consistent with the WTO Agreement.

4.113 The challenged Chinese regulations establishing a system of selection of importation entities are necessary to protect public morals and fully justified under Article XX (a) of the GATT.

4.114 The selection of importation entities is designed to protect public morals in China. In fact, China has decided not to allow the importation of cultural goods, the content of which could have a negative impact on public morals, especially those that depict or vindicate violence or pornography.

Then, the measures establish a content review mechanism for imported cultural goods, based on a selection of importation entities that ensures an effective contribution of these entities to the content review.

4.115 The selection of importation entities is also necessary for the protection of public morals in China. Pursuing a high level of protection, i.e. prohibiting importation of cultural goods negatively impacting public morals through effective content review, is of vital importance for China. Its importance is clearly affirmed by the challenged measures and further illustrated by the sanctions imposed in case of infringements.

4.116 The selection of importation entities contributes to the pursued aim in various ways. According to the relevant regulations, the importation entities to be selected must have an organizational structure and competent personnel ensuring that the content review be conducted both efficiently and effectively. The importation entities' geographical presence within China and its coherence with the State's plans guarantees no entry gate into the Chinese market is overlooked. Finally, the limited number of importation entities enables the government authorities to exercise efficient control over and cooperate effectively with importation entities.

4.117 The selection of importation entities has limited impact on trade in cultural goods. While primarily aimed at content review, the selection and supervision of importation entities also focus on their capacity to avoid disruption of the normal trade flow. The correct implementation of content review by these entities helps to minimize undue delay of importation. Figures about import volume further demonstrate the lack of trade distortion.

4.118 The selection of importation entities is also applied in a reasonable manner and in full compliance with the requirements set by the "Chapeau" of Article XX of the GATT, insofar as it is not applied in a manner constituting a means of arbitrary or unjustifiable discrimination. Indeed, when considering China's regulatory framework in its entirety, it appears that domestic publishers must also be approved by the administrative authorities, on the basis of content review related requirements.

4.119 Given the fact that the selection of importation entities is based on requirements adapted to the need to ensure an efficient content review while limiting its collateral trade effects, it cannot therefore be viewed as a disguised restriction to international trade. Further, this is evidenced by the import statistics for reading materials and audiovisual products, which show that the number of imported titles has been steadily increasing.

4.120 Justified under Article XX (a) of the GATT, the challenged measures do not violate China's obligations under paragraphs 5.1, 5.2, 1.2 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report on China's Accession.

3. Distribution services

4.121 In its first written submission, the United States challenges certain specific requirements applying to foreign entities wishing to establish in the activity of distribution of reading materials and audiovisual products, i.e. (i) requirement that foreign entities have no record of laws or regulations violations in the past three years for being authorized to invest in the activity of distribution of reading materials (so-called "pre-establishment legal compliance"), (ii) approval process to engage in the distribution of reading materials and audiovisual products, and (iii) "Decision making criteria" (such as "friendliness", "great capability", "standardized management", "advanced technology" and "reliable investment") that the approval agency, including both General Administration of Press and Publication ("GAPP") and Ministry of Culture, would apply in the examination and approval of Chinese-foreign joint ventures for the distribution of reading materials and audiovisual products.

4.122 Considering that these claims were not addressed in the US panel request and that the related measures were not addressed in this regard, they cannot be considered to be within the Panel's terms of reference and should therefore be disregarded. As far as the remaining claims relating to allegedly discriminatory prohibitions and/or discriminatory requirements are concerned, including the above identified claims should they be found to be within the Panel's terms of reference, they should be rejected as being unfounded.

(a) Reading materials

(i) Alleged discriminatory prohibitions

4.123 The United States provided the Panel with an inaccurate picture of the different Chinese concepts relating to distribution.

4.124 *Fa Xing* is the generic term covering the different features of distribution. It covers two distinct distribution channels: *Zong Fa Xing* and *Fen Xiao*. *Fen Xiao* corresponds to the traditional conception of distribution through wholesaling (*Pi Fa*) and retailing (*Ling Shou*).

4.125 The United States' description of *Zong Fa Xing* as a compulsory step of the distribution chain before wholesaling by any distributor is therefore incorrect since *Zong Fa Xing* is a comprehensive "top to bottom" distribution channel, distinct from the traditional distribution channel. Accordingly, the translation of *Zong Fa Xing* by the United States as "master distribution" is not accurate. Similarly the translation of *Fen Xiao* submitted by the United States, i.e. "sub-distribution", is also inaccurate insofar as it insinuates that *Fen Xiao*, which is in fact an autonomous "top to bottom" distribution channel (like *Zong Fa Xing*, but with intermediaries), would be a stage of the distribution channel leading to *Zong Fa Xing*, thus ignoring the fact that both distribution channels are autonomous distribution channels.

4.126 The United States also fails to take into account the recent legislative developments in the sector of distribution of electronic publications. In fact, the *1997 Electronic Publications Regulation* has been replaced by the recently promulgated *2008 Electronic Publications Regulation*. Considering the above legal development, the prohibitions for foreign-invested enterprises to engage in *Zong Pi Fa* and the wholesaling of electronic publications are no longer applicable, contrary to the US assertion in its first written submission.

4.127 China, in fact, never intended to include *Zong Fa Xing* in the scope of distribution services. What China actually committed under Sector 4B of its Schedule to the GATS was and still is wholesale, which is a sub-category of *Fen Xiao*.

4.128 A proper interpretation of the commitments undertaken by China under Sector 4B ("wholesaling") reveals that *Zong Fa Xing* can not be considered as wholesaling. "Distribution Trade Services" of which wholesaling is a sub-sector have been defined by China in Annex 2 of its Schedule to the GATS as being "characterized as reselling merchandise". "Reselling" is defined as "selling (a thing) again, esp. commercially". Consequently, a product being resold must have been previously sold.

4.129 *Zong Fa Xing* may be operated by two types of entities, either the publisher itself for its own publications or by an approved Publication *Zong Fa Xing* entity commissioned by the publisher. In the case where the publisher itself operates *Zong Fa Xing* for its own publications, the *Zong Fa Xing* operation cannot be qualified as a distribution trade service as it is not a "reselling operation", but a direct sale to the end-consumer. In cases where an entrusted Publication *Zong Fa Xing* entity operates *Zong Fa Xing* of reading materials, it will itself sell the reading materials to the end-consumer without relying on further intermediaries.

4.130 Therefore, the US claims related to the prohibition for foreign invested entities to engage in *Zong Fa Xing* and *Zong Pi Fa* as well as wholesale of electronic publications should be rejected.

(ii) Alleged discriminatory requirements

4.131 When read in conjunction, Paragraphs (2) and (3) of Article XVII of the GATS make clear that the mere fact that a Member establishes a formally different treatment between domestic and foreign services and service suppliers cannot suffice to establish a violation of Article XVII of the GATS. In fact, as clearly established by Paragraph (3) of Article XVII, a formally different treatment, which is in itself not prohibited by the GATS, may only be considered as violating Article XVII, "if its modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member".

4.132 The United States in its first written submission has only addressed the first element of the above required demonstration without putting forward any element evidencing a modification of the conditions of competition resulting from the alleged different treatment.

4.133 The United States, when asserting that the registered capital requirements for domestic and foreign-invested enterprises engaging in the wholesaling of reading materials are different, only provides a partial picture of the applicable regime. The United States omits to mention that according to the *1993 Company Law*, shareholders of a wholly Chinese-owned company must contribute the entire registered capital contribution before its establishment, while foreign-invested enterprises can contribute the capital requirements in several separate instalments after its establishment. This treatment of foreign-invested enterprises cannot be considered as affecting the conditions of competition.

4.134 As far as the requirement of operating terms is concerned, the United States neglects that, even though foreign-invested enterprises are subject to a fixed term of operation, they are free to extend that term under normal and transparent conditions. The only requirements are that the extension must be agreed by all investors, all Board Directors, and comply with the laws, regulations and policies on foreign investment applicable at the time of extension. Thus, the approval is almost automatic and only for the purpose of verifying the intention of investors and compliance with the applicable foreign investment policy which need to be compatible with China's GATS commitments. This requirement cannot be considered as affecting the conditions of competition.

4.135 As far as the approval process is concerned, both wholly Chinese-owned enterprises and foreign-invested enterprises must go through GAPP approval procedures and the State Administration for Industry and Commerce registration procedures. The only difference relating to the approval process therefore lies in the fact that foreign-invested enterprises will have to submit an additional application, i.e. to the Ministry of Commerce ("MOFCOM"). As far as the time-limits for both approval procedures are concerned, it appears that they are almost identical (only a 5-days difference).

4.136 As far as the implication of MOFCOM in the approval process is concerned, it should be recalled that pursuant to China's Schedule to the GATS, and in particular to its horizontal commitments, China expressly limited its commitments on market access by indicating that "In 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 ventures."

4.137 Through this limitation, China preserved its right to enforce the laws and regulations governing these corporate forms at the time of its accession to the WTO. These laws and regulations already provided for the approval processes of foreign-invested enterprises by MOFCOM that the

United States is challenging. In any event, the approval process cannot be considered as affecting the conditions of competition.

(b) Audiovisual products

(i) The US claim under Article XVI of the GATS

4.138 The United States has provided the Panel with an inaccurate description of the challenged measures, by asserting that the Chinese party to a Sino-Foreign joint venture engaging in the wholesaling of audiovisual products must hold at least 51 per cent of the shares.

4.139 However, the relevant challenged measures refer to the rate of distribution of profit and allocation of loss in contractual joint ventures. According to these measures, in the sector of audiovisual products distribution, and consistently with China's Schedule to the GATS, foreign investment is limited to the form of contractual joint ventures. In such corporate forms, the allocation of profit and loss is negotiated in the contract between the partners, and can be freely determined.

4.140 Article XVI of the GATS does not impose any obligations on WTO Members to insert any limitations with respect to the rate of profit and loss allocation in their Schedule to the GATS. Thus, the relevant Chinese measures challenged cannot be found to be violating Article XVI of the GATS.

(ii) The US claims under Article XVII of the GATS

4.141 Similarly to its claim regarding the distribution of reading materials, the United States has only addressed the formal differences in the treatment of foreign and domestic competitors without putting forward any element evidencing a modification of the conditions of competition resulting from the alleged different treatment as required by paragraph (3) of Article XVII of the GATS.

4.142 As far as the allegations regarding the equity participation are concerned, China recalls that these provisions' limitations refer to the rate of distribution of profit and allocation of loss in contractual joint ventures. Even though there are formally different treatments regarding the rates of profit and loss allocations among shareholders within the contractual joint venture engaging in the distribution of audiovisual products, this does not impact the actual conditions of competition to the detriment of such contractual joint ventures.

4.143 As far as the limitation of the operating terms is concerned, the United States neglects that, even though foreign-invested enterprises are subject to a fixed term of operation, they are free to extend that term under normal and transparent conditions as explained in the context of reading materials distribution services. This formally different treatment does not affect the conditions of competition.

4.144 As far as the approval process is concerned, an assessment of the relevant legal framework reveals that foreign-invested enterprises have to undergo only four subsequent approval stages, not six as alleged by the United States. Similarly to the explanations provided by China in the context of the US claim related to the distribution of reading materials, China, by limiting its commitments to certain corporate forms (*inter alia* equity joint ventures and contractual joint ventures), preserved its right to impose a MOFCOM approval to foreign-invested enterprises. In any event, the approval process cannot be considered as affecting the conditions of competition.

4.145 Contrary to what the United States asserts, i.e. that foreign partners in the contractual joint venture may not contact Chinese government agencies during the approval process, none of the provisions of the *Audiovisual (Sub-)Distribution Rule* expressly prohibits the foreign partners from contacting the relevant authorities in the course of the approval process and thus from actively

participating in that process. Therefore, no formally different treatment between foreign-invested enterprises and domestically-owned distributors exists.

4.146 As far as the US claim regarding the potential requests by the approval authorities for so called "other document" during the approval process is concerned, there is no different treatment between foreign-invested and domestically-owned enterprises insofar as the latter also face similar potential additional requirements.

(c) Sound recordings

4.147 The United States is wrongly asserting that what it has chosen to label "electronic distribution of sound recordings", which in fact corresponds to network music services, could be qualified as a means of delivering "sound recording distribution services", thus allegedly being covered by China's relevant commitments under Sector 2D of its Schedule to the GATS.

4.148 Network music services are, in fact, a new type of service, which emerged virtually around 2001, totally different in kind from the "sound recording distribution services" committed by China, thus not being covered by its commitments.

4.149 There are a number of significant differences between network music services and "traditional" sound recording distribution services as committed by China. The most evident difference lies in the fact that, contrary to "traditional" sound recording distribution, network music services do not supply the users with sound recordings in physical form, but supply them with the right to use a musical content. Apart from this fundamental difference, it further appears that not only the infrastructure and operation of both businesses, but also the perception of the consumers with regard to the separate offers, significantly differ.

4.150 China also established new and distinct regulatory regime for this newly arisen service. The first regulation in this field, the *Internet Culture Rule* in 2003, sets up the conditions for the establishment of Internet cultural entities, established a content review mechanism for imported cultural works, and stipulated sanctions for any unlawful service activity. The *Network Music Opinions* further provides specific procedures for the regulation of the market access of network music service, the enhancement of the supervision over prohibited content, and the enforcement of intellectual property rights.

4.151 The United States in its first written submission failed to make a comprehensive interpretation of China's relevant commitments, i.e. the relevant market access and national treatment commitments for "sound recording distribution services" under Sector 2D which China has provided to the Panel.

4.152 The ordinary meaning of "sound recording distribution services" refers to the marketing and supply of a specific category of goods, i.e. goods containing recorded music, such as CDs or other physical supports. Network music services, however, which consist basically of the transmission of intangible content to users via the Internet, cannot be considered as falling under China's relevant commitments under Sector 2D of its Schedule to the GATS.

4.153 China's commitment referring to "sound recording distribution services" in Sector 2D should further be read in light of the entire Schedule to which it belongs, i.e. other entries in different sub-sectors, as well as the related Annexes included in China's Schedule to the GATS. Sector 4A-4E of China's Schedule, which covers the general category of "distribution services" refers to the definition of "distribution services" provided in Annex 2 of its Schedule to the GATS, which refers to the action of reselling merchandise. This reference provides further relevant guidance for the interpretation of the specific entry of "sound recording distribution services" in Sector 2D.

4.154 When interpreted against this specific context, the sub-sector "sound recording distribution services" must be considered as covering the distribution of a specific category of goods, i.e. goods containing recorded music, such as CDs or other physical carriers, and cannot be interpreted as covering the supply of network music services.

4.155 Finally, when considering the circumstances prevailing at the time of the conclusion of the services negotiations concerning China's accession, it appears that none of the parties involved can actually have had the intention of including a commitment related to a virtually inexistent service category, i.e. network music services.

4.156 The principle of "technological neutrality", on which the US claim is actually based, has no textual basis in the WTO legal framework and is far from being a principle generally agreed upon among WTO Members.

4.157 Even if the principle of "technological neutrality" could be taken into consideration by the Panel, *quod non*, the analysis of the United States is flawed since it is based on the erroneous premise that network music services constitute a means of delivery for sound recordings distribution services as committed by China.

4.158 According to the US acceptation of this principle, a commitment inserted into a Member's schedule regarding a particular service sector should extend to all means of delivery of that particular service unless an express limitation has been inserted into the Schedule for one or more delivery modes, including potential or non-existing ones at the time of conclusion of its Schedule to the GATS. In *US – Gambling*, however, the Panel limited the scope of the so-called principle of "technological neutrality" to "possible" means of delivery. New services or new means of delivery not existing at the time of the conclusion of a Member's Schedule to the GATS cannot reasonably be considered as "possible". Any other interpretation would lead to open-ended, unpredictable and therefore unsustainable commitments.

4.159 Unduly extending the scope of this contentious principle would be against the principle of progressive liberalization as reflected in the Preamble to the GATS and would preclude Members, especially developing Members, from making further commitments.

4.160 A distinct service, such as network music services, which have not been offered for liberalization at the time of the negotiation of the Schedules for the simple reason that they hardly existed at that time, cannot be committed post hoc through the dispute settlement process. This is all the more true in view of the fact that new services appeared following the development of information technologies are currently subject to ongoing discussions within the WTO which are far from creating consensus among Members.

4.161 The principle of *in dubio mitius* supports a restrictive interpretation of China's GATS commitments. The principle of *in dubio mitius* indeed requires that sovereign State obligations pursuant to treaties, such as China's GATS commitments, be interpreted restrictively. The Appellate Body in *EC – Asbestos* stated that an adjudicatory body, and therefore a Panel, "cannot lightly assume that sovereign states intended to impose upon themselves the more burdensome, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations." Applying this principle to the present case, China's GATS commitments must not be interpreted as covering network music services.

4.162 Considering the above, it appears that China did not include so-called "electronic distribution of sound recordings" in its GATS commitments and that therefore the challenged measures do not violate Article XVII of the GATS.

4. Product distribution

(a) Reading materials

4.163 In its panel request, the United States alleged that China acted inconsistently with Article III:4 of the GATT (and with paragraph 5.1 and paragraph 1.2 of China's Accession Protocol) by establishing different distribution opportunities for imported and domestic reading materials. However, the United States had not raised such concerns in its request for consultations.

4.164 As the Panel in *Korea – Commercial Vessels* clarified, "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". It follows that the US request to examine claims under Article III:4 of the GATT with regard to imported reading materials is inconsistent with Articles 4 and 6 of the DSU, thus not within the terms of reference.

4.165 Should the Panel decide to examine the United States claims' concerning reading materials under Article III:4 of the GATT, it should be underlined that the United States challenges, in its first written submission, several issues in relation to this claim which were not mentioned in its panel request.

4.166 First, it challenges the mandatory subscription regime applying to imported reading materials as well as the conditions, limitations and process applicable to persons wishing to subscribe to imported reading materials. However, in its panel request, the United States had not raised this issue. The initial claim of the United States related, in fact, to the prohibition imposed on foreign service suppliers to distribute imported reading materials and its restrictive effect on the distribution opportunities of these reading materials. The subscription regime as such and the conditions imposed on subscribers of imported reading materials are clearly a distinct issue.

4.167 Moreover, the United States did not, in its panel request, refer to provisions that would specifically deal with the channelling requirement and the conditions imposed on subscribers of imported reading materials. It only made a general reference to the *Imported Publications Subscription Rule*. However, such a general reference is not sufficient to consider that the measures concerning the conditions imposed on subscribers have been adequately identified in the meaning of Article 6.2 of the DSU.

4.168 Secondly, the United States included electronic publications in its claims concerning reading materials under Article III:4 of the GATT. However, it had not mentioned these products in its panel request. Electronic publications, which are a different product, cannot be considered to be included in this limitative list.

4.169 Even if the US claims were to be addressed, the United States fails to establish less favourable treatment for reading materials.

4.170 It refers to two types of subscription systems, i.e. the one applicable to the restricted category of reading materials and the one applicable to the non-restricted category of newspapers and periodicals. The restricted category refers to reading materials that are prohibited from distribution in China but which are subscribed for research purposes. The non-restricted category refers to newspapers and periodicals that are subject to quasi-automatic subscription. While it is true that these two types of subscription systems are different from the rules applicable to domestic like products, the United States must establish that these differences result in less favourable treatment.

4.171 As far as the restricted category is concerned, the subscription system applied to foreign reading materials does not affect the conditions of competition between foreign and domestic products

in this category. Indeed, the so-called restricted category includes reading materials with prohibited content that are not allowed to be distributed in China, but are imported by certain government agencies and institutions for research purpose only. Therefore, the challenged measures do not modify the competition between imported reading materials allowed to be distributed in China and their domestic counterparts.

4.172 As far as the non-restricted category of newspapers and periodicals is concerned, subscription is granted more or less automatically, without any involvement of the State agencies. As a result, consumers can easily buy non-restricted newspapers by subscription. Therefore, the challenged measures do not modify the competition between imported non-restricted reading materials and their domestic counterparts.

(b) Sound recordings

4.173 In its first written submission, the United States referred, in its claim under Article III:4 of the GATT, to two regulations that had not been mentioned in its panel request, i.e. the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*.

4.174 In its panel request, the United States had only mentioned the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Catalogue*, the *Several Opinions*, and the *Network Music Opinions*.

4.175 The United States has therefore not properly identified the two measures at stake in the context of its corresponding claim in the panel request. The Panel should therefore conclude that these measures do not fall within the terms of reference.

4.176 Should the Panel, however, consider that the above measures fall within the terms of reference, it would have to conclude that the United States failed to establish a prima facie case showing that the relevant measures, i.e. the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* affect the so-called "electronic distribution".

4.177 Even if these two measures could be reviewed by the Panel, *quod non*, the United States failed to make a prima facie case that the above identified measures affect the conditions of distribution, insofar as Article 28 of the *2001 Audiovisual Products Regulation* and Articles 16 and 14 of the *Audiovisual Products Importation Rule* have to be considered as border measures at the importation stage.

4.178 The United States is trying to subsume the distribution of sound recordings in non-tangible form under Article III:4, even though no physical goods are actually being distributed.

4.179 The concept of "distribution" within the meaning of Article III:4 of the GATT has to be understood as only addressing trade in physical products. This has been confirmed by the Panel in *Canada – Wheat*. The Panel had recourse to the definition in the New Shorter Oxford Dictionary, which defines distribution to mean "the dispersal of commodities among consumers effected by commerce." The Panel took this to mean that "distribution" entails *inter alia* the supply of goods to consumers or to on-sellers".

4.180 The commercial steps subsequent to the transfer of the content of sound recordings imported in hard copy format into a digitized format ready for network transmission cannot be scrutinized under Article III:4 of the GATT as they do not involve any supply/transfer of goods as acknowledged by the United States itself in its definition of so-called "electronic distribution".

4.181 The essence of the so-called electronic distribution of sound recordings lies in the transmission of music content over the Internet, allowing the user to either download the content or to hear the content in real-time, and does not lie in the distribution of goods.

4.182 Considering the above, the challenged measures cannot be scrutinized under Article III:4 of the GATT and paragraphs 5.1 and 5.2 of China's Accession Protocol.

(c) Motion pictures for theatrical release

4.183 The United States is trying to subsume the distribution of motion pictures for theatrical release under Article III:4 of the GATT, even though no physical goods are actually being distributed.

4.184 As demonstrated above, motion pictures for theatrical release cannot be qualified as goods, and their distribution does not consist in the distribution of a good, but in the distribution of an intangible work through the organisation of public shows on the basis of licensing agreements allowing their exploitation. The only goods involved in theatrical distribution services, the film reels, are mere accessories to such services. Even though a film reel is initially imported, the materials actually being distributed within China are copies produced after various transformations of the motion pictures (dubbing, subtitling, etc.). Therefore, the challenged measures cannot be scrutinized under Article III:4 of the GATT and paragraphs 5.1 and 5.2 of China's Accession Protocol.

4.185 Even if the distribution of motion pictures were to be scrutinized under Article III:4 of the GATT, the challenged Chinese regulations do not modify conditions of competition and therefore do not violate Article III:4 of the GATT 1994.

4.186 The distribution of foreign motion pictures in Chinese movie theatres is carried out by companies approved by SARFT. There are currently two approved distributors, China Film Distribution Company and Huaxia Film Distribution Company.

4.187 Contrary to what the United States pretends, Chinese regulations do not establish a "duopoly" and they do not in any way limit the number of companies that can be approved by SARFT. The *Film Regulation* establishes a licensing system for the activity of distribution of motion pictures, whether domestic or foreign, and lays down the basic conditions and procedure according to which distributors may obtain such a licence.

4.188 In fact, there are only two approved distributors because the number of foreign motion pictures imported into China is limited. Indeed, in conformity with its Schedule to the GATS, China imports 20 motion pictures on a revenue-sharing basis per year and applies screening quotas on all foreign motion pictures (whether on a revenue-sharing or on a lump-sum basis).

4.189 It follows that the distribution system applied in China for foreign motion pictures, although different from the one applied for domestic motion pictures, is appropriate in view of the limited number of foreign motion pictures that are imported into China.

4.190 The two distributors approved by SARFT ensure the smooth distribution of all foreign motion pictures imported into China. This is all the more true than these two distributors are amongst the biggest and most efficient distributors of domestic motion pictures in China.

4.191 Moreover, foreign motion pictures are distributed on a large scale and in the most important markets. In 2007, all of the 50 foreign motion pictures were distributed onto the mainstream market, i.e. in urban areas and on a nation-wide basis. By contrast, most Chinese motion pictures do not have access to these nation-wide and large-scale distribution networks.

4.192 Foreign motion pictures do not face less favourable screening opportunities than domestic motion pictures; in particular, American blockbusters occupied the peak periods (especially summer) and 80 per cent of the screen capacity. Foreign motion pictures enjoy better distribution and screening opportunities than domestic motion pictures. This is especially true for foreign motion pictures on a revenue-sharing basis, which are often potential blockbusters, and for which Chinese distributors have a clear interest in ensuring the distribution as efficiently as possible.

4.193 The absence of less favourable treatment of foreign motion pictures clearly appears from the box office figures provided in the Annual Report of China Film Industry for 2007, which reveal that Chinese blockbusters totalled 16.19 per cent of the box office of the mainstream market whereas foreign blockbusters totalled 25.21 per cent. In view of this reality, the requirement established by Chinese regulations to support domestic films, which serves the sole purpose of implementing screening quotas, also does not alter conditions of competition. In fact, it is rather a safety net for domestic motion pictures, which merely allows them to remain in the competition.

5. Conclusion

4.194 For the reasons set forth in this submission, China requests the Panel to reject the claims raised by the United States.

C. ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Introduction

4.195 This dispute involves several measures that implicate a number of China's WTO commitments.

4.196 Briefly, the US concerns focus on three issues. First, with respect to trading rights, China committed in its Accession Protocol to grant all foreign enterprises, all foreign individuals, and all enterprises in China the right to import reading materials, audiovisual home entertainment products such as videocassettes, VCDs and DVDs, sound recordings and films for theatrical release into China. However, China's measures ensure that state-owned Chinese importation monopolies and oligopolies preserve their exclusive rights to import, since foreign companies are categorically prohibited from importing reading materials, AVHE products, sound recordings and films for theatrical release into China. The measures that impose these restrictions breach China's trading rights commitments.

4.197 Second, China inscribed market access and national treatment commitments with respect to both distribution services and audiovisual services in its Services Schedule. China's distribution services commitments were supposed to open full opportunities for foreign-invested enterprises to supply reading material wholesaling services in China. Likewise, China's audiovisual services commitments allow Chinese-foreign contractual joint ventures to engage in AVHE and sound recording distribution services. Chinese measures, however, prohibit foreign-invested distributors from supplying many services in these sectors. Where foreign-invested distributors are permitted to supply a service, Chinese measures subject these distributors to discriminatory requirements. The challenged measures are inconsistent with the market access and national treatment commitments in China's Services Schedule within the meaning of Articles XVI and XVII of the GATS.

4.198 Third, China committed to provide national treatment with respect to imported goods pursuant to both the GATT 1994 and China's Accession Protocol. However, China's measures concerning several of the products at issue – namely reading materials, films for theatrical release, and hard copies of sound recordings intended for electronic distribution – create discriminatory commercial hurdles for imported products. For example, many imported reading materials are

subjected to a restrictive and discriminatory subscription regime. Furthermore, while both Chinese and foreign enterprises can distribute domestic Chinese products, only Chinese enterprises can distribute imported reading materials. Similarly, imported and domestic hard copies of sound recordings intended for electronic distribution face distinctly different content review regimes, with a significantly more onerous regime imposed on imports. Finally, only two state-controlled distributors are permitted to distribute imported films, and the distribution contract does not permit the negotiation of key commercial terms. By contrast, domestic films have the full range of distributors at their disposal, and their distribution contracts are subject to full competitive negotiation. As China's measures accord imported products less favourable treatment than like domestic products, they are inconsistent with Article III:4 of the GATT 1994 and paragraphs 5.1 and 1.2 of China's Accession Protocol.

2. Trading rights: films for theatrical release, unfinished AVHE products and unfinished sound recordings are goods subject to China's trading rights commitments

4.199 Since the parties agree that trading rights in the Protocol refer to the import (and export) of goods, one should begin with an analysis of whether cinematographic film qualifies as a good for purposes of the Accession Protocol. First, the GATT has made clear for more than half a century that exposed cinematographic film crossing national borders is a good. This agreement, which applies to trade in goods, includes a specific provision on films for theatrical release in Article IV, which is entitled "Special Provisions relating to Cinematograph Films."

4.200 China's position also has a number of other major flaws. According to China, the alleged "intangible" nature of films disqualifies them as goods. However, even if China were correct that "tangibility" is the key element of a "good," the United States is, in fact, challenging measures that prohibit foreign-invested enterprises from importing hard-copy cinematographic film, which are tangible items. China concedes this point in its first written submission.

4.201 International classifications of products also demonstrate the long-standing practice of Members treating films as goods. The Harmonized Commodity Description and Coding System (HS), which only covers goods, describes products under heading 3706, and the United Nations' Central Product Classification (CPC) does classify cinematographic film as a good in Subclass 3895, in addition to classifying the associated services (in subclass 96113).

4.202 China's next assertion, that films are not goods because they are sold through a series of associated services, would have serious systemic implications, if accepted. In essence, China would negate the existence of a good, whenever it is closely connected to a series of services. China uses a similar line of reasoning to contend that the challenged measures simply deal with a copyright licensing service for motion pictures rather than the importation of goods. Even if certain provisions of China's measures regulate copyright licensing, this does not change the fact that other provisions in these measures directly prohibit foreign-invested entities from importing films.

4.203 China also asserts that its GATS commitments with respect to films demonstrate that films are subject exclusively to the disciplines of the GATS, and fall outside the scope of China's Accession Protocol or the GATT 1994. Again, there is no foundation for this assertion in the text of the WTO Agreement, and the Appellate Body has rejected this line of reasoning. In *Canada – Periodicals*, the Appellate Body concluded that 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." Finally, China's own customs regime recognizes that films are goods.

4.204 Second, China similarly argues that unfinished AVHE products and unfinished sound recordings, often called "masters," are not goods. For the reasons articulated above, China's arguments with respect to unfinished AVHE products and sound recordings are also unavailing.

There is once again no textual basis for this assertion. Furthermore, the 2007 Harmonized System, (implemented under the Harmonized System Convention, to which China has been a party since 1993) describes products under HS heading 8523, which makes clear that these products are goods. The CPC also classifies "recorded media for sound or other similarly recorded phenomena" other than films under goods subclass 47520. In addition, as with films, China treats these products as goods. China's tariff schedule, which has not yet implemented the 2007 changes to the HS, incorporates the description of this product under HS heading 8524.

4.205 Moreover, China asserts that its measures do not regulate the right to import master copies of AVHE products or sound recordings, but simply deal with rights to enter into copyright agreements. As with films, China may have provisions regulating copyright licensing, but this does not change the fact that other Chinese provisions directly regulate who can import the good subject to that licensing.

3. Trading rights: China's measures are inconsistent with its trading rights commitments and are not justified under any exceptions

4.206 China does not contest the US arguments concerning the inconsistency of the challenged measures with its trading rights commitments related to reading materials, finished AVHE products, and finished sound recordings. Indeed, China asserts, but fails to demonstrate, that its measures governing these products are justified under several exceptions.

4.207 China begins its efforts to try to justify its measures by invoking the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and a related UNESCO Declaration. However, China fails to note that the UNESCO Convention expressly provides: "Nothing in this Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties." In any event, nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of "cultural goods," and China's Accession Protocol likewise contains no such exception.

4.208 China then argues that its "right to regulate trade in a manner consistent with the WTO Agreement," provided in the first clause of paragraph 5.1 of the Accession Protocol, justifies its wholesale carve out of the Products in dispute here from its trading rights commitments. First, if China's reading of its right to regulate trade allowed China to deny the right to import to all foreign and all private Chinese enterprises for entire categories of products at will, then China would have eliminated its trading rights commitment altogether, not simply "regulated trade."

4.209 Second, China's expansive reading of its right to "regulate" is inconsistent with the structure and operation of paragraph 5.1, read as a whole. China's expansive interpretation of the right to regulate trade would make the specific mechanisms in Annexes 2A and 2B superfluous, since they serve precisely the same function China appears to claim flows from its right to regulate trade.

4.210 Turning to China's assertion that its measures denying trading rights are justified under Article XX(a) of the GATT 1994, the United States submits, without prejudice to the question of whether Article XX applies to China's Accession Protocol, that China has not met its burden to demonstrate that its measures satisfy the requirements of this article. Content review, China's concern here, is independent of importation and can be performed by individuals or entities unrelated to the importation process at any time before, during or after that process.

4.211 The measures at issue are not "necessary" within the meaning of Article XX, and they do constitute "arbitrary or unjustifiable discrimination" and a "disguised restriction on international trade." As the Appellate Body has stated, "a 'necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'." Given the utter absence of a nexus between the challenged measures and the protection of public morals, China's

measures denying trading rights lie far too distant from the pole of indispensability to qualify as "necessary" within the meaning of Article XX. The Appellate Body has not found a measure to be necessary where there is a "reasonably available WTO-consistent alternative". Here, there are many such alternatives at hand. Indeed, China's "in-house" content review regime for domestic producers offers a fully WTO-consistent alternative to China's measures.

4.212 China's arguments regarding the chapeau of Article XX are equally unpersuasive. As applied, China's measures ban foreign and private Chinese importers from the business of importing the Products into China, thereby protecting the business interests of a limited group of Chinese state-owned enterprises. One further aspect of China's chapeau analysis deserves mention. China's statement that domestic producers of reading materials, finished AVHE products, and finished sound recordings are confronted with limitations comparable to those on foreign producers is most remarkable, and does not reflect the facts.

4. Trade in services: China's measures prohibiting foreign-invested enterprises from engaging in master distribution, master wholesale and wholesale of reading materials are inconsistent with Article XVII of the GATS

4.213 As part of its claims under Article XVII of the GATS, the United States challenges four sets of discriminatory prohibitions on foreign-invested enterprises engaging in the wholesale of reading materials. China only attempts to address the fourth set of US concerns – i.e., China's discriminatory prohibition on foreign-invested enterprises engaging in the master distribution of books, newspapers and periodicals and the master wholesale and wholesale of electronic publications.

4.214 China contends that it made no commitment with respect to master distribution in Sector 4B of its Services Schedule. However, as China concedes, master distribution is a form of distribution that is synonymous with master wholesale (*Zong Pi Fa*). Several Chinese regulations and other sources confirm, in turn, that master distribution is also known as "first-level wholesale", and is the right to organize the distribution of a particular reading material, which includes the right to designate which "second-level wholesalers" may distribute the publication in a certain region of China. Thus, master distribution or "first-level wholesale" is included in China's commitments under Sector 4B of its Services Schedule.

4.215 China also contends that the *1997 Electronic Publications Regulation* was replaced in April 2008, rendering the concept of master wholesale "obsolete" and removing the prohibition on foreign investment in the wholesale of these products. However, the measure cited by China replacing the *1997 Electronic Publications Regulation* does not in fact replace the key provisions of this measure involving the distribution of electronic publications. Of course, even if China's new measure had replaced the old regulation, the United States would continue to seek a finding with respect to the *1997 Electronic Publications Regulation* that was included in the US panel request.

5. Trade in services: China's services commitments cover the electronic distribution of sound recordings

4.216 Turning to China's argument with respect to the electronic distribution of sound recordings and China's obligations under Article XVII of the GATS, China's defence to this claim rests on the argument that China did not undertake commitments in its Services Schedule with respect to the electronic distribution of sound recordings, but only with respect to distribution of hard-copy sound recordings.

4.217 Consistent with Article 31 of the Vienna Convention on the Law of Treaties, one should begin with an analysis of the ordinary meaning of the relevant terms of China's commitments. In

Sector 2D of its Services Schedule, China inscribed no limitations on market access or national treatment under mode 3 with respect to "sound recording distribution services."

4.218 The ordinary meaning of "recording" is "the action or process of recording audio or video signals for subsequent reproduction" or "recorded material." Thus, the ordinary meaning of "recording" does not distinguish between recordings of sound stored on physical media or those stored electronically. Distribution of sound recordings thus includes distribution of any recorded sound, whether in hard-copy or electronic.

4.219 The definitions of certain terms in the GATS provide relevant context for the interpretation of China's commitments. Article I:3(b) of the GATS defines services broadly to "includ[e] any service in any sector except services supplied in the exercise of government authority." In addition, Article XXVIII(e)(i) defines "sector" to mean "with respect to a specific commitment, one or more, or all, sub-sectors of that service as specified in a Member's Schedule." In light of the ordinary meaning of "sound recording distribution" and the context, China's national treatment commitments in this sector include the electronic distribution of sound recordings.

4.220 China contends that the relevant context for the interpretation of China's commitments under Sector 2D is Annex 2 to its schedule, and that Annex 2 demonstrates that "distribution services" only include distribution of tangible items such as hard-copy sound recordings. However, nothing in China's schedule provides that Annex 2 even applies to Sector 2D, in contrast, for example to Sector 4. More significantly, Article XXVIII(b) of the GATS defines "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service."

4.221 Because an analysis of the relevant treaty terms pursuant to Article 31 does not leave the meaning of the terms of China's GATS schedule ambiguous, obscure, or unreasonable, there is no need to resort to supplementary means of interpretation. Even if this were not the case, an analysis of the supplementary means of interpretation under Article 32 confirms the US interpretation under Article 31 that China's services commitments cover the electronic distribution of sound recordings.

4.222 China contends that the electronic distribution of sound recordings was a new phenomenon that did not exist at the time of China's accession. In fact, China's premise is false. An analysis of the "circumstances of [the] conclusion" of China's accession reveals that the electronic distribution of sound recordings was a reality long before China's accession and that China itself was aware of this development.

4.223 Even if China were correct that it did not intend to make a commitment with respect to the electronic distribution of sound recordings, in *US – Gambling*, the panel made clear that a Member's intent is not relevant in discerning whether the Member has a commitment with respect to a particular means of delivery. Because China did not explicitly exclude electronic distribution of sound recordings from its national treatment obligations under mode 3, China's services commitments include this form of distribution.

4.224 The US interpretation of China's schedule is also consistent with the principle of technological neutrality, which China attempts to dismiss. China engages in a lengthy but fruitless discussion of the ways in which the mechanics of distributing hard-copy media containing music versus electronic distribution differ. At the end of the day, this discussion only confirms the point that electronic distribution of sound recordings merely constitutes a modern means to supply an existing service.

4.225 In addition, if China's arguments were accepted, WTO Members could invoke this reasoning to evade services commitments any time a new means of delivering a service was developed. On the other hand, the principle of technological neutrality is consistent with the concept that the GATS is

sufficiently dynamic so that Members need not renegotiate the Agreement or their commitments in the face of ever-changing technology.

6. Trade in goods: China's measures regarding the distribution of hard-copy sound recordings intended for electronic distribution are inconsistent with Article III:4 of the GATT 1994

4.226 China makes several unsuccessful arguments in attempting to rebut the US claim under Article III:4 with respect to hard-copy sound recordings intended for electronic distribution. First, China misunderstands the US claim here by arguing that the electronic distribution of sound recordings is not covered by the GATT 1994, because the GATT 1994 only covers trade in goods. However, the US claim applies only to measures affecting imports of hard-copy media containing sound recordings that are intended for electronic distribution after importation. The claim does not deal with the provision of electronic distribution services.

4.227 China also asserts that the challenged measures are "border measures" at the importation stage and therefore do not affect the distribution of products that have already been imported. China's argument is misplaced. The Ad Note to Article III of the GATT 1994 provides that internal measures applicable to both an imported product and the domestic like product that are enforced for imported products upon importation are internal measures, not border measures. In this case, the measures at issue impose content review-related legal requirements on both imported and domestic hard copy CDs that they must fulfil before distribution inside China.

4.228 This conclusion is in fact confirmed by China's next argument, which turns its assertions regarding "border measures" on their head. China argues that the rationale behind the content review requirements for imports is to ensure that in the process of transferring content from the hard copy format to the digital format, China seeks to ensure that the content "has not been altered during its conversion into digital format." China provides no support for this assertion, but this claim does reveal that China does not view this measure as a "border measure," since the conversion into digital form will only occur during the internal distribution process inside China.

7. China's measures are properly before the Panel and are within the Panel's terms of reference

4.229 Finally, China raises numerous objections regarding the Panel's terms of reference. First, in response to the US trading rights claims regarding films for theatrical release, China contends that the *Film Distribution and Exhibition Rule* is a measure that is not within the Panel's terms of reference, because it was not identified in the US panel request. The *Film Distribution and Exhibition Rule* is included in the US panel request with respect to the trading rights claims. The US panel request describes the measures at issue as the failure to "allow[] all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China the following products (collectively, the "Products"): films for theatrical release ... ." The *Film Distribution and Exhibition Rule* is a legal instrument that falls within the scope of the measure described by this narrative.

4.230 Moreover, under Section I of the US panel request, which addresses trading rights, the United States identified a series of measures – such as the *Film Regulation* and the *Film Enterprise Rule* – involved with China's trading rights regime, and included, as well in this connection, "any amendments, related measures or implementing measures". The *Film Distribution and Exhibition Rule* is closely and directly related to both the *Film Regulation* and the *Film Enterprise Rule*, which all explicitly address the importation of films for theatrical release.

4.231 Furthermore, as the panel stated in *Japan – Film*, measures that are not specified in a Member's panel request can nonetheless be included in that request if they are "subsidiary or closely related to" measures that are specified in that request. Here again, the *Film Distribution and Exhibition Rule* is closely related to both the *Film Regulation* and the *Film Enterprise Rule* in that it focuses specifically on, and elaborates upon, the film import regime addressed in these two measures.

4.232 China also asserts that the *Several Opinions*, the *Importation Procedure* and the *Sub-Distribution Procedure* should not be examined by the Panel. However, these measures are specifically identified in the US panel request and are part of the Panel's terms of reference. They are each legally binding on the agencies that issued them, represent the type of legal document widely used in routine administration, and are fully recognized in the Chinese administrative law regime.

4.233 Moreover, China erroneously asserts that three discriminatory requirements – pre-establishment legal compliance, approval process, and decision-making criteria applicable to the distribution of reading materials and AVHE products – are not within the Panel's terms of reference because they were not spelled out in the US panel request. Consistent with Article 6.2 of the DSU, Section II of the US panel request identified all of the measures that provide for these three problematic requirements – i.e., the *Publications (Sub-)Distribution Rule*, the *Sub-Distribution Procedure*, the *Audiovisual (Sub-)Distribution Rule*, and the *Several Opinions*.

4.234 China also raises two sets of procedural objections with respect to certain elements of the US Article III:4 claim regarding reading materials. First, China argues that the US claim under Article III:4 of the GATT 1994 regarding different distribution opportunities for imported reading materials was not addressed during consultations and, therefore, is not part of the Panel's terms of reference. This objection is without merit, as the legal bases contained in a party's consultation request and panel request need not be identical. As the Appellate Body concluded in *Mexico – Rice*, a "precise and exact identity" between the legal bases included in a consultation request and those included in a panel request is not required.

4.235 Second, China contends that certain aspects of the discriminatory treatment accorded to reading materials – that is, aspects related to China's subscription regime for imported reading materials, to the conditions imposed on subscribers, and to electronic publications – were not mentioned in the US panel request and are not measures included in the Panel's terms of reference. However, China's objection in this Article III:4 context is unavailing. Article 6.2 of the DSU requires the identification of each measure relevant to a particular claim, but does not require the complaining party to identify each individual provision of the relevant measure.

4.236 The US panel request specifically identifies the measures at issue, and those measures in turn include provisions setting forth the discriminatory aspects raised in China's objection – i.e. (1) China's discriminatory subscription regime is provided for in the *Imported Publications Subscription Rule*; (2) the conditions imposed on subscribers are also provided for in the *Imported Publications Subscription Rule*; and (3) China's discriminatory treatment of imported electronic publications is provided for in the *1997 Electronic Publications Regulation*, and the *Publications Regulation*.

4.237 Finally, China argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are not in the Panel's terms of reference for purposes of the US claims under Article III:4 because these measures were not included in the US panel request. The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are within the Panel's terms of reference. First, these two instruments fall within the scope of the narrative in the US panel request describing the measure at issue. Second, the section of the US panel request dealing with the GATT 1994 includes the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, the *Catalogue*, and the *Several Opinions* as well as "any amendments, related measures, or implementing measures." The *2001 Audiovisual Products Regulation and Audiovisual*

Products Importation Rule are closely related to the other measures specifically listed in that request and therefore are within the Panel's terms of reference. Finally, these measures also properly fall within the Panel's terms of reference under the Panel's reasoning in *Japan – Film*.

D. ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. Introduction

4.238 China is of the view that this dispute is fundamentally about three sets of issues. Firstly, this dispute is about the attempt of the United States to unduly extend the scope of China's commitments beyond what was negotiated and agreed, by invoking rules which are not applicable to the present case and by blurring the scope of the goods and services subject to the present dispute.

4.239 This dispute is, secondly, about the right of China to regulate trade in cultural goods in accordance with legitimate policy objectives, as provided for by WTO disciplines, including China's Accession Protocol.

4.240 Finally, this dispute requires a correct and precise understanding of the Chinese legislation and regulatory framework applicable to the cultural goods and services concerned. The United States, indeed, has based most of its claims on an inaccurate interpretation of the Chinese measures, and has repeatedly drawn inappropriate legal conclusions.

4.241 Moreover, the United States in its first written submission has addressed certain Chinese measures or even new claims, which it did not address either in the panel request or in its request for consultations. China would like to refer the Panel to the detailed arguments of terms of reference made by China in its first written submission in this respect.

4.242 In addition, in light of the ambiguous or even inconsistent way in which the United States has defined the scope of its claims, China urges the Panel to carefully examine the products and services at issue in order to establish whether the United States has properly met its obligation to establish a prima facie case of violation.

2. Products/service at issue and applicable rules

(a) The importation of motion pictures for theatrical release

4.243 The United States, by remaining ambiguous about the definition of the product at issue, and thus about the scope of its claim, is suggesting that the Panel scrutinize the Chinese measures governing the importation of motion pictures for theatrical release under the rules applicable to trade in goods, i.e. the right to trade pursuant to paragraph 5.1 of China's Accession Protocol.

4.244 This is incorrect. Chinese measures should, instead, be examined under the rules applicable to services.

4.245 China has always regulated the exploitation of motion pictures for theatrical release as a service activity. This is reflected in China's commitments under Sector 2D of its GATS Schedule.

4.246 The way China has regulated the exploitation of motion pictures for theatrical release is in line with the business reality of this sector. The exploitation of a motion picture for theatrical release consists in the first place in the exploitation of the intangible feature that it contains, i.e. an artistic works that is to be finally projected in movie theatres.

4.247 The basic features of the international motion picture business clearly reveal that the commercial interests of this business lie in the exploitation of artistic works through a series of services. The commercial exploitation of motion pictures for theatrical release mainly involves three categories of service providers: the producers, the distributors and the movie theatre operators.

4.248 Under this commercial chain, the distribution of motion pictures is organized on the basis of copyright licence agreements through which the producer grants the distributor the right to use copies of the motion picture in order to organize its distribution.

4.249 The producer provides the distributor with the materials necessary for the distribution of the motion picture in movie theatres. The distributor will receive copies of the so-called master negative, as well as other related delivery materials, such as soundtracks or advertising materials, in order to organize the distribution of the motion picture on its territory.

4.250 At the end of the period of release, all licensed rights will in principle immediately revert to the producer and the distributor will, at the producer's choice, either return or destroy the delivered materials as well as the materials created by the distributor.

4.251 It results from the above that the exploitation of motion pictures for theatrical release, including their importation, should fall under the rules applicable to trade in services and not under those applicable to trade in goods. China does not deny that exploiting motion pictures may involve the importation of film reels. However, in such cases, the film reel is merely an accessory linked to the motion picture distribution service.

4.252 An examination of the challenged measures under paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol as well as paragraphs 83 and 84 of the Working Party Report would undermine China's expressly reserved right under its GATS schedule to regulate motion picture business.

(b) The distribution of motion pictures for theatrical release

4.253 Even though no physical goods are actually being distributed, the United States is claiming that the distribution of motion pictures should be scrutinized under Article III:4 of the GATT 1994.

4.254 Article III:4 of the GATT deals with measures affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of goods. In the context of Article III:4 of the GATT 1994, the term "distribution" refers to the process of supplying goods to on-sellers or consumers.

4.255 Distribution of motion pictures for theatrical release does not involve the sale of goods. What is ultimately purchased by movie-goers is the right to attend the screening and all that they retain are memories of the show. It follows clearly from the above that the theatrical distribution of motion pictures cannot be qualified as the distribution of goods within the meaning of Article III:4 of the GATT 1994.

4.256 Finally, China would like to emphasize, should the Panel consider – despite the elements just presented – that Article III:4 could be relevant in this specific context, that the allegations of less favourable treatment claimed by the United States are unfounded since they are not supported by the facts demonstrated in China's first written submission.

(c) Audiovisual products used for publication

4.257 The category of "audiovisual products used for publication" refers in fact to master copies with audiovisual content that are to be published in China via copyright licensing agreements.

4.258 These master copies carry an audiovisual content that is subject to a copyright licensing agreement between the foreign rights holder and a Chinese publisher. The master copy is used for the sole purpose of making copies in accordance with the licence agreement. The importation of the master copy is thus only an accessory of the copyright licensing.

4.259 The challenged measures do not regulate the importation of goods. Rather, they regulate the importation of audiovisual products used for publication as the licensing of the right to make copies of an audiovisual content.

4.260 Therefore, the US claim under paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol, as well as paragraphs 83 and 84 of the Working Party Report, lacks any legal basis as far as audiovisual products used for publication are concerned.

(d) Network music services

4.261 By remaining ambiguous about the definition of the service at issue, the United States would like the Panel to consider that China's GATS commitments on sound recording distribution services cover network music services.

4.262 The United States improperly describes this activity as "electronic distribution of sound recordings", thus attempting to assimilate it to distribution of sound recordings in a physical form, while it relates in fact to a different service for which China has not taken any commitments.

4.263 Network music services can be defined as the dissemination to users of music in digital format via the Internet. The most common network music services are usually known as "on-line music download" and "on-line music streaming".

4.264 There are a number of significant differences between network music services and traditional sound recording distribution models. The most evident difference lies in the fact that, contrary to traditional sound recording distribution, network music services do not supply the users with sound recordings in physical form, but supply them with the right to use a musical content.

4.265 Not only the infrastructure and operation, but also the perception of the consumers of both businesses, differ significantly. For instance, the supply of network music services is exclusively operated via the Internet and does not need any commodity distribution infrastructure.

4.266 Moreover, consumers can, at any time and at any place, access, buy or receive music immediately from any computer with Internet access, without having to visit a retail outlet. They can download individual tracks, instead of having to buy the entire album, and create customized compilations.

4.267 A textual interpretation of the GATS commitments with respect to "sound recording distribution services" refers to the marketing and supply of a specific category of goods, i.e. goods containing recorded music materials, such as CDs or other physical supports.

4.268 One should also consider the fact that network music services hardly existed at the time of the negotiation of China's GATS Schedule and that the legal framework governing the distribution of sound recordings addressed exclusively the distribution of sound recordings in their traditional, hard-copy format.

4.269 Finally, even assuming that the principle of technological neutrality would be relevant in this case, its only implication would be that new means of delivering a particular service would be covered by the commitments already undertaken for this service. This is not the case for network music

services, which are a different service and not merely another means of distribution. The difference between network music services and traditional distribution of sound recording is analogous to the difference between email services and postal services. Even though same messages are being delivered, email services are well recognized by members GATS schedules as a different service from traditional postal services.

4.270 Unduly extending the scope of a Member's commitments to new types of services, as the US argument would imply, would be against the principle of progressive liberalization as reflected in the Preamble of the GATS. Consequently, unlike the committed service, a distinct service cannot be committed post hoc through the dispute settlement process.

(e) Distribution of sound recordings intended for so-called "electronic distribution"

4.271 The United States is trying in this dispute to convince the Panel that the distribution of sound recordings in non-tangible form should be scrutinized under Article III:4, governing the distribution of physical goods.

4.272 The concept of "distribution" within the meaning of Article III:4 of GATT should be understood as only addressing distribution of physical goods.

4.273 The commercial steps subsequent to the transfer of the content of sound recordings imported in hard copy format into a digitized format ready for network transmission cannot be scrutinized under Article III:4 of the GATT 1994 as they do not involve any distribution of goods.

4.274 In fact, what users are actually downloading or streaming is the digital version of the artistic work rather than a tangible good. The essence of the so-called electronic distribution of sound recordings lies in the transmission of music content over the Internet, allowing the user to either download the content or to hear the content in real-time rather than lie in the distribution of goods.

3. China's right to regulate trade in cultural goods

4.275 The US allegation fails to take into account China's right to regulate trade in a manner consistent with the WTO Agreement, in particular under Article XX of the GATT, which allows, among other things, the adoption of specific measures for the protection of legitimate policy objectives, including public morals.

4.276 As vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. Cultural goods may have a negative impact on public morals, such as the depiction or vindication of violence or pornography, against which minors must be specifically protected.

4.277 Considering the potential impact of cultural goods on public morals, China's longstanding policy has been to implement a high level of protection which is reflected in a complete prohibition of cultural goods with inappropriate content and a high level of protection against the possible dissemination of cultural goods with a content that could have a negative impact on public morals.

4.278 To that effect, China applies a content review for the importation of cultural goods, which is operated through a system of selection of importation entities which play an essential role in such content review.

4.279 The selection of importation entities is necessary to achieve the objective pursued. Indeed, their contribution to this objective, which must be assessed in light of the high level of protection and the limited impact on trade sought by China, is reflected by the requirements of having: (i) an

importation entity with an appropriate organizational structure; (ii) a reliable and qualified personnel, and; (iii) an appropriate geographical coverage while preserving a limited number of entities involved in order to ensure the efficiency of the review.

4.280 Therefore, Chinese measures governing the trading rights of cultural goods do not violate China's obligations under paragraphs 5.1, 5.2, 1.2 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report.

4. Understanding of the Chinese legislation and regulatory framework applicable to cultural goods and services

(a) No less favourable treatment for the distribution of imported reading materials under Article III:4 of the GATT 1994

4.281 China has implemented two types of subscription systems: the first applies to the restricted category of reading materials and the second applies to the non-restricted category of newspapers and periodicals.

4.282 The restricted category refers to reading materials that are prohibited from distribution in China but which may be acquired for subscription for research purposes. The non-restricted category refers to newspapers and periodicals that are subject to quasi-automatic subscription.

4.283 While it is true that these two types of subscription systems are different from the rules applicable to like domestic products, the United States should have established that these differences result in less favourable treatment. However, the United States has failed to do so.

(b) Distribution services of reading materials under Article XVII of the GATS

4.284 According to the United States, China has implemented several measures either prohibiting foreign-invested enterprises from engaging in certain forms of distribution or exposing foreign investment enterprises to less favourable treatment.

4.285 As far as distribution forms are concerned, what is at issue are two distinct channels: *Zong Fa Xing* and *Fen Xiao*. *Fen Xiao* corresponds to the traditional concept of distribution through wholesaling (*Pi Fa*) and retailing (*Ling Shou*). By contrast, a product that is subject to *Zong Fa Xing* is directly sold by *Zong Fa Xing* operators to the end consumers without relying on any intermediaries.

4.286 What China actually committed under Sector 4B of its GATS Schedule was the activity of "wholesaling", which is a sub-category of *Fen Xiao*. China has provided the Panel in its written submission with the elements showing that *Zong Fa Xing* cannot, contrary to the US assertion, be considered as wholesaling as committed under Sector 4B of China's GATS Schedule.

4.287 As far as the alleged discriminatory requirements are concerned, China reiterates that the United States has provided the Panel with an incomplete legal analysis under Article XVII of the GATS.

4.288 The mere fact that the United States has provided the Panel with elements allegedly establishing a formally different treatment between domestic and foreign invested services and service supplier is certainly not sufficient for establishing a prima facie case of violation of Article XVII of the GATS.

(c) No market access issue or less favourable treatment for the distribution of audiovisual products

4.289 Regarding the claims based on Article XVI, the United States has provided the Panel with an inaccurate description of the challenged measures, by asserting that the Chinese party to a Sino-Foreign contractual joint venture engaging in the distribution of audiovisual products must hold at least 51 per cent of the shares.

4.290 These challenged measures do not provide that the Chinese party must hold at least 51% of the shares. Rather, these measures refer to the rate of allocation of profit and loss in contractual joint ventures.

4.291 Article XVI of the GATS does not impose any obligations on WTO Members to insert any limitations with respect to the rate of profit and loss allocation in their GATS Schedule. Thus, the relevant Chinese measures challenged do not violate Article XVI of the GATS.

4.292 As far as the US claims related to allegedly discriminatory requirements imposed on foreign-invested distribution enterprises are concerned, the United States, once again, has only addressed alleged formal differences in the treatment of foreign and domestic competitors and failed to prove a modification of the conditions of competition resulting from the alleged different treatment, as is required by paragraph 3 of Article XVII of the GATS.

5. Conclusion

4.293 China respectfully requests the Panel to find that all the US claims are unfounded and therefore shall be dismissed.

E. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

4.294 China made important market opening commitments related to reading materials, AVHE products, sound recordings and films for theatrical release when it acceded to the WTO. Unfortunately, this much anticipated liberalization still awaits full realization, since China's laws and policies have created major stumbling blocks, and in some cases, have thwarted it entirely.

4.295 In its previous submissions, the United States has demonstrated that China's efforts to implement its trading rights, services and goods obligations fall short in three respects. This submission will show how China's arguments and procedural objections in its first written submission, first oral statement and answers to the first set of Panel questions fail to rebut the US claims concerning the Accession Protocol, the GATS and the GATT 1994.

4.296 First, China agreed to allow all foreign enterprises, foreign individuals, and enterprises in China to import reading materials, AVHE products, sound recordings and films for theatrical release into China. Despite this commitment, China permits only selected state-owned importers to participate in this business. China asks the Panel to find that China's commitments do not extend to films for theatrical release, unfinished AVHE products or unfinished sound recordings, because the commercial exploitation of these products involves associated services, so, China claims, the goods themselves should be viewed as services. However, the Panel should decline this invitation: when China's trading rights commitments are read in light of the GATT 1994, and are considered in light of prior reasoning by the Appellate Body, international classifications, and China's own treatment of these products, it is evident that China's alchemy fails.

4.297 China also proffers Article XX(a) of the GATT 1994 to try to justify its trading rights prohibitions, but this attempted defence fails as well. The Panel does not need to determine whether the GATT exception in fact applies to China's measures, because China's measures fall far short of satisfying the requirements of sub-paragraph (a), and their application fails to meet the standards in the chapeau of Article XX. This leaves the US claim unrebutted; China's measures are inconsistent with its trading rights commitments under the Accession Protocol.

4.298 Second, China prohibits foreign enterprises from supplying certain kinds of distribution services related to reading materials and sound recordings, despite China's broad liberalizing commitments in its Services Schedule. And where China does allow foreign enterprises to distribute reading materials and AVHE products, China imposes discriminatory requirements favouring Chinese competitors and also further hampers foreign AVHE service suppliers by limiting the capital contributions they can make. China has offered no convincing rebuttals to these US claims, making it clear that the measures at issue are inconsistent with China's market access and national treatment commitments under Articles XVI and XVII of the GATS.

4.299 Third, contrary to its national treatment obligations, China maintains two parallel, unequal channels for the commercial exploitation of reading materials, sound recordings and films for theatrical release within China. In one channel, imported reading materials, sound recordings and films for theatrical release travel through a thicket of restrictions that devalue the commercial opportunities available to those products. In the other channel, domestic products travel in the fast lane to consumers, unfettered by the limitations imposed on their imported counterparts. China's efforts to justify these measures are unavailing. China's measures accord imported products less favourable treatment than like domestic products in a manner inconsistent with Article III:4 of the GATT 1994 and paragraphs 5.1 and 1.2 of China's Accession Protocol.

2. China's measures regarding trading rights are inconsistent with China's obligations under the Accession Protocol and Working Party Report

4.300 China's trading rights regime for reading materials, AVHE products, sound recordings, and films for theatrical release is inconsistent with China's obligations contained in paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol, as well as in paragraphs 83 and 84 of the Working Party Report. While China has advanced several arguments responding to this claim, none of them succeed.

(a) Goods versus services

4.301 China makes a number of erroneous arguments that films for theatrical release, unfinished AVHE products, and unfinished sound recordings, are not goods, and are not subject to the trading rights disciplines. China's reasoning would transform all goods commercially exploited through a series of associated services into services themselves. As the United States has demonstrated, these products are goods subject to the trading rights disciplines, and the relevant measures challenged by the United States run afoul of China's trading rights commitments.

4.302 In its submissions, China argued that films for theatrical release are not goods based on certain assertions such as: a motion picture is intangible; the commercial exploitation of motion pictures for theatrical release occurs through a series of services and the tangible film is a mere accessory of a service; and international classification instruments confirm the status of motion pictures as a service. However, the text of the GATT, the Appellate Body's guidance on this issue, and China's own treatment of films as goods, all belie China's contentions.

4.303 First, the product that is the subject of the US trading rights claim is tangible, hard-copy cinematographic film that can be used to project motion pictures in a theatre. Even if, assuming

arguendo, China were correct that "goods" must be tangible to qualify as goods, the product relevant to the US trading rights claim – i.e., hard-copy cinematographic film – is tangible.

4.304 Second, China also unsuccessfully contends that films for theatrical release are not goods because they are exploited through a series of services. China argues that because the "delivery materials" containing film are mere accessories of such services, films are not goods. If accepted, China's argument would have serious systemic implications. Because the vast majority of goods are commercially exploited through a series of associated services, China's argument would transform virtually all goods into services. China's own customs regime also demonstrates that China itself treats films as goods.

4.305 China goes on to provide certain criteria that it says are not decisive, but claims "may help determine whether a particular good affected by a measure regulating the supply of a service should be treated as an 'accessory to a service'." However, these criteria merely highlight further the flaws in China's argument. Under China's approach, a wide swath of goods would be magically transformed into services.

4.306 China also attempts to anchor its argument that films are not goods in the Appellate Body's guidance in *EC – Bananas III* concerning whether the measure at issue affects trade in goods, trade in services, or both. However, an analysis of the relevant measures using the Appellate Body's guidance, which China endorses, reveals that the measures unambiguously affect trade in goods. In fact, China's measures themselves refer to the importation of the good separate from and in addition to the provision of services using the good.

4.307 China's argument that films for theatrical release are not goods is also belied by the text of the GATT 1994. Article III:10 and Article IV of the GATT 1994, part of the Multilateral Agreements on Trade in Goods, deal with cinematographic films, and demonstrate a long history of treating films as goods in the multilateral trading system.

4.308 Third, contrary to China's contentions, international classifications of films demonstrate that films for theatrical release are goods. 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." Similarly, the United Nations' Central Product Classification (CPC) does classify cinematographic film as a good in Subclass 3895, in addition to classifying the associated services (in subclass 96113).

4.309 As with films, China argues that the "master copies" of AVHE products and sound recordings being imported and used for reproduction, are a mere accessory of copyright licensing and therefore are not goods. China's argument is flawed for a number of reasons.

4.310 The fact that these tangible goods carry content does not take them out of the category of goods. The fact that certain provisions of the relevant measures may regulate copyright licensing does not mean that other provisions of the same measures do not regulate the importation of the goods themselves; indeed, other provisions do just that. Finally, the 2007 Harmonized System (implemented under the Harmonized System Convention, to which China has been a party since 1993) makes clear that unfinished AVHE products and unfinished sound recordings are goods.

4.311 China's tariff schedule addresses these items in HS heading 8524. The term "unfinished AVHE products" is intended to capture master copies of *inter alia* videocassettes, VCDs, and DVDs to be used to publish and manufacture copies for sale in China. These products would be covered by the broad description for HS heading 8524 because these master copies are "records, tapes and other recorded media for sound or other similarly recorded phenomena."

4.312 Similarly, the term sound recordings as used by the United States covers *inter alia* recorded audio tapes, records, and audio CDs. The United States considers that "unfinished sound recordings" are master copies of sound recordings, such as master recording discs, to be reproduced and sold in China. These master recording discs fit within the scope of the description, "records, tapes and other recorded media for sound or other similarly recorded phenomena." Accordingly, these items are treated as goods in China's own customs regime.

4.313 China concedes that it does charge customs duties for "hard-copy audiovisual product (including sound recordings) intended for publication." Moreover, Article 2 of the *Audiovisual Products Importation Rule* defines "audiovisual products" as "audio tapes, video tapes, records, and audio and video CDs which have recorded content." The measure then cross-references the HS codes for these "products," included in Annex 1 to the measure. The CPC also classifies "recorded media for sound or other similarly recorded phenomena" other than films under goods subclass 47520.

(b) China's measures are not justified under its right to regulate trade in a manner consistent with the WTO Agreement or Article XX(a) of the GATT 1994

4.314 With respect to the remaining products at issue – i.e., reading materials, finished AVHE products, and finished sound recordings – China concedes that it places limitations on its trading rights commitments, but contends that these limitations are justified. China submits that its right to regulate trade in a manner consistent with the WTO Agreement permits restrictions on its trading rights commitments that are consistent with Article XX of the GATT 1994. China, however, has failed to sustain its arguments with respect to the right to regulate and Article XX.

4.315 Contrary to China's reading of the first clause of paragraph 5.1 of its Accession Protocol, the right to regulate trade in a manner consistent with the WTO Agreement applies to measures regulating goods that are traded, and not to measures regulating whole categories of traders engaged in the importation of goods.

4.316 During China's accession negotiations, WTO Members agreed to specific limitations on China's trading rights commitments with respect to a set of listed goods. That is, only state trading enterprises are allowed to import the goods enumerated in Annex 2A1 and only designated importers were permitted to import the goods enumerated in Annex 2B until December 2004. China did not list the goods at issue in this dispute in either Annex, and China's trading rights commitments do not authorize China to add to these limitations after accession. Interpreting the first clause of paragraph 5.1 concerning the right to regulate trade as justifying the measures at issue would render Annexes 2A and 2B redundant.

4.317 China further contends that the measures at issue are justified by Article XX(a) of the GATT 1994 and that they are applied in a manner consistent with the chapeau of Article XX. As a threshold matter, it is not necessary to determine whether Article XX applies to China's commitments contained in the Accession Protocol and Working Party Report. When faced with a similar situation in *US – Shrimp(Thailand)/US – Customs Bond Directive*, the Appellate Body examined the measure at issue on an *arguendo* basis, and after finding this measure did not satisfy the requirements of Article XX, concluded that it did not need to express a view on the question of whether Article XX is available as an affirmative defence for a measure found to be inconsistent with the Anti-Dumping Agreement. Similarly, China's measures reside well outside of the parameters of Article XX(a), and their application fails to meet the requirements contained in the chapeau of Article XX.

4.318 Without prejudice to whether Article XX applies to China's commitments contained in the Accession Protocol and Working Party Report, China has not met its burden to establish that the measures at issue satisfy this exception.

4.319 The trading rights prohibitions found in China's measures are not "necessary" within the meaning of Article XX(a). As the Appellate Body has explained, "a 'necessary measure is ... located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'." China has failed to establish a nexus between prohibiting all foreign importers and all privately-owned Chinese importers from importing the goods at issue and achieving its content review goals. Restricting trading rights to only a single, or a select few, Chinese state-owned importers is nowhere near "indispensable" to content review, and thus the restrictions on trading rights are not "necessary" under Article XX(a).

4.320 The Appellate Body has also not found a measure to be necessary where there is a "reasonably available WTO-consistent alternative". In this dispute, China has numerous alternatives to achieve its content review objectives that do not restrict the right to import. For example, foreign-invested enterprises could conduct the content review of reading materials, AVHE products, sound recordings and films for theatrical release, after developing the expertise to do so by training existing personnel or hiring experts as employees to conduct such review.

4.321 Moreover, China fails to show that the application of challenged measures is consistent with the chapeau of Article XX. China contends that "the administrative authorities (GAPP and MOC) need to make certain that the importation entities are able to participate effectively and efficiently in the content review process. This can only be achieved through a selection process". Indeed, the selection process produces results that are both arbitrarily and unjustifiably discriminatory and a disguised restriction on trade.

4.322 First, China's selection criteria in fact go well beyond the four factors China cited in its first written submission. China a priori requires applicants who want to engage in the importation/content review process for these products to be wholly state-owned enterprises.

4.323 Second, China's actual process for selecting import entities for these products involves a number of non-transparent, entirely discretionary Chinese government decisions that also contribute to the discriminatory application of this regime. To be successful, applicants subject to China's approval process must meet the requirements of a "State plan for the total number, structure and distribution of" importers. When the Panel asked China what the State plan is, China provided no insights (other than to say that it is not available in written form).

4.324 Further, China imposes a completely discretionary "designation" process to select importers of most of the products, and in some cases, this process entirely supersedes the "approval" process based on the four selection criteria that China described. Only importers of books and electronic publications are simply "approved" by GAPP. Finally, China's contention that domestic producers of the goods at issue are subject to content review requirements comparable to those applied to importers is inaccurate for several reasons, and is, moreover, besides the point in a trading rights claim.

3. China's measures regarding distribution services are inconsistent with China's obligations under the GATS

4.325 Despite China's market access and national treatment commitments in the distribution services and audiovisual services sectors of its Services Schedule, China imposes discriminatory prohibitions and requirements on foreign service suppliers seeking to engage in the distribution of reading materials, AVHE products, and sound recordings. These measures are inconsistent with China's obligations contained in Articles XVI and XVII of the GATS.

(a) Reading materials

4.326 China imposes discriminatory prohibitions and requirements on foreign-invested reading material wholesalers that modify the conditions of competition in favour of wholly Chinese-owned reading material wholesalers.

(i) Discriminatory prohibitions

4.327 China prohibits foreign-invested enterprises from engaging in four types of reading materials distribution: (1) distribution of imported newspapers and periodicals, as well as imported books and electronic publications in the limited distribution category; (2) distribution of imported books and electronic publications in the non-limited distribution category; (3) master distribution of books, newspapers, and periodicals; and (4) master wholesale and wholesale of electronic publications.

4.328 First, China prohibits foreign-invested enterprises from wholesaling imported newspapers and periodicals, as well as imported books and electronic publications in the "limited distribution category". China's measures at issue do not fall within the terms, limitations, conditions or qualifications on market access or national treatment that China has specified in its Services Schedule. Accordingly, the measures at issue are inconsistent with China's obligations under Article XVII. China does not contest this US claim.

4.329 Second, China denies foreign-invested enterprises the right to engage in the wholesaling of imported books and electronic publications in the "non-limited distribution category". As the United States has explained, and China has confirmed, the *Publications (Sub-)Distribution Rule* ". . . makes clear that only books [, newspapers and periodicals] published in China are eligible for distribution by FIEs." China's prohibition is, therefore, inconsistent with China's obligations under Article XVII. Again, China does not contest this US claim.

4.330 Third, China also prohibits foreign-invested enterprises from engaging in the master distribution of all books, newspapers and periodicals, whether imported or domestic. Master distribution falls within the meaning of "distribution services" under Annex 2 to China's Services Schedule, and is covered by China's commitments under Sector 4 of its Services Schedule. Accordingly, China's measures are inconsistent with China's market access and national treatment commitments inscribed under mode 3 of Sector 4 of its Services Schedule.

4.331 China itself concedes that master distribution is a type of distribution service. Indeed, according to Annex 2 of China's Services Schedule, the "principal service" involved in a distribution service that falls under Sector 4 is "reselling merchandise". As China has explained, master distributors, when they are separate entities from publishers, themselves sell reading materials, and are not agents of publishers. This of course means that master distributors are reselling reading materials purchased from publishers through an initial sale.

4.332 China's contention that it did not intend to include master distribution within its distribution services commitments is also unpersuasive. If indeed it was China's intention to exclude master distribution from its distribution services commitments in Sector 4 of its Services Schedule, it should have done so with a limitation to the effect. China inscribed no such limitation with respect to master distribution under Sector 4.

4.333 Master distribution includes wholesaling. China itself has stated that master distribution is synonymous with "master wholesale". Moreover, China has confirmed that master distribution involves specific services that qualify as "wholesaling" as defined in Annex 2 of China's Services Schedule. Annex 2 provides: "wholesaling consists 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." China has already explained that master distributors engage in the sale of reading materials to industrial, commercial, institutional and other professional business users. China's measures also make clear that master distributors can also resell reading materials to "other wholesalers", as provided for in the definition of "wholesaling" in Annex 2.

4.334 Moreover, to the extent that master distribution also could be considered to involve retailing, master distribution is also covered by China's commitments under mode 3 of Sector 4C of China's Services Schedule. China has stated on numerous occasions that master distribution also involves retailing, including of primary and middle school textbooks.

4.335 Fourth, foreign-invested enterprises are also deprived of the right to engage in the master wholesale and wholesale of electronic publications. China responds that it has removed the prohibition on foreign-invested enterprises from engaging in the wholesale of electronic publications and has rendered the master wholesale of electronic publications obsolete. While the United States accepts that the *2008 Electronic Publications Regulation* repealed the *1997 Electronic Publications Regulation* in 2008, the former only addresses the production, publishing and importing of electronic publications and is wholly silent with respect to distribution (including wholesale and master wholesale).

4.336 According to China, the distribution of electronic publications is governed by the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule*. However, these measures also prohibit foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications. As China itself concedes that these two measures represent the complete set of rights granted to foreign-invested enterprises with respect to the distribution of electronic publications, those enterprises are only permitted to sub-distribute books, newspapers and periodicals published in China. The right of foreign-invested enterprises to master wholesale and wholesale electronic publications is not provided for in either measure.

4.337 The United States continues to seek a finding from the Panel with respect to the *1997 Electronic Publications Regulation* even though it has been repealed by the *2008 Electronic Publications Regulation*. Moreover, the United States seeks a finding with respect to the *Publications (Sub-)Distribution Rule* as it also prevents foreign-invested enterprises from master wholesaling and wholesaling electronic publications.

(ii) Discriminatory requirements

4.338 In the limited arena where foreign-invested enterprises may engage in reading material distribution – i.e., the sub-distribution of books, newspapers and periodicals published in China – China imposes numerous discriminatory requirements that deprive foreign-invested wholesalers of national treatment. China discriminates against foreign-invested wholesalers through requirements regarding: (1) operating terms; (2) registered capital; (3) pre-establishment legal compliance; (4) examination and approval; and (5) GAPP decision-making criteria.

4.339 Foreign-invested enterprises are limited to a 30-year operating term, while their wholly Chinese-owned competitors are free of any term limitations. This places foreign-invested wholesalers at a significant competitive disadvantage as their continued operations are subject to the discretion of government authorities, and because any extension of the operating term requires the agreement of all investors and all Board Directors, and must comply with the laws, regulations and policies on foreign investment. Under Chinese law, each of these parties holds a veto on extension and can use that leverage to extract concessions from the foreign-invested parties. China's contention that the term extension is "non-discretionary, automatic and simplified" is contradicted by Chinese law. In fact, four Chinese measures cited by China state explicitly that extension depends on approval by the examining authority.

4.340 China's registered capital requirement also modifies the conditions of competition in favour of wholly Chinese-owned sub-distributors of books, newspapers and periodicals. China does not contest that foreign-invested wholesalers of books, newspapers and periodicals published in China must have RMB 30 million in registered capital, while their wholly Chinese-owned competitors need only RMB 2 million. China argues, however, that this disparity does not result in less favourable treatment because foreign-invested enterprises can contribute their registered capital in instalments, while wholly Chinese-owned enterprises must contribute their registered capital prior to establishment. This argument fails, however, since wholly-Chinese owned enterprises are also permitted to contribute their registered capital in instalments.

4.341 China's discriminatory pre-establishment legal compliance requirement likewise accords further less favourable treatment to foreign-invested wholesalers than to domestic suppliers. Pursuant to this requirement, foreign-invested enterprises are prohibited from engaging in the wholesale distribution of books, newspapers and periodicals published in China if they have any record of legal non-compliance in the three years prior to their application to engage in such services. Wholly Chinese-owned wholesale distributors of reading materials, however, are not subject to this requirement. While China argues that a similar requirement is imposed on wholly Chinese-owned wholesalers of reading materials. – i.e. curbing domestic suppliers' freedom of action only for violations of one measure that result in "the administrative punishment of revocation of [the entity's] licence" – the requirement applicable to foreigners totally bars market entry for any "law or regulation violations" or "other bad offences".

4.342 Foreign-invested wholesalers also face a fundamentally discriminatory examination and approval process in order to enter this market. They must go through a six stage process that takes at least 90 days, whereas wholly Chinese-owned wholesalers are treated preferentially to a three stage process, which takes only 40 days. China contends that the MOFCOM approval process is non-discretionary, but the text of the *Publications (Sub-)Distribution Rule* belies this claim – i.e., no criteria or conditions govern how MOFCOM makes its approval decisions. China also argues unsuccessfully that its horizontal commitments inscribed in its Services Schedule preserve its right to maintain such discriminatory requirements. China's horizontal commitment, however, provides no such safe-harbour for its GATS-inconsistent examination and approval process. This inscription is a classic GATS Article XVI:2(e) limitation, restricting the types of entities through which a service supplier may supply a service.

4.343 Finally, GAPP's decision-making criteria for approving foreign-invested enterprises – which include friendliness, great capability, standardized management, advanced technologies and reliable foreign investment – modify the conditions of competition by subjecting foreign-invested applicants, but not wholly Chinese-owned applicants, to additional hurdles that must be overcome in order to enter the Chinese market place.

(b) AVHE products

4.344 China maintains several measures that are inconsistent with its market access and national treatment obligations for foreign-invested service distributors of AVHE products. These measures are therefore inconsistent with Article XVI:2(f) and Article XVII of the GATS.

(i) Article XVI

4.345 China's measures are inconsistent with Article XVI of the GATS because: (1) China made a market access commitment in its Services Schedule under mode 3 that Chinese-foreign contractual joint ventures would be permitted to engage in the distribution of AVHE products upon China's accession; (2) China did not inscribe any limitations on the participation of foreign capital with respect to Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products;

and (3) China's measures limit the participation of foreign capital in Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products.

4.346 China's contentions to the contrary fail to rebut the US claim. China does not even address the language in the *Foreign Investment Regulation* and the *Several Opinions* that directly supports the US position. China initially appears to concede the validity of the US interpretation of the *Catalogue* and the *Audiovisual (Sub-)Distribution Rule*, by stating that the relevant measures "provide that the Chinese party to a Sino-Foreign joint venture engaging in the wholesaling of audiovisual products must hold at least 51 per cent of the shares."

4.347 However, China then contends, contrary to the US description of these measures, that the measures actually regulate the "rate of distribution of profit and allocation of loss," not the level of participation of foreign equity in contractual joint ventures. Based on this assertion, China then states that Article XVI does not require Members to inscribe limitations with respect to profit and loss allocation in their services schedules. However, China does not provide any textual basis for its conclusion that the explicit limitations on the percentage of shares that the foreign party may hold should be construed instead as a limitation on the allocation of profit and loss between the parties to the joint venture.

(ii) Article XVII

4.348 China also fails to rebut the US claim that China maintains discriminatory requirements on Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products and that these discriminatory requirements are inconsistent with China's obligations under Article XVII of the GATS. China discriminates against foreign-invested distributors of AVHE products through requirements regarding: (1) equity participation limits; (2) operating term; (3) pre-establishment legal compliance; (4) examination and approval; and (5) decision-making criteria.

4.349 First, China provides discriminatory treatment to foreign service suppliers by requiring that the foreign party to a Chinese-foreign contractual joint venture hold no more than 49 per cent of the shares while the Chinese party can hold up to 100 per cent and no less than 51 per cent of the shares. China repeats its argument that the measures identified by the United States actually regulate the rate of allocation of profit and loss. The inability to hold a majority position in a joint venture severely disadvantages foreign suppliers by depriving them of important control over the operation of the AVHE product distribution venture, while Chinese suppliers do not face such a disadvantage. 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.

4.350 Second, China also requires that foreign-invested entities engaged in the distribution of AVHE products face a 15-year operating term while wholly Chinese-owned AVHE distributors are not subject to such a limitation. China does not dispute that foreign-invested entities are subject to a limitation on their operating term. Foreign-invested entities face greater uncertainty and cost in the continuity of their operations than wholly Chinese-owned entities. This operating term limitation also modifies conditions of competition to the detriment of the foreign-invested distributors because extension requires the agreement of all investors, all Board Directors and the laws, regulations and policies on foreign investment. Furthermore, extension is far from automatic and depends upon a new round of examination and approval, procedures under which government authorities have the authority to disapprove requests for extension.

4.351 Third, China also maintains discriminatory requirements with respect to pre-establishment legal compliance, which accord less favourable treatment to foreign-invested distributors than to like

domestic service suppliers. Although China raises certain procedural arguments with respect to these measures, China does not dispute that these measures provide for discriminatory treatment for foreign-invested enterprises in breach of Article XVII.

4.352 Fourth, China also accords less favourable treatment to foreign-invested entities than wholly Chinese-owned entities engaged in the distribution of audiovisual products by placing more administrative burdens on foreign-invested entities as it relates to the examination and approval process.

4.353 While China's horizontal commitments in its Services Schedule provide a definition of foreign-invested enterprises, those horizontal entries contain no language that qualifies or limits China's national treatment obligations. Nor does China's horizontal commitment provide any such safe-harbour for China's GATS-inconsistent examination and approval process. Indeed, as China itself recognizes, this type of entry fits within the scope of the market access provision of Article XVI:2(e) of the GATS. China's argument that the laws and regulations governing the approval process were in place at the time of China's accession is also unavailing as the relevant question is whether China currently maintains any measures that are inconsistent with China's GATS obligations.

4.354 China also disputes certain aspects of the approval process as set forth by the United States for Chinese-foreign contractual joint ventures engaged in the distribution of AVHE products. However, what China's argument betrays is that foreign-invested distributors face a more burdensome process for becoming an approved entity than wholly Chinese-owned entities. China also contends that the measures do not modify the conditions of competition to the detriment of foreign services or service suppliers. However, Article XVII:3 contains no safe-harbour for discriminatory measures that only modify the conditions of competition in favour of domestic entities by a supposedly small amount.

4.355 Fifth, China also requires that the relevant authorities, in approving applications from foreign-invested joint ventures, give priority to foreign-invested enterprises displaying the friendliness, capital strength, management standardization, and technological advancement of foreign-invested applicants in making their determinations. These additional conditions are only imposed on the approval process for foreign-invested entities and are not applicable to wholly Chinese-owned entities. China has elected not to advance substantive arguments with respect to these discriminatory requirements.

(c) Sound recordings

4.356 China has failed to establish that the electronic distribution of sound recordings is beyond the scope of its services commitments for sound recording distribution services. In Sector 2D of its Services Schedule, China scheduled no market access or national treatment limitations under mode 3 for Chinese-foreign contractual joint ventures engaged in sound recording distribution services. However, China maintains several measures that accord less favourable treatment to foreign-invested entities engaged in the electronic distribution of sound recordings. By doing so, these measures are inconsistent with Article XVII of the GATS.

4.357 China does not address the US claims that the measures at issue treat foreign-invested enterprises differently from wholly Chinese-owned entities. Instead, China's defence to this claim rests on the argument that China did not undertake commitments in its Services Schedule with respect to the electronic distribution of sound recordings, but only with respect to distribution of hard-copy sound recordings. China's arguments are without merit.

4.358 First, an analysis of the term "sound recording distribution services" in China's Services Schedule under Articles 31 and 32 of the Vienna Convention on the Law of Treaties confirms that the

electronic distribution of sound recordings is within the scope of China's commitments. In particular, with respect to supplementary means of interpretation under Article 32 of the Vienna Convention, China has failed to establish that the electronic distribution of sound recordings was a "new" phenomenon at the time of its accession and thus beyond the scope of its commitments on sound recording distribution services.

4.359 Second, even if China were correct that it could not have been aware of electronic distribution of sound recordings as a commercial reality at the time of its WTO accession, China has failed to establish that the electronic distribution of sound recordings is more than a new means of supplying an existing service. China argues that the relevant question is not whether a service is "new" but rather whether it is "different" from services for which a Member has made commitments.

4.360 China goes on to argue that certain factors should be considered in determining whether a service is different. There is no textual basis in the GATS for the application of these factors to an analysis of the meaning of a Member's services commitment. In addition, the United States has set forth examples in previous submissions demonstrating the flaws in China's attempt to characterize the electronic distribution of sound recordings as different from distribution of sound recordings in hard-copy format.

4.361 China's proposed (but utterly non-textual) "criteria" fail to effectively distinguish among services, and thus these "criteria" fail to support China's argument. Indeed, many of China's arguments merely corroborate the conclusion that the electronic distribution of sound recordings is a different means of supplying sound recording distribution services, rather than an altogether different service. Since the electronic distribution of sound recordings is within the scope of China's sound recording distribution services commitments, China's measures according discriminatory treatment to foreign service suppliers of such services are inconsistent with Article XVII of the GATS.

4. China's measures regarding the internal sale, offering for sale, purchase, distribution and use of products are inconsistent with China's obligations under Article III:4 of the GATT 1994

4.362 China's measures governing the internal sale, offering for sale, purchase, distribution and use of imported reading materials, hard copies of imported sound recordings intended for electronic distribution, and imported films for theatrical release are inconsistent with Article III:4 of the GATT 1994.

(a) Reading materials

4.363 China treats imported reading materials less favourably than domestic reading materials. These measures: (1) confine most categories of imported reading materials to a single distribution channel; (2) impose onerous conditions on those seeking to obtain imported reading materials; and (3) strictly limit which enterprises are permitted to distribute imported reading materials. Domestic reading materials do not face these restrictions.

4.364 First, China requires all imported newspapers and periodicals, as well as imported books and electronic publications in the "limited distribution category", to be distributed only through a highly restrictive subscription regime. All other distribution channels are denied to these imported products. Domestic reading materials, however, can be distributed through subscription as well as through a wide variety of other distribution channels.

4.365 Second, China imposes higher burdens on those seeking to obtain imported reading materials, thereby treating imported reading materials less favourably than like domestic reading materials. Where imported and domestic reading materials are obtained through subscription, the requirements

imposed on subscribers of imported reading materials are more onerous, requiring examination and approval of the subscriber, which delays and possibly prevents the receipt of the imported reading material by the subscriber.

4.366 Third, China restricts all imported newspapers and periodicals, as well as imported books and electronic publications in the "limited distribution category", to distribution by Chinese wholly state-owned distributors. Similarly, China restricts all imported books and electronic publications in the "non-limited distribution category" to wholly Chinese-owned distributors. In contrast, domestic reading materials can be distributed by a wide array of distributors that are best suited to the particular needs of the reading material in question. China has not provided any substantive arguments challenging this third aspect of the US claim.

4.367 China contends that restricting these imported reading materials to distribution through subscription is non-discriminatory, because the "limited distribution category" includes reading materials with prohibited content used by certain government agencies and institutions for research purposes.

4.368 However, China provides no support for its assertion that the "limited distribution category" consists of reading materials with prohibited content. In fact, China's proposed interpretation is inconsistent with Chinese law, which makes distributing prohibited content in China illegal. China also argues that the use of the term "entity" in the relevant measure supports its assertion that only government agencies and institutions are permitted to subscribe to reading materials in the "limited distribution category". China's interpretation of "entity" would mean that government agencies and institutions are the only wholly Chinese-owned entities permitted to obtain imported newspapers and periodicals in the "non-limited distribution category". China's newly minted defence would render China's subscription regime for imported reading materials more, rather than less, discriminatory.

4.369 China also argues that newspapers and periodicals in the "non-limited distribution category" are subject to "quasi-automatic subscription" with "no rejection of applications" and "without the involvement of state agencies". Despite this contention, China's argument conflicts with the express provisions of its own law. In addition, China fails to address the fact that imported newspapers and periodicals in the "non-limited distribution category" are only available to consumers through subscription, while domestic newspapers and periodicals are available through a myriad of channels.

(b) Sound recordings

4.370 China has failed to rebut the US claim under Article III:4 of the GATT 1994 relating to imports of sound recordings intended for electronic distribution. Contrary to China's obligations under Article III:4, China's measures impose a more onerous content-review regime on imports of sound recordings intended for electronic distribution than for domestic sound recordings.

4.371 First, China considers that the electronic distribution of sound recordings is not covered by the GATT 1994 because the GATT 1994 only covers trade in goods. In making this argument, China misunderstands the US claim, which only applies to measures affecting imported hard-copy media containing sound recordings that are intended for electronic distribution. The US claim does not include a challenge to any measure's treatment of services or service suppliers involved in the electronic distribution of sound recordings. Accordingly, China's discussion of the distinction between goods and services is not relevant to this claim.

4.372 China's statements regarding the nature of the products are likewise unavailing. The distribution of copyrighted materials – whether incorporated into hard-copy sound recordings sold in hard copy or distributed electronically – always involves one or more intellectual property rights with

respect to the copyrighted material. This fact does not demonstrate that the products and measures fall outside the purview of Article III of the GATT 1994.

4.373 China also asserts that the challenged measures are "border measures" at the importation stage and therefore do not "affect[]" the distribution of products that have already been imported. This assertion is erroneous and ignores the Ad Note to Article III of the GATT. In this case, the measures impose a content review regime on all sound recordings intended for electronic distribution. For imports, the content review procedures are administered upon importation. This does not transform the measures into measures to which Article III:4 is inapplicable.

4.374 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. Before distributing a sound recording electronically, the ICP or MCP must go through the delay and administrative burden of a content review process that the ICP or MCP need not go through for domestic like products. Accordingly, the relevant measures affect the "sale, offering for sale, purchase, distribution or use" of such products within the meaning of Article III:4.

(c) Films for theatrical release

4.375 China's regime for the sale, offering for sale, purchase, distribution or use of films for theatrical release likewise accords less favourable treatment to imported products within the meaning of Article III:4. China's measures provide that imported films can only be distributed by one of two state-controlled enterprises – China Film Group and Huaxia. Furthermore, commercial negotiations do not determine the terms of distribution or which of these two distributors will handle the imported film. Domestic films do not face these limitations.

4.376 China's principal argument with respect to the US claim under Article III:4 for films for theatrical release is that such items are not goods subject to the GATT 1994 disciplines. As set forth in the US first oral statement and above, China's contention that films are not goods is untenable. China also argues that films cannot be "distributed" within the meaning of Article III:4 because "distribution" is limited to the supply of goods to on-sellers or consumers. China's interpretation of the term "distribution" in Article III:4 is flawed. Accordingly, China has failed to establish that there is no distribution under the meaning of Article III:4.

4.377 China also argues that imported films for theatrical release are not subject to less favourable treatment. However, China's regime governing the distribution of films for theatrical release entails a number of significant disadvantages that accord imported films less favourable treatment than that accorded to domestic films.

4.378 While China contends that there is no mandatory duopoly for the distribution of imported films in China, it admits that only two entities are currently designated to distribute such films. Regardless of whether this duopoly is mandatory, it is discriminatory nonetheless. Further, China's contention that there is no mandatory duopoly does not withstand scrutiny. The *Film Distribution and Exhibition Rule* expressly provides for such a duopoly, and the *Domestic Film Distribution and Exhibition Rule* confirms that China Film Group and Huaxia are the only two distributors of imported films in China.

4.379 China further submits that the number of approved distributors of imported films is limited by SARFT because the number of films imported into China is limited. China's attempt to justify its actions by suggesting there is a reasonable correlation between the quantity of films imported into

China and the quantity of available distributors, however, only confirms that imported films receive less favourable treatment than that accorded to domestic films.

4.380 Even leaving aside the discriminatory nature of the actual distribution ratios, China cannot justify its limits on the number of distributors for imported films based on the limits China has imposed on the number of films imported into China. WTO Members are not permitted to provide less national treatment in the case of limited imports and more national treatment in the case of many imports. Article III:4 provides that each imported product must be accorded treatment no less favourable than that accorded to each domestic product.

4.381 China goes on to argue that the trade impact of its discriminatory distribution regime does not rise to the level of less favourable treatment under Article III:4. However, consistency with Article III:4 is not determined on the basis of outcomes or trade effects. Article III:4 protects opportunities, not outcomes. Limiting imported films to two distributors, which do not permit negotiation on key commercial terms, while domestic films have access to all available distributors on commercial terms, is a fundamental denial of equal opportunity.

4.382 In addition, Article III:4 does not allow Members to balance off less favourable treatment in one area with more favourable treatment in another area in order to achieve some kind of "net" national treatment. Thus, the fact that China asserts (again without any supporting evidence) that the payment of taxes and other costs by China Film Group or Huaxia may result in imported films receiving a higher per centage of total box office receipts, does not justify the discriminatory non-negotiable terms imposed on imported films by one of two distributors, while domestic films are free to choose among all distributors and negotiate their contracts as they wish.

4.383 Finally, China submits that China Film Group and Huaxia are only obligated to comply with China's screen quota and that these two distributors are not required to support domestic films in any other way. China proffers no evidence to substantiate this contention, and China's position does not withstand scrutiny. China's requirement that China Film Group and Huaxia actively support domestic films is not limited to complying with the screening quota, and include metrics for supporting domestic films that have no direct relationship with the screening quota.

5. China's measures regarding the internal sale, offering for sale, purchase, distribution and use of products are inconsistent with China's obligations under the Accession Protocol

4.384 For the reasons explained above and in previous US submissions, the relevant Chinese measures are inconsistent with Article III:4 of the GATT 1994. As a consequence, these measures are also inconsistent with paragraphs 5.1 and 1.2 of Part I the Accession Protocol with respect to imported reading materials, imported hard copies of sound recordings intended for electronic distribution, and imported films for theatrical release.

6. The Panel's terms of reference

4.385 China also objects to the inclusion of several of its measures, as well as one of the US claims, in the Panel's terms of reference. As explained in the US first oral statement and the US answers to the first set of Panel questions, China's objections are unavailing. For the reasons cited above and in previous US submissions, the United States respectfully requests that the Panel dismiss China's procedural objections and rule on these measures and this claim, which are all properly before the Panel and within its terms of reference.

7. Conclusion

4.386 The United States respectfully requests the Panel to find that China's measures at issue are inconsistent with China's obligations under the Accession Protocol, the GATS and the GATT 1994. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its obligations under the Accession Protocol, the GATS, and the GATT 1994.

F. SECOND WRITTEN SUBMISSION OF CHINA

1. Introduction

4.387 The claims made by the United States in this case are characterized by a persistent failure to recognize the unique nature of the cultural goods that are the subject of its claim, and a fundamental misinterpretation of the extent of the commitments made by China on its accession to the WTO.

4.388 In its first oral statement and in its answers to the Panel's questions, the United States, in attempting to further substantiate its claims in light of China's arguments, only succeeded in showing the weaknesses and flaws inherent in its claims.

4.389 China respectfully asks the Panel to take particular note of instances where the United States has changed the subject of its case and is pursuing different claims from those originally set out in its panel request. This is particularly true for the following:

(a) With respect to the US claim concerning trading rights and distribution opportunities for motion pictures for theatrical release, the United States has tried to move its target from motion pictures for theatrical release to cinematographic films;

(b) With respect to the US claim concerning distribution opportunities for sound recordings and motion pictures for theatrical release, the United States tries to change the basis of its claim in order to support its argument that the Chinese measures are inconsistent with Article III: 4 of the GATT.

4.390 Despite this manoeuvring, the United States fails to rebut China's contentions that (i) the claims concerning trading rights and distribution opportunities for motion pictures for theatrical release relate to measures regulating trade in services and (ii) the Chinese measures relating to sound recordings and motion pictures for theatrical release do not affect the distribution of goods within the meaning of Article III: 4 of the GATT.

4.391 With respect to the US claim concerning distribution services for sound recordings, China reiterates that "sound recording distribution services" in China's GATS Schedule only covers the distribution of sound recording in physical form, and not network music services, which is a distinct service.

4.392 Concerning China's justification of the measures required to implement its content review system, China maintains that it is entitled to put in place a system designed to ensure the rigorous exclusion of all cultural content that would have a negative impact on public morals and will demonstrate that the United States has failed to meet its burden of proof in establishing that any WTO-consistent alternative was reasonably available to China.

4.393 With respect to the terms of reference of the Panel, China will demonstrate that the "catch-all" approach developed by the United States is inconsistent with the requirements of Article 6.2 of the DSU.

2. Terms of reference

4.394 The United States, in its first oral statement and in its answers to the Panel's questions, tries to justify the inclusion of claims which China believes to be beyond the scope of the Panel's terms of reference, based on the following arguments:

(a) For measures which the United States has failed to mention in its panel request, the United States contends that such measures were properly identified, because they have the same effect as measures which it had identified in its panel request;

(b) It also argues, with regard to these measures allegedly "identified by their effects", that they were included in the panel request because they fell within the category of so-called "related" or "implementing" measures as mentioned in the panel request;

(c) With respect to the "discriminatory requirements" and "different distribution opportunities" which the United States fails to mention in its panel request, it now seeks to suggest that they were properly brought before the Panel simply because it mentioned the relevant measures and WTO obligations alleged to be breached in the panel request.

4.395 However, China considers that these arguments by the United States are not consistent with the requirements set out in Article 6.2 of the DSU and are without merit.

4.396 At the outset, it should be underlined that the Appellate Body ruled that, when faced with an issue relating to the scope of its terms of reference, a panel must "scrutinize carefully the request for establishment of a panel to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU".

4.397 In this regard, it should be recalled that the Appellate Body has consistently held that Article 6.2 of the DSU imposes "requirements of precision" in the request for the establishment of a panel, which serve the due process objective of putting the other parties sufficiently on notice that "specific measures" are going to be challenged, and on what legal basis.

4.398 Although the United States had consulted extensively with China about and had explicitly identified those measures at issue in certain sections of its panel request, it nevertheless failed to identify them in other sections in the same panel request. China and other parties should not reasonably be expected to have noticed from the US panel request that these measures would be challenged also in relation to other claims.

4.399 Following the same logic, the United States also fails to identify explicitly all "discriminatory requirements" and "different distribution opportunities" that it seeks to challenge under the relevant measures and unreasonably expects China and other parties to have had sufficient notice that the United States may target any other "requirements" and "opportunities" when it deems appropriate to do so at a later stage.

4.400 With respect to the measures allegedly identified by their effects, China submits that describing the alleged effects of a measure does not amount to "identifying the specific measure" and does not satisfy the "requirement of precision". Indeed, following the US approach would (i) entail that the complaining party may smuggle into the terms of reference any measure not previously identified by alleging that it shares the same effects as a measure originally identified in its panel request and (ii) place on the responding party the burden of establishing which measures may have such challenged effects, whereas it is precisely disputing that its measures have such alleged effects.

4.401 With respect to the US argument that these measures allegedly "identified by their effects were included in the panel request merely because they fell within the category of so-called "related" or "implementing" measures, China submits that this "catch-all" approach would minimize unreasonably the burden of the complaining party and prejudice China's due process right to be sufficiently informed of the measures which are challenged by the United States.

4.402 Finally, with respect to the US suggestion that "discriminatory requirements" and "different distribution opportunities" were properly brought before the Panel by virtue of the fact that there are complaints made in relation to measures mentioned in the panel request, is not supported by the wording of Article 6.2 or by past WTO practice. First, as held by the Appellate Body in *Japan – Film* and *US – Carbon Steel*, the mere reference to regulations in the panel request does not imply that each and every aspect of these regulations has been challenged. Secondly, China submits that Article 6.2 of the DSU requires the complaining party to identify the basis of its complaint by identifying the issues that arise in relation to particular regulations. Therefore, the mere reference to a regulation in the panel request without putting it in relation with the legal issue does not satisfy the "requirement of precision" and does not respect the "letter and the spirit of Article 6.2 of the DSU".

4.403 It follows that the United States is attempting to extend the scope of the dispute in a manner inconsistent with the due process requirements of Article 6.2 of the DSU. China thus respectfully requests the Panel to dismiss the US attempt to include them at this late stage, and its underlying arguments.

3. Trading rights

(a) Motion pictures for theatrical release

(i) The United States should not be permitted to change the subject of its claim

4.404 In its panel request and in its first written submission, the United States made its claim with regard to trading rights for "film for theatrical release". By contrast, in its first oral statement and its answers to the Panel's questions, the United States has moved its target towards "cinematographic film".

4.405 In doing so, the United States, in an attempt to identify a good which could justify scrutinizing the Chinese measures under the WTO disciplines on goods, tries to play with the ambiguity of the term "film" in order to change the object of its claim.

4.406 The term "film" has a dual meaning as it can refer either to an artistic work or to a material on which this artistic work may be recorded. This dual meaning of the term "film" explains why two different concepts are used in international classifications, in order to distinguish the artistic work on the one hand, and the material on the other hand. These two concepts are "motion pictures for theatrical release" (referring to the artistic work) and "cinematographic film", (referring to the material).

4.407 In line with these international classifications, the Chinese measures at issue also make a clear distinction between "motion pictures for theatrical release" and "cinematographic film", and clearly specify that they apply to the former.

4.408 Therefore, the Chinese measures relate to the importation of motion pictures, not to the importation of cinematographic film as such, i.e. the material.

4.409 In view of the above, it appears that the United States, by using the unusual term "film for theatrical release" in its panel request and its first written submission and by subsequently shifting to

"cinematographic film", attempts to play with the dual meaning of the term "film" and to blur the distinction between "motion pictures for theatrical release" and "cinematograph films".

4.410 However, despite such manoeuvring by the United States in order to bring the Chinese measures concerning motion pictures for theatrical release under the WTO disciplines on goods, it is clear that motion pictures for theatrical release cannot be considered as equating to cinematographic films since the terms describe different concepts, and since motion pictures for theatrical release may be transmitted without a cinematographic film, and are intended only for public shows in theatres.

4.411 Furthermore, the US attempt in its answers to the Panel's questions to further switch the subject of its claim from "cinematographic film" to "hard-copy" cinematographic films is fruitless since cinematographic film is always in hard-copy.

4.412 The United States' newly described claim in respect of cinematographic film or hard-copy cinematographic film should not be found to fall under the terms of reference of the Panel. In these circumstances, the United States no longer pursues the establishment of a prima facie case with regard to its claim about films for theatrical release, which should therefore be dismissed.

(ii) The Chinese measures should only be scrutinized under the GATS, not under WTO disciplines on goods

4.413 First, it must be underlined that the Chinese measures regulate the services involved in the exploitation of motion pictures for theatrical release. They regulate the importation of motion pictures as part of the supply of such services. Thus, the Chinese measures relate to trade in services, not trade in goods.

4.414 These Chinese measures only affect cinematographic film as an accessory to the services related to the exploitation of motion pictures for theatrical release, and therefore cannot be scrutinized under WTO disciplines on goods.

4.415 Contrary to what the United States and some third parties have argued, the mere existence of goods used in relation to an activity cannot in itself justify the application of WTO disciplines on goods to measures affecting such activity.

4.416 Indeed, the WTO jurisprudence indicates that: (i) a measure affecting the supply of services and involving goods could fall under the GATS exclusively, the GATT exclusively or both; and (ii) whether the GATS, the GATT or both should apply is to be determined on a case by case basis.

4.417 China submits that a measure regulating the supply of a service, although it may have an impact on a good which is only an accessory to that service, should be scrutinized under the disciplines on trade in services only.

4.418 Cinematographic film should be treated as an accessory to the services related to the exploitation of motion pictures. This accessory nature of cinematographic film is characterized by the following aspects:

(a) It is not in itself an object traded in its own right;

(b) The exploitation of motion pictures for theatrical release through a series of services does not require a transfer of ownership of cinematographic film;

(c) The supply of the cinematographic film is part of the provision of the services of exploitation of motion pictures for theatrical release and cannot be considered independently from these services;

(d) It has no own commercial value in the context of exploitation of motion pictures for theatrical release, and does not generate revenue other than the revenue arising from the supply of these services.

4.419 It is not possible to consider that the Chinese measures affect cinematographic film independently of the regulation of the services related to the exploitation of motion pictures for theatrical release. The right to import cinematographic film exists only as a logical outcome of the right to import a motion picture for theatrical release. Therefore, the Chinese measures should be examined only under the GATS.

4.420 Contrary to what the United States asserts, the fact that Article IV of the GATT deals with cinematographic films does not invalidate this conclusion.

4.421 Article IV of the GATT, which deals with screen quotas, relates to trade in services, as recognized by the GATT Secretariat. Furthermore, Article IV contains disciplines on certain measures regulating services related to the exploitation of motion pictures for theatrical release since the purpose of screen time limitations is to reserve a certain exhibition time for domestic motion pictures for theatrical release, that is the artistic work, and not for the cinematographic film *per se*.

4.422 Consequently, Article IV of the GATT does not support the applicability of the WTO disciplines applicable to goods to the Chinese measures.

4.423 Moreover, an examination of the relevant measures under rules governing trade in goods would lead to an incoherent interpretation of China's WTO commitments.

4.424 China has not made any commitment under the GATS in respect of motion picture distribution services. China's additional commitment in sector 2D, whereby China allows the importation of a limited number of motion pictures for theatrical release on a revenue-sharing basis, is subject to "compliance with China's regulations on the administration of films". This indicates that China has reserved the right to maintain its regulatory framework governing the administration of films, which includes the ability to maintain a designation system for the importation of motion pictures for theatrical release.

4.425 China's commitments represent a single set of rights and obligations, so that the trading rights commitment under its Accession Protocol and its GATS Schedule must be read as a coherent whole.

4.426 As consistently held by the Appellate Body, all applicable provisions of a treaty must be interpreted in a way that gives meaning to all of them, harmoniously. It follows that China's trading rights commitment under its Accession Protocol cannot be interpreted as covering the importation of motion pictures for theatrical release since it would undermine China's abovementioned reserved right.

(b) Reading materials and audiovisual products, including sound recordings

(i) China's right to invoke Article XX of the GATT *to justify limitations on trading rights*

4.427 The United States attempts to present China's right to regulate trade in a manner consistent with the WTO Agreement as a mere justification for a "wholesale carve out of the Products in dispute … from its trading rights commitments", risking the "elimination" of such commitments. In so doing,

it has not taken account of the fact that all words in paragraph 5.1 should be given their proper meaning.

4.428 In particular, both China's commitment with respect to the right to trade and China's reserved right to regulate trade in a manner consistent with the WTO Agreement should be given their respective full meanings in order to be interpreted correctly and to avoid diminishing China's rights and obligations, as required by Article 3.2 of the DSU.

4.429 The US argument is based on the erroneous assumption that respecting China's right to regulate trade would open the door to the exclusion of "entire categories of product at will" from the scope of its trading rights commitments, thus making Annexes 2A and 2B meaningless.

4.430 However, contrary to the US assertion, the "without prejudice" clause of paragraph 5.1 does not create a right to exclude products from the scope of China's trading rights commitments, but rather to adopt and maintain measures consistently with the WTO Agreement. It follows that the potential restrictions may only result from the application of other provisions of the WTO Agreement, which are implemented through measures which also meet all the relevant requirements set out in such provisions.

4.431 The "without prejudice clause" thus aims at providing the basis for a coherent reading between China's commitments, on the one hand, and China's reserved right to implement certain policy objective through the adoption of WTO consistent measures, on the other hand.

4.432 Indeed, China's trading rights commitments under paragraph 5.1 do not rule out the application of measures limiting such trading rights and their justification under the Article XX of the GATT. China's right to implement such restrictions or prohibitions as a way of protecting its public morals is unquestionable and fully covered by Article XX of the GATT. Thus, it is clear that in some circumstances, the achievement of this aim will necessarily imply the limitation of the right to import goods into China.

4.433 In the instant case, the United States is in fact complaining about the effects of a measure which is fully consistent with another provision of the WTO Agreement. To that extent, China submits that Article XX of the GATT is unarguably part of the WTO Agreement and is thus relevant in the context of paragraph 5.1 of China's Accession Protocol.

4.434 The reference to the WTO agreement in the "without prejudice" clause confirms the right to regulate trade in a manner consistent not only with the WTO Agreement itself, but also with any other agreements which are part of it (as is the GATT 1994). Also, the reference to the WTO Agreement in the context of paragraph 6.1 cannot have a different meaning from that in the context of paragraph 5.1, as alleged by the EC. In fact, what paragraph 6.1 implies is that in the context of the Accession Protocol, "WTO Agreement" refers to all agreements that are incorporated into the WTO Agreement and are an "integral part" of it.

4.435 Such an interpretation ensures a balance between China's rights deriving from its accession to the WTO, and other WTO Members' rights deriving from China's accession commitments. Thus, the obligation of China to conform to the requirements set out by the relevant provisions of the WTO Agreement, such as Article XX of the GATT, ensures that China will not exercise its right to regulate in a manner that would undermine other Members' rights.

4.436 To that extent, the "without prejudice" clause is comparable to the chapeau of Article XX of the GATT. It is also the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between China's right to regulate trade on the basis of other provisions of the WTO Agreement and China's trading rights commitments. To deny China the right to rely on

Article XX of the GATT would thus significantly affect the balance of rights and obligations reflected in the Accession Protocol to the detriment of China.

4.437 Finally, because the Marrakech Agreement itself does not contain any provisions which address the issue of measures adopted by Members with respect to the regulation of trade, it is difficult to see how a WTO Member could "regulate trade in a manner consistent with the WTO agreement" other than by reference to specific provisions of the various agreements which are an "integral part" of the WTO Agreement.

4.438 It follows that paragraph 5.1 of the Accession Protocol allows China to maintain measures which are justified under Article XX of the GATT and which may result in limitation on the right to trade.

(ii) The Chinese measures meet the requirements of Article XX of the GATT

4.439 Determination of whether a measure is necessary in the sense of Article XX of the GATT should be made through a process of weighing and balancing of a series of factors. Such a process begins with an assessment of the relative importance of the interests and values furthered by the challenged measure, before turning to the other factors, including the contribution of the measure to the realisation of the ends pursued and its restrictive impact on international trade.

4.440 China notes that it is not disputed by the United States and the third parties that the preservation of public morals is a crucial policy issue of primary importance for China.

4.441 China wishes to recall that WTO Members are free to set the level of protection or enforcement they see fit. In this respect, the level of protection sought by China is that of a complete prohibition within its territory of any cultural content that could, by colliding with the standards of right and wrong conduct specific to China, have a negative impact on public morals. In order to enforce such level of protection, it is necessary for China to review the content of all imported cultural goods.

4.442 China understands that what is disputed by the United States and the third parties is not China's right to perform a content review of all imported cultural goods, but the fact that such content review must be performed (i) at the importation stage, (ii) by the importation entities (iii) which can only be state-owned enterprises meeting certain criteria.

4.443 However, such aspects of the challenged measures are necessary to achieve the level of protection and enforcement sought by China.

4.444 China has already explained why and how the selection process permits the selection of entities fulfilling certain criteria which guarantee that the content review is performed in an effective and efficient manner that allows the achievement of the level of protection sought by China while not causing undue delay in the trade of cultural products.

4.445 In addition, China would like to highlight that achievement of the intended result requires not only that the content review is performed in an effective and efficient manner, but also requires the prevention of any possibility of circumvention of the content review in order to avoid any dissemination of unauthorized cultural contents, whether intentional or inadvertent.

4.446 In this respect, China considers that the content review of imported cultural products must be implemented at the importation stage, i.e. before any possible dissemination of their content. China has accordingly entrusted the importing entities with the task of performing the content review which also minimizes the risk of fraud or failure to present the imported cultural product for content review.

4.447 State-owned enterprises are entrusted with the content review not only because China considers that only state-owned enterprises should be called on to bear the cost of the review, which relates solely to the public interest, but also because they are the only entities considered to fulfil the necessary technical and organizational requirements, as set out in the relevant Chinese regulations.

4.448 With respect to the objectives pursued, China submits that no reasonable WTO-consistent alternatives are available.

4.449 The United States tries to invoke WTO-consistent alternatives consisting in the possibility that foreign-invested enterprises could conduct the content review before, during or after importation, through development of the expertise, training of existing personnel or hiring of experts or domestic Chinese entities. It attempts to find support for its proposal in the so-called "in-house" content review applicable to domestic publishers.

4.450 China recalls that, as held by the Appellate Body, any alternatives raised by the complaining party must be "reasonably available". The Appellate Body has made clear that an alternative measure is not reasonably available where (i) it is merely theoretical in nature, or (ii) it does not preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.

4.451 China submits that the United States has failed to present any reasonably available alternative meeting the Appellate Body's criteria.

4.452 The level of protection that China seeks to enforce cannot accommodate dissociation between the importation business and the performance of the content review. The content review must be performed at the importation stage, before any cultural product is imported into China's territory.

4.453 Foreign entities and individuals cannot carry out the content review. Foreign entities may not fully understand the concept of public morals as held by China. In addition, they are not registered in China according to China's laws and regulations, and cannot properly be held liable for any failure to prevent cultural goods with prohibited content being imported into China. It is impossible for the Chinese government to review and control the capacity of each importer registered in China to conduct the content review.

4.454 In light of these considerations, the alternatives raised by the United States are only theoretical.

4.455 The United States also refers to the possibility that foreign-invested enterprises could develop expertise for the content review concerning a particular product. This would be incompatible with the high level of protection sought by China, which requires the content review to be performed in a harmonized manner.

4.456 Training existing personnel or hiring experts would require the State to review and supervize the quality and standard of such training or experts' qualifications, which is impossible since the number of importers would be potentially unlimited. An effective and efficient content review mechanism cannot be accommodated with an excessively large number of entities, should the right to import be granted to each applicant.

4.457 Considering the high level of protection sought by China, the risks associated with the approach suggested by the United States and the extraordinary burden placed on China in order to attempt to implement it make such option theoretical in nature. Therefore, the alternative raised by the United States cannot be considered to be "reasonably available".

4.458 Further, China submits that hiring Chinese companies to perform the content review does not appear to be a practicable solution either. Having a different entity to conduct the importation and the content review respectively would result in undue delays in trade and/or lowering the efficiency and effectiveness of the content review.

4.459 Finally, China would like to stress that the in-house content review applicable to domestic publishers, as suggested by the United States, would not be of assistance in the case of imported products. China notes that the domestic publisher conducting an in-house content review under this regime can only be a wholly state-owned entity, the establishment of which requires approval by the competent government agency on the basis of its capability to conduct the content review.

4.460 Applying such a regime to a foreign publisher would require the publisher to carry out its own content review of its publication in the exporting country. This would require the relevant government agency to examine and supervise all such foreign publishers' capability of conducting content reviews based on Chinese standards. Such requirements clearly falls outside the jurisdiction of the Chinese authorities and would cause unacceptable costs or substantial technical difficulties. In addition, the foreign publishers, without a commercial presence in China, could not be held responsible in the case of violation of the content review requirements, which would undermine the effectiveness of the content review.

4.461 For all these reasons, the alternatives suggested by the United States do not constitute "reasonably available" alternatives. The United States has thus failed to meet its burden of proof that less trade restrictive, WTO-consistent alternatives are "reasonably available" to China.

4.462 Turning to the requirements of the chapeau, China submits that, in light of the above, the potential limitation on the number and type of entities that may be granted the right to import the products at stake is justified by its necessity in order to achieve the policy objectives pursued by China.

4.463 China submits that there is no arbitrary or unjustifiable discrimination between domestic and foreign enterprises. The United States appears to allege that discrimination would result from the different ways in which the content review is performed for domestic and imported products. However, China has shown that the United States' unfounded assertion in this regard is irrelevant since the subject of this dispute is not the content review system, but the selection of certain entities to import cultural products.

4.464 Further, there is also no discrimination between foreign and Chinese producers of reading materials and audiovisual products, including sound recordings, since the requirements laid down by the Chinese laws and regulations are equally applicable to both categories of companies.

4. Distribution services

(a) The United States has put forward contradictory definitions and aims to broaden the scope of the present dispute

4.465 China would like to emphasise that the United States attempts to either create confusion as to the product at stake or to broaden unduly the scope of the present dispute beyond its panel request.

4.466 First, the United States has adopted a confusing position with respect to the definition of "sound recordings" in the course of the present dispute. Indeed, it is apparently not willing to provide a consistent definition of the term, given that, depending on the legal issue at stake, sound recordings might sometimes be physical goods and sometimes intangible items as best serves its case.

4.467 Secondly, the United States is broadening the scope of the dispute beyond its panel request by switching from the concept of "digital distribution of sound recordings" to that of "electronic distribution of sound recordings".

4.468 China emphasizes that the measures at stake exclusively govern the supply of network music services over the Internet. Consequently, any attempt to include various other technical means in the scope of the present dispute should be dismissed.

(b) The scope of "sound recordings distribution services" in China's GATS schedule is limited to the distribution of sound recordings in physical form

4.469 In its first written submission, the United States alleges that China's commitments in relation to "sound recording distribution services" under Sector 2D cover what the United States has chosen to label "electronic distribution of sound recordings", properly "network music services" as described by China in its first written submission.

4.470 China reiterates that a proper interpretation of China's commitments in Sector 2D confirms that these commitments are limited to the distribution of sound recordings in physical form.

4.471 Since, as demonstrated by China, "distribution services" refers to the marketing and supply of goods and commodities, "sound recordings distribution services" does not cover the transmission of intangible content to users via the Internet.

4.472 This conclusion is further confirmed by the specific meaning that China attributes to the concept of "distribution services" in Annex 2 of its GATS Schedule.

4.473 China further notes that the Republic of Korea, in its answers to the Panel's questions, submitted that its commitment on "record production and distribution services (Sound Recordings)" in Sector 2D of its GATS Schedule only covers the production and distribution of sound recordings in physical form.

4.474 Finally, the only examples put forward by the United States concerning the reality of online music business at the time of China's accession to the WTO relate to unauthorized download offers.

(c) Network music services are distinct from the distribution of sound recordings in physical form

4.475 The US assertion that network music services are covered by China's commitment on "sound recording distribution services" is based on the assumption that dissemination of music in digital format through the Internet is a mere "means of delivery" of the "sound recording distribution services".

4.476 The United states relies on the so-called principle of "technological neutrality", according to which the GATS does not limit the technologically possible means of delivery of a service, to claim that since China has not imposed any limitations as regards the means of delivery of the relevant committed service, its commitment also applies to the so-called "electronic distribution of sound recordings".

4.477 At the outset, China would like to recall that the principle of "technological neutrality" is still under consideration among Members and that the interpretation of this principle provided by the Panel in *US – Gambling* has not been confirmed by the Appellate Body. In addition, following the US logic would conflict with the principles of the GATS, including the "positive list approach" and

the "request/offer approach", by introducing new services into a Member's GATS Schedule without going through any negotiation process.

4.478 Turning to the question of whether dissemination of music through the Internet would be a simple "means of delivery" of "sound recording distribution services", China submits that the so-called principle of technological neutrality is irrelevant in the present dispute since network music service is not merely adopting a new technological "means of delivery" to deliver sound recording services.

4.479 In the present dispute, China would like to submit that the following factors clearly demonstrate that the network music service is a service which significantly differs from the sound recording distribution service.

(i) Operational characteristics

4.480 First, one should focus on the operational characteristics of the relevant services when distinguishing one service from another, that is, the economic activities that the supply of the service requires.

4.481 Network music services, on the one hand, and sound recording distribution services (as committed by China), on the other hand, do not share the same operational characteristics. The traditional sound recording distribution business involves distribution networks, which handle the distribution, marketing and sales of the sound recordings. It requires the establishment of a logistical infrastructure ensuring the usual activities associated with trade, *inter alia* sorting and assembling of goods, packing, breaking bulk, repacking in smaller lots, storage, shipment, and the managing of sale outlets.

4.482 The structure of network music services differs significantly from the traditional physical distribution of sound recordings. The supply of network music services is at present exclusively operated via the Internet, and requires, not the establishment of a commodity distribution infrastructure, but a robust hosting and aggregation infrastructure. Further, it requires a range of support technologies.

4.483 Differences in the constraints applicable to both activities are further reflected by the different skills required to carry out these distinct activities. While for traditional distribution, chain and supply managers, salespersons, etc. are required, network music services rely on IT specialists to operate their systems.

4.484 All of the above matters demonstrate that there are significant intrinsic differences between distribution of sound recordings in physical form and network music services.

(ii) End-uses and consumers' perceptions

4.485 Whether two services share the same characteristics may further be assessed against their end-uses and consumers' perception of them. This criterion reflects the function of the service from the consumers' perspective, that is, the benefit that the consumer derives from the service being supplied.

4.486 Distribution of sound recordings in physical form and network music services do not perform the same functions from the consumers' perspective. The essential function of sound recording distribution services is the acquisition of certain physical goods such as CDs, cassette tapes etc., while the essential function of network music services is the acquisition - at any time and from anywhere - of certain intangible data which can be decoded with a computer or other device to play music works.

(iii) International classifications

4.487 Finally, the fact that network music services are a separate and distinct service from sound recording distribution services as described in China's first written submission is further evidenced by the draft of CPC Ver.2, which is currently under negotiation.

4.488 Indeed, the draft of the revised CPC identifies two separate and distinct categories of services, namely (i) musical audio download and streamed audio content; and (ii) distributive services related to goods containing recorded music, which correspond respectively to network music services and to traditional distribution of sound recording as described by China in its first written submission.

4.489 The fact that CPC Ver. 2 identifies two separate and distinct categories and classifies them in completely different sections clearly shows that they are by nature separate and distinct services.

4.490 It follows from all the above arguments that network music services and distribution of sound recording services are distinct and separate services. Accordingly, the US argument that China's commitment on "sound recording distribution services" covers network music services in the absence of a limitation concerning a specific means of delivery is based on the false assumption that network music services are a mere means of delivery and is therefore unfounded.

5. Product distribution

(a) Sound recordings

4.491 In its first written submission, the United States claims that the allegedly more burdensome content review requirements applied to hard-copies of imported sound recordings intended for electronic distribution are inconsistent with Article III:4 of the GATT 1994.

4.492 In the course of the present dispute, the United States has further asserted that Article III:4 of the GATT 1994 covers measures that may affect "a variety of elements in the chain from importation to consumption including sale, offering for sale, purchase, distribution or use" of a particular physical product.

4.493 Therefore, as these different "elements" correspond to different stages in the process of supply of the relevant product, they would necessarily all relate to the product as it was imported.

4.494 Considering that the imported product identified by the United States is a hard copy of sound recordings intended for digital distribution, the alleged "less favourable distribution opportunities" would then logically relate to the imported hard copies intended for electronic distribution.

4.495 However, what the United States is targeting in its panel request and its first written submission is what it calls the "electronic distribution of sound recordings".

4.496 The United States recognizes that the movement of the imported product (the hard copy) in the Chinese market stops at the moment it is acquired by the Internet Culture Provider.

4.497 By contrast, its content, which has been transferred by the Internet Culture Provider into a digital format and which is subject to the content review, is transmitted through the Internet.

4.498 Therefore, distribution allegedly affected by the content review requirements does not relate to the hard-copy, which is the good actually being imported, but to the digitalized content.

4.499 The formally different treatment identified by the United States does not affect the "distribution" of hard copies and can therefore not be scrutinized under Article III:4 of the GATT 1994. In fact, what the United States suggests should be compared is the allegedly different treatment applied to digitalized content.

4.500 Following the reasoning of the United States would entail major systemic implications, insofar as it would amount to applying rules on trade in goods to services provided over the Internet.

4.501 As already sufficiently demonstrated by China, the term "distribution" within the meaning of Article III: 4 of the GATT relates to physical products.

4.502 Further, China would like to comment on the erroneous interpretation of the term "distribution" in the context of Article III:4 of the GATT 1994 provided in the course of the proceeding by the United States and Japan. Contrary to what they argue, the use of the term "*inter alia*" by the Panel in *Canada – Wheat Exports and Grain Imports* does not suggest that the term "distribution" must be understood as having a broader meaning than the supply of goods, but merely indicates that the Panel, when referring to the dictionary in order to determine the ordinary meaning of "distribution", chose the economic definition from among others.

4.503 Faced with such obvious inconsistencies, the United States is attempting now to shift its ground in its claim from "distribution" of the hard copy to the "use" of the hard copy.

4.504 The Unites States' answers to the Panel's questions shows that it has abandoned its claim related to the distribution opportunities as put forward in its panel request for the simple reason that it cannot establish a prima facie case in this respect.

4.505 China is of the view that no provision in the DSU authorizes a complaining party to change the legal basis of its claim in its answers to the Panel's questions. Therefore, the United States' newly described claim should be dismissed.

(b) Motion pictures for theatrical release

4.506 As highlighted above, the United States, in the course of the proceedings, is attempting to change the subject of its claim from motion pictures for theatrical release to cinematographic film. The US claim about the distribution of cinematographic film is not within the scope of the terms of reference of the Panel and should not be examined by it.

4.507 As demonstrated by China, the distribution of motion pictures for theatrical release consists of services that do not involve the distribution of goods in the meaning of Article III:4 of the GATT 1994, which the United States has not tried to rebut. Even if the cinematographic film itself were to be considered under Article III: 4 of the GATT, *quod non*, it is not the imported cinematographic film which is "distributed".

4.508 As China has demonstrated in its first written submission, the Chinese measures regulate the distribution of motion pictures for theatrical release, not cinematographic film. Distribution of motion pictures for theatrical release, which consists in the provision of a service, cannot be characterized as distribution of goods in the meaning of Article III:4 of the GATT 1994 because it relates to the exploitation of an intangible artistic work through the organization of public shows and does not involve the supply of goods to consumers.

4.509 The United States is attempting to base its argument on the erroneous assumption that the Chinese measures regulate the distribution of cinematographic film. This erroneous assumption itself cannot support its claim under Article III: 4 of the GATT 1994.

4.510 The United States itself recognizes and describes in detail that imported cinematographic film is not the good being distributed by the motion picture distributor. The imported internegative or interpositive produced by the licensor is provided by the licensor to the distributor to produce in the laboratory the prints for distribution to local cinemas for theatrical exhibition of the film. The cinematographic film actually distributed is different from the film originally imported, save that they both carry the same motion picture.

4.511 Therefore, even if cinematographic film could be considered to be distributed in the meaning of Article III:4 of the GATT 1994, it would not be the imported cinematographic film which is "distributed".

6. Conclusion

4.512 For the reasons set out in this submission, China requests the Panel to reject the claims made by the United States.

G. ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Introduction

4.513 The United States will now present further views on the reasons why the Chinese measures at issue are inconsistent with China's obligations under the Accession Protocol, the GATS and the GATT 1994. Where China has endeavoured to rebut the US claims, it has fallen short, while other US claims have received no response. Likewise, China has failed to sustain its burden with respect to the defences it has raised.

2. Trading rights: films for theatrical release, unfinished AVHE products and unfinished sound recordings are goods subject to China's trading rights commitments

4.514 China's most recent attempt to claim that films for theatrical release are not goods merely restates China's previous unsuccessful arguments on this same issue. First, China's contention that the United States has shifted the focus of its claim is baseless. Throughout this dispute, the US claims have related to the product that the relevant Chinese measures regulate in a manner that is inconsistent with China's trading rights commitments. The US claims from the beginning have related to an integrated product that includes a carrier medium carrying content that can be commercially exploited by projection in a theatre.

4.515 China's attempt to artificially separate goods containing content from the content itself fails to overcome the US claims. Beginning with the text of the WTO Agreement, Article IV of the GATT 1994, an agreement relating to trade in goods, refers to the "exhibition of cinematographic films" in relation to screen quotas. The provision makes clear that when discussing the commercial exploitation of the artistic work in a theatre, the GATT 1994 uses the term "cinematographic film", not motion pictures. Article III:10 of the GATT 1994 provides an exception for films to the national treatment obligations set forth in the other paragraphs of Article III. The GATT's national treatment obligations apply only with respect to goods; thus, an exception to those obligations also applies only to goods.

4.516 In addition, China points to the language in the HS description of the product as referring to cinematographic film "for the projection of motion pictures." However, this language demonstrates that the Harmonized System contemplates a physical product with integrated content that may be commercially exploited in a particular way. This HS description does not take films out of the category of goods, but instead confirms that films containing content to be exploited are goods.

China's accession schedule of tariff concessions, incorporates the HS description of these products under heading 3706.

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

4.518 China also repeats its argument that because films are a mere accessory to a service, measures relating to importation should be analysed exclusively under the GATS, rather than the trading rights disciplines. China's reasoning is flawed and has been rejected by the Appellate Body. In a related argument, China asserts that a good that is an accessory to a service cannot be scrutinized under the WTO disciplines on goods. First, there is no textual basis in the WTO Agreement for China's assertion that a good used to provide a service is no longer a good. Similarly, China's proposed criteria for determining when a good is a mere accessory of a service have no textual basis in the GATT 1994 or the GATS and do not create a principled rationale for distinguishing among different kinds of goods.

4.519 In addition, China's repeated argument that the relevant measures regulate copyright licensing as opposed to the importation of films is without merit. While certain provisions of these measures may regulate copyright licensing, other provisions of these measures also regulate the importation of films. As the Appellate Body has made clear, a measure regulating both goods and services may be analysed under the goods and services disciplines.

4.520 China's attempt to use its services commitments with respect to motion pictures as a shield for its trading rights-inconsistent measures is meritless. These services commitments in no way "reserved [China's] right" to maintain measures that are inconsistent with its trading rights commitments – let alone the right "to maintain a designation system for the importation of motion pictures for theatrical release." The text of China's Services Schedule has no relevance to whether China's measures restricting who may import films are inconsistent with China's trading rights commitments.

4.521 With respect to unfinished AVHE products and unfinished sound recordings, China appears to have abandoned its contention that such products are not goods subject to its trading rights commitments. China's previous arguments in this regard are without merit.

3. Trading rights: China's measures regarding reading materials, finished AVHE products and finished sound recordings are not justified under its right to regulate trade in a manner consistent with the WTO Agreement or Article XX of the GATT 1994

4.522 Turning to reading materials, finished AVHE products and finished sound recordings, and China's affirmative defence to the US trading rights claims regarding them, China has failed to establish its prima facie case. China is unable to demonstrate that the measures at issue are justified by the first clause of paragraph 5.1 of its Accession Protocol or by Article XX of the GATT 1994.

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

4.524 The "right to regulate trade" clause applies to measures addressing the goods being traded, rather than the traders of those goods. As is clear from paragraph 84(b) of the Working Party Report, regulating the right to trade includes applying WTO-consistent requirements concerning import licensing, technical barriers to trade, and sanitary and phytosanitary measures. Thus, the right to regulate trade in a WTO-consistent manner is fundamentally different from the "right to regulate the right to trade in a manner consistent with the WTO Agreement." It is the "right to regulate the right to trade" that China seeks to read into paragraph 5.1 in order to justify depriving all foreign importers of the right to trade on the basis of national origin.

4.525 While the United States agrees with China's statement that the "right to regulate trade" clause is distinct from the exceptions contained in Annexes 2A and 2B, the United States does not agree with China's contention that both the "right to regulate trade" clause and Annexes 2A and 2B permit China to reserve certain products *per se* to state trading. Under China's expansive reading of the "right to regulate trade" clause, these Annexes would be rendered redundant. China argues that the "right to regulate trade" clause and Annexes 2A and 2B provide for different limitations on China's trading rights commitments. Yet, China also asserts that Annexes 2A and 2B subject goods to state trading, while the "right to regulate trade" clause also subjects goods to state trading.

4.526 While the United States does not concede its availability, China's Article XX defence is likewise without merit. China argues without success that denying all foreign importers and privately-held importers in China the right to import the products at issue is "necessary to protect public morals" based on the following four asserted requirements for its content review system: first, content review must be performed in association with importation; second, content review must be performed by importers; third, importers must be Chinese wholly state-owned enterprises as no other entities are capable of conducting content review; and fourth, content reviewing entities must be limited in number so that individual reviewers can be "examined and supervised" by the Chinese government.

4.527 The United States proposes several reasonably-available WTO-consistent alternatives. By training or hiring content review experts, foreign-invested enterprises could conduct the content review of the products they import. The Chinese Government could conduct the review of products imported by foreign-invested importers. Foreign-invested importers could also hire domestic Chinese entities with the appropriate expertise to perform the necessary review. While China contends that its four system requirements demonstrate that the WTO-consistent alternatives proposed by the United States are not practicable, China's own system as described to the Panel does not meet these requirements.

4.528 First, despite China's assertions that content review cannot be disassociated from importation, China's own system de-links these unrelated activities. Second, contrary to China's contentions, importers are not integral to the content review process. Third, reserving importation exclusively to Chinese wholly state-owned enterprises is also unnecessary. Content review in China is performed principally, if not exclusively, by the Chinese Government for imported products, and not by wholly state-owned enterprises. Fourth, the number of content reviewing entities does not need to be drastically limited as China suggests. The large number of content review entities for domestic products shows that it is not overly burdensome or too costly to "examine and supervise" the individual reviewers working at these entities to achieve China's desired level of enforcement. In sum, China's content review system differs substantially from a system meeting the four purported requirements described in its submissions. In fact, the only significant difference between China's system and the reasonably available WTO-consistent alternatives proposed by the United States is that China reserves importation to wholly state-owned enterprises.

4.529 Likewise, China's concerns regarding cost are addressed under the US proposals. Two of the US proposals – either having the foreign importers and privately held importers in China conduct

content review after obtaining the necessary expertise, or having these importers hire domestic entities with the appropriate expertise to conduct content review – would require minimal additional costs. These proposals essentially involve substituting foreign importers and privately held importers in China into the roles currently played by the state-owned importers. The third US proposal – having the Chinese Government conduct all content review – would also require minimal additional costs, as much of the content review of imported products is already performed by the Chinese Government, and the Chinese Government is already bearing the costs of these activities.

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

4.531 China's objections regarding its alleged inability to assert jurisdiction under the US proposals are unavailing. Under the US proposals in which the Chinese Government or enterprises in China are conducting content review, China's ability to assert jurisdiction is clear. China asserts that no entity would be willing to conduct content review on behalf of other entities because the responsibility and penalties involved are too great. This ignores China's arguments that state-owned enterprises are the only entities capable of reviewing products manufactured by other producers.

4.532 China has likewise failed to show that the application of its measures satisfies the requirements of the chapeau of Article XX. Instead, China simply directs the Panel to its arguments with respect to Article XX(a). However, even if a measure is "necessary", its application must also constitute neither a "means of arbitrary or unjustifiable discrimination" nor a "disguised restriction on international trade". The United States has demonstrated that China's measures fall far short of the chapeau's requirements.

4. Trade in services: China's services commitments cover the master distribution of reading materials

4.533 Exhibit US-99 illustrates the United States' rebuttal arguments regarding master distribution and its inclusion of "wholesaling" within the meaning of Annex 2 of China's Services Schedule.

5. Trade in services: China's services commitments cover the electronic distribution of sound recordings

4.534 With respect to the electronic distribution of sound recordings, China's measures accord less favourable treatment to foreign-invested entities engaged in the electronic distribution of sound recordings than to wholly Chinese-owned distributors, thereby contravening Article XVII of the GATS. China's principal defence rests on the argument that the electronic distribution of sound recordings is outside the scope of China's services commitments.

4.535 China unsuccessfully attempts to apply an analysis of the ordinary meaning of the relevant terms under the customary rules of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties. China's contention that the term "distribution" can only encompass distribution of goods is belied by the text of the GATS, which explicitly contemplates distribution of a service in Article XXVIII(b). China's reliance on Annex 2 of its Services Schedule is of little utility in explaining the meaning of the term "distribution" in Sector 2D of China's schedule.

4.536 With respect to supplementary means of interpretation under Article 32 of the Vienna Convention, China has failed to provide any support for its assertion that the electronic distribution of sound recordings was unknown at the time of its accession to the WTO. China ignores the considerable evidence adduced by the United States showing that the electronic distribution of sound recordings was known to China and other WTO Members before China joined the WTO.

4.537 As for China's contention that the "sole reality" abroad and in China was "unauthorized download offers", these assertions are contradicted by the evidence submitted in this dispute. China's assertion that it is unaware of the existence of the joint venture between the Chinese government and a Houston-based company to supply music online is also contradicted by the facts.

4.538 Even if China were correct that the electronic distribution of sound recordings was unknown at the time of its WTO accession, China fails to establish that the electronic distribution of sound recordings is a new service rather than a new means of supplying an existing service. China argues that the electronic distribution of sound recordings is an altogether new service from the distribution of sound recordings in hard-copy such that technological neutrality is not relevant. China has articulated certain criteria that it maintains should "be taken into consideration when distinguishing one service from another." However, there is no textual basis in the GATS for the application of these criteria to an analysis of a Member's services commitments.

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

4.540 With respect to the international classifications of services, China appears to take a contradictory position regarding the relevance of such classification instruments by relying on instruments that support its argument and dismissing those that are disadvantageous to its position. China claims that W/120 and the Provisional CPC are not binding on Members and have little utility in determining the meaning and scope of China's commitments. China also argues that the classification of "online audio content" in CPC Ver. 2 shows that the electronic distribution of sound recordings is distinct from other sound recording distribution services. This is in spite of the fact that CPC Ver. 2 is still in draft, is not the version of the CPC that was the basis for any of China's services commitments, and has not been accepted by WTO Members as relevant for Members' services commitments.

4.541 With respect to China's contention that the relevant measures only relate to the distribution of sound recordings over the Internet, and not through "other electromagnetic means," China refers only to one of the measures relevant to the US GATS claim on electronic distribution of sound recordings. However, Article I(1) of the *Network Music Opinions*, which China does not discuss, refers to the network music market as encompassing "music products transmitted through such wired or wireless media as the internet and mobile communications." Moreover, an interpretation of the *Network Music Opinions* posted on the Chinese Ministry of Culture's website states that in the *Network Music Opinions*, "music was defined for the first time, referring to music products as transmitted through the Internet, mobile communication network as well as other wired and wireless media ... ."

6. Trade in goods: China's measures regarding the internal sale, offering for sale, purchase, distribution and use of the products are inconsistent with Article III:4 of the GATT 1994

(a) Sound recordings intended for electronic distribution

4.542 China has also failed to rebut the US prima facie case that the measures regulating hard-copy sound recordings intended for electronic distribution accord less favourable treatment to imported products than to domestic like products in contravention of Article III:4 of the GATT 1994. China's first erroneous assertion is that the US claim relates to the treatment accorded to the electronic distribution of sound recordings. The US claim relates to China's less favourable treatment of imported hard-copy sound recordings intended for electronic distribution. China's discussion that an Article III:4 claim can only relate to a good, which must be a tangible item, is irrelevant.

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

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

4.545 In the case of hard-copy sound recordings intended for electronic distribution, the relevant measures affect the imported products within the meaning of Article III:4. Specifically, before the ICP or MCP can distribute an imported product electronically, it must submit the sound recording for content review, a requirement not faced by domestic sound recordings intended for electronic distribution. The fact that the hard-copy sound recording is converted after importation into a format that can be distributed electronically does not mean that the Chinese measures do not accord less favourable treatment to the imported products. The steps involved in moving the product from importation to the next stage (i.e., from importation to the ICP or MCP, then to the Ministry of Culture for content review, and then back to the ICP or MCP) are part of the distribution of the product. Accordingly, by imposing an administrative hurdle on only the imported products before the ICP or MCP can move the product further downstream, the relevant Chinese measures adversely affect the conditions of competition for the imported product.

4.546 In addition, a finding that a measure that accords less favourable treatment to imports does not "affect" the distribution of the product merely because there is further processing of the product downstream would undermine the discipline of Article III:4 by allowing a loophole in the national treatment obligation.

4.547 Finally, there is no basis for China's contention that the United States has changed its claim by showing that the relevant measures affect the use of the imported product, rather than the distribution. The US panel request provides, "[i]t thus appears that sound recordings imported into China in physical form are treated less favourably than sound recordings produced in China in physical form ... The measures at issue therefore appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994." As provided in Article 6.2 of the DSU, the panel request provides a brief summary of the legal basis sufficient to set forth the problem presented by the relevant measures clearly.

4.548 China also provided a discussion of its view of the translation of the relevant measures. The United States provides a response to China's arguments in Exhibit US-102. Through its discussion of the translations, China seeks to argue that Article 14(1) of the *Audiovisual Products Importation Rule* and Article 28 of the *2001 Audiovisual Products Regulation* relate to the import of audiovisual products rather than imported audiovisual products. China argues that these measures establish conditions for importation and are thus border measures. China's translation is unsupported by an analysis of the ordinary meaning of the relevant Chinese terms. Regardless of the translation issues, these measures are not border measures. Ad Note to Article III of the GATT 1994 makes clear that a regime that applies to both imported and domestic products is not a border measure because the measure is enforced at the border with respect to imports. As the GATT 1994 provides, the fact that the content review requirement is enforced at the border for imported product does not transform the measures into border measures.

(b) Films for theatrical release

4.549 China erroneously contends that the relevant measures do not affect the distribution of the relevant product within the meaning of Article III:4 of the GATT 1994. These measures restrict which entities may import films and which entities may distribute imported films. The term "affecting" in Article III:4 has been interpreted broadly to encompass "laws or regulations which might adversely modify the conditions of competition between domestic and imported products." The discriminatory treatment applicable to imported films adversely modifies the conditions of competition in favour of the domestic product because domestic films do not face the same limitations on their distribution opportunities as those faced by imported films. This suffices to establish that China's measures are inconsistent with China's obligations under Article III:4. In addition, the concept of distribution in Article III:4 is broad and encompasses a range of activities required to move a product downstream. The fact that there may be changes to the product downstream does not change the fact that the imported film faces less advantageous distribution opportunities than a domestic like product.

7. China has not sustained its claim under Article 6.2 of the DSU with respect to the Panel's terms of reference

(a) China's *Film Distribution and Exhibition Rule*, *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are within the Panel's terms of reference

4.550 China's second submission characterizes one of the US arguments regarding the *Film Distribution and Exhibition Rule*, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* as relating to measures with the "same effects". The United States, however, makes no such argument. Instead, the United States argues that these measures are included in the Panel's terms of reference as they are laws and regulations through which the WTO-inconsistent legal regime described in the US panel request is put into place.

4.551 China goes on to contend unsuccessfully that these three measures are not included in the Panel's terms of reference, despite the fact that they are closely and directly related to measures

identified in the US panel request. First, the United States has shown that these three measures are included in the US panel request because they fall within the clause incorporating amendments, related measures and implementing measures contained in the US panel request. China ignores the panel report in *EC – Bananas III*. Second, the United States has shown that the three measures are "subsidiary or closely related to" measures cited in the US panel request, and are thereby included in the Panel's terms of reference pursuant to the reasoning of the panel in *Japan – Film*.

(b) China's discriminatory requirements and different distribution opportunities are within the Panel's terms of reference

4.552 China's second written submission then turns to China's claims that discriminatory requirements and different distribution opportunities imposed on foreign-invested enterprises are not within the Panel's terms of reference with regard to the US claims under Article XVII of the GATS. China's contentions that its discriminatory requirements are outside of the scope of the US panel request are without merit. First, the US panel request explicitly refers to "discriminatory requirements" and "discriminatory limitations" in the context of the US claims regarding reading materials, and "requirements" and "discriminatory limitations" in the context of the US claims regarding AVHE products. Second, the US panel request explicitly enumerates all of the measures that contain the challenged discriminatory requirements. Contrary to China's contention, Article 6.2 does not require panel requests to identify each individual provision of each challenged measure. Finally, China maintains its misplaced reliance on the reports in *Japan – Film* and *US – Carbon Steel*, while ignoring the points made in this context by the United States.

4.553 In its first written submission, China contended that the US Article III:4 claim regarding restrictions on distribution opportunities for imported reading materials was outside of the Panel's terms of reference, because it was not included in the US Consultation Request. China has offered no response to the US arguments explaining why this claim is included in the Panel's terms of reference, including with respect to the Appellate Body's reasoning in *Mexico – Rice*.

8. Translation

4.554 China provided a discussion of the translation of certain measures in an exhibit submitted with its second written submission. The United States responds to China's discussion of these translation issues in Exhibit US-102.

H. ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Introduction

4.555 In its second written submission, the United States has tried to further substantiate its claims and to rebut China's arguments, and even sometimes to expand the subject of its claim beyond what was initially included in its panel request and its first written submission.

4.556 China believes that the claims of the United States, far from being clear-cut, are based on an erroneous reading of the WTO Agreements, including China's accession documents, or on a misrepresentation of the facts.

4.557 Concerning trading rights for films for theatrical release, the US second written submission focuses all its efforts on demonstrating that cinematographic film is a good, a fact which is irrelevant in this case and has never been disputed by China. This does not help the US case, because it is the measures at stake which determine what WTO rules are applicable.

4.558 As regards sound recordings distribution services, China's commitments are limited to sound recordings in physical form, and do not cover network music services. The United States fails to establish that network music services are not a service distinct from the distribution of sound recordings in physical form. China has brought further evidence demonstrating that these two services are clearly distinct and that network music services were not covered by China's commitments under GATS.

4.559 With respect to product distribution for sound recordings intended for electronic distribution, the United States tries to convince the Panel that the subject of its claim relates not to the exploitation of music over the Internet, but rather to an alleged less favourable treatment of the imported hard-copy of sound recordings. However, an analysis of the United States' contentions made throughout these proceedings reveals that this is not in fact the subject of its claim.

4.560 With respect to product distribution for motion pictures for theatrical release, the United States has likewise attempted to move the target of its claim to cinematographic film. However, this does not help its case since imported cinematographic film is not "distributed" within the meaning of Article III:4 of the GATT 1994.

4.561 In addition to the above, the United States provides an unacceptably restrictive picture of the rights which China derived from its WTO Accession (especially its right to regulate trade in a manner consistent with the WTO Agreement) and makes an inaccurate presentation of the relevant Chinese laws and regulations (especially on distribution services for reading materials).

2. Terms of reference

4.562 The United States has sought to develop a case that goes far beyond what was set out in its panel request in three respects.

4.563 Firstly, the United States has challenged measures which it failed to mention in its panel request. When confronted with this failing, it contended that such measures were properly identified, because they have the "same effect" as measures described in its panel request. China submits that describing the alleged effects of a measure does not amount to "[identifying] the specific measure" and does not satisfy the "requirement of precision" imposed on parties to a dispute. Moreover, the alleged effects are the subject of the dispute on which findings are yet to be made. Considering that the responding party normally disputes that its measures have the effects alleged by the complaining party, it is unreasonable to expect the responding party to identify measures based on their alleged effects.

4.564 Secondly, the United States argues that these measures were included in the panel request because they fall within the category of so-called "related" or "implementing" measures as mentioned in the panel request. However, accepting this argument would prejudice China and other parties' due process right to be sufficiently informed of the measures which are challenged by the United States. It would also have the effect of minimizing unreasonably the burden of the complaining party, which would only be required to identify one specific measure followed by a "catch-all" expression such as "as well as any amendments, related measures, or implementing measures".

4.565 Thirdly, the United States has raised totally new claims with respect to distribution services and "different distribution opportunities", which it entirely failed to mention in its panel request. It now seeks to suggest that they were properly brought before the Panel simply because it mentioned the relevant measures and WTO obligations alleged to be breached in the panel request. However, this argument is not supported by the wording of Article 6.2 of the DSU or by previous WTO jurisprudence.

4.566 China therefore respectfully requests the Panel to make findings only on the basis of the claims advanced in the US panel request, and to ignore the additions that the United States has sought to make to its claim since that document.

3. Trading rights

(a) Motion pictures for theatrical release

4.567 In its panel request and in its first written submission, the United States made its claim with regard to trading rights for "films for theatrical release". However, since its first oral statement, it instead seeks to refer to "cinematographic film". This is an attempt to play with the dual meaning of the generic term "film" (which can refer either to the carrier or to the content), in an attempt to bring the Chinese measures under the WTO disciplines on goods.

4.568 Contrary to what the United States suggests, "motion pictures for theatrical release" (i.e. artistic works intended to be shown in theaters) are different from cinematographic film. The Panel should dismiss any attempt by the United States to change the subject of its claim because it goes beyond the Panel's terms of reference, and the Panel should treat the United States' abandonment of its previous assertions as a failure by the United States to establish its case.

4.569 Moreover, the United States' attempt to focus on the existence of a good (which has never been denied by China) does not help the US case. In the case of measures which affect an activity involving goods and services, China respectfully submits that the starting point for the Panel's analysis should be to examine how the measures affect these goods and services, and not merely whether these goods and services exist. In particular, it is necessary to consider whether the measures affect trade in goods as goods or the supply of services as services, and consequently whether they fall under WTO rules on goods, WTO rules on services or both.

4.570 The commercial exploitation of motion pictures for theatrical release is realized through a series of services. The United States persistently interprets the term "film" as used in the relevant Chinese measures as referring to the physical carrier, cinematographic film, when in fact the term as used in the measures refers to the artistic work. The measures regulate the exploitation of motion pictures through the organization of public shows through a series of services, and regulate the importation of motion pictures for theatrical release as part of these services. Therefore, the measures regulate the provision of services and not the supply of goods.

4.571 Further, in the context of theatrical release of motion pictures, cinematographic film is not itself the object of trade. It is not exploited as such but merely follows the services involved in this theatrical release as an accessory to such services. China has demonstrated that the Chinese measures do not affect cinematographic film independently from the regulation of services but only as a logical outcome of this regulation.

4.572 The United States refers to several situations which are allegedly similar to the case of cinematographic films. However, these examples repeat the mistake of focusing on the product, rather than the relevant measure. If such an approach was, for example, applied to a lottery ticket imported in order to organize lotteries, it would lead to the conclusion that measures which regulate the approval of entities allowed to organize lotteries, i.e. an entertainment service, fall under WTO rules on goods when they affect the importation of the lottery ticket. However, such a conclusion would completely overlook the fact that the ticket has no other purpose than to provide lottery services.

(b) China is entitled to put in place a system allowing it to review the content of imported cultural products

4.573 China notes that the United States does not appear to dispute that China has a sovereign right to put in place a system designed to review and control the content of cultural goods that enter its territory. The United States also does not appear to dispute that China is entitled to decide the level of protection that it requires.

4.574 China has decided that the control of cultural content is a matter of fundamental importance, and that it requires a complete exclusion from its territory of materials which could have a negative impact on public morals. The right to set such standard of enforcement and to put in place a system that will maintain such standard is unquestionable and recognized also by the Appellate Body jurisprudence.

4.575 In its second written submission, the United States attempts to unduly restrict the scope of China's explicitly reserved right to regulate trade in a manner consistent with the WTO Agreement by suggesting that the "without prejudice" clause in paragraph 5.1 of China's Accession Protocol allows China to regulate goods that are traded, but not to regulate categories of traders engaged in the importation of goods. In fact, the "without prejudice" clause in paragraph 5.1 confirms China's right to regulate trade, not the right to regulate goods. Contrary to the United States' assertion, the "without prejudice" clause of paragraph 5.1 thus does not create a right to exclude products from the scope of China's trading rights commitments, but rather to adopt or maintain measures consistently with the WTO Agreement.

4.576 China's right to regulate trade is therefore different to the exceptions listed in Annex 2A and Annex 2B of the Accession Protocol. While Annexes 2A and 2B reflect the negotiated right of China to preserve State trading for a certain number of products and sectors, China's right to regulate trade is the expression of a general right of WTO Members to maintain certain measures and to pursue legitimate objectives.

4.577 The Appellate Body has consistently held that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously". Thus, both China's commitment with respect to the right to trade and China's explicitly reserved right to regulate trade in a manner consistent with the WTO Agreement should be given their respective full meanings in order to avoid diminishing China's rights and obligations.

4.578 The United States also argues that China has failed to establish a nexus between importation and content review. However, the level of protection sought by China is that of a complete prohibition within its territory of all cultural content which could have a negative impact on public morals. In China's view, this justifies implementing the content review at the importation stage, i.e. before any possible dissemination of the content of these products in China.

4.579 The United States further alleges that China has numerous alternatives to achieve its content review objectives that would not result in a limitation on the right to import. However, the United States fails to identify precisely any WTO consistent alternative which would allow China to enforce the same level of protection than the current measures at issue.

4.580 The United States goes on to submit that the Chinese measures at issue do not meet the requirements of the chapeau of Article XX of the GATT and are applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade, because the relevant importation entities are required to be wholly state-owned entities. However, China considers that only state-owned enterprises should be called on to bear the cost of the review, which relates solely to the public interest. In addition, state-owned enterprises are

the only entities currently considered to fulfil the technical and organizational requirements set out in the relevant Chinese laws and regulations.

4.581 The requirements referred to by the United States are clearly laid down in the Chinese laws and regulations. There is therefore nothing "opaque" or "disguised" about such requirements.

4. Distribution services

(a) *Zong Pi Fa* no longer exists

4.582 After the adoption in 1999 of the *Interim Provisions on the Administration of the Publications Market*, *Zong Pi Fa* no longer exists. The two notices referred to by the United States are not legal instruments adopted by a government agency and cannot be used to interpret the relevant Chinese measures.

(b) Alleged discriminatory requirements

4.583 In respect of allegedly discriminatory requirements, the United States must show, not merely that foreign-invested enterprises are treated differently from domestic enterprises, but also that they are treated less favourably - in other words, that the different requirements alter the conditions of competition with domestic services and services suppliers. However in fact, none of the requirements cited by the United States places foreign-invested enterprises at any disadvantage in the market place.

4.584 The approach of the United States is to engage in unfounded speculation about situations in which these requirements could act to the detriment of the foreign invested entity. However, these speculations are flawed. For example:

(a) The US argument that foreign-invested enterprises have twice as many chances of being rejected in the context of the approvals process, simply because they are (on the United States' case) required to obtain six approvals rather than three, is logically flawed;

(b) The limitations on the operating terms of foreign-invested enterprises in China which are criticized by the United States are in fact adopted to protect the reasonable expectations and interests of such enterprises by guaranteeing their business activity within the approved business scope and operating term;

(c) The United States' suggestion that the extension of the operating term is anything other than non-discretionary, automatic and simplified is incorrect. As long as the application for extension satisfies the three conditions set out in the relevant regulations, the examining authority is obliged by law to grant approval.

(c) Network music services are not covered by China's commitments under the GATS

4.585 China's commitment under Sector 2D of its Schedule to the GATS in respect of "sound recording distribution services" only covers the supply of sound recordings in physical form. It does therefore not extend to the supply of music over the internet.

4.586 "Distribution" traditionally refers to the supply of goods rather than to the dissemination of content over the internet. As a result, China invites the Panel to accept its definition of "sound recording distribution services" under the general rule of interpretation contained in Article 31 of the Vienna Convention.

4.587 While the United States attempts to show that "electronic distribution of sound recordings" was not a new phenomenon at the time of China's accession to the WTO, the evidence it cites in support of this contention in fact shows that network music services did not constitute an established business embedded in a legal framework at the relevant time, either in the United States, or in China. Further, the United States fails satisfy its burden of proof and substantiate its claim that the so-called "electronic distribution of sound recordings" is a mere means of supplying "sound recording distribution services" which China has committed under Sector 2D of its Schedule to the GATS.

4.588 China invites the Panel to adopt the criteria it has put forward in its answers to the Panel's questions as useful guidelines when determining the boundary between a (committed) service delivered by a new means of delivery and a distinct service not committed. "A service" committed remains the same service even if this service is supplied by a new technological means. However, the so-called "electronic distribution of sound recordings" cannot be considered to be the same service initially committed by China under Sector 2D of its Schedule to the GATS, when applying the criteria suggested by China.

4.589 Besides the essential operational characteristics, the perception of the consumer of the two services, which includes the result of the supply of the service for the consumer, is also different. When supplied with network music services, the end-consumer obtains a significantly different result from that obtained from the distribution of sound recordings in physical form, i.e. he or she is granted access to certain intangible data which can be decoded with a computer or other devices to play music works.

4.590 In addition, the CPC Ver. 2 classifies sound recording distribution services and network music services under completely different sections (one-digit level), showing that they are by nature separate and distinct services. Previous versions of the CPC also distinguish between the distribution of physical items (i.e. goods) and the transmission of intangible items.

5. Product distribution under Article III:4 of the GATT 1994

4.591 The United States has attempted to extend the scope of its claim under Article III:4 of the GATT 1994. In its panel request, the United States challenged allegedly less favourable distribution opportunities for imported cultural products. In its answers to the questions of the Panel, the United States extended its ambit to less favourable opportunities not only with respect to the distribution, but also to the use of, in particular, imported sound recordings. In its second written submission, the United States is now alleging that the Chinese measures at stake affect the internal sale, offering for sale, purchase, distribution or use of sound recordings for electronic distribution.

4.592 China submits that the United States should not be allowed to change its claim in this manner, and asks the Panel to find that the United States has accordingly failed to establish a prima facie case of violation of Article III:4 of the GATT, since it fails to identify precisely which situation covered by Article III:4 of the GATT (and the similar provisions of the Accession Protocol) is relevant in respect of the challenged measures.

(a) Reading materials

(i) Newspapers, periodicals, books and electronic publications in the "restricted category"

4.593 The restricted category includes reading materials with prohibited content used by certain government agencies and institutions for research purposes. Contrary to the US assertions, China has provided ample support for this fact.

4.594 In addition, the United States is incorrect to refer to the *Publications Market Rule* to draw conclusions about subscriptions to imported publications in this category, as these provisions only apply to publications in the market sales system, i.e. books and electronic publications in the unrestricted category. Therefore, Article 24 of the *Publications Market Rule* cannot be used to interpret the *Imported Publications Subscription Rule*, a measure on the subscription system.

4.595 As the restricted category includes prohibited or illegal publications that cannot be distributed in Chinese market, the approval of entities to be able to subscribe to publications in the restricted category is determined by GAPP on a case-by-case basis and in fact, may only be granted to certain government agencies and institutions.

(ii) Newspapers and periodicals in the unrestricted category

4.596 Newspapers and periodicals in the unrestricted category are subject to "quasi-automatic subscription" with "no rejection of applications" and "without the involvement of state agencies".

4.597 The United States seeks to attack these propositions by reference to the *Imported Cultural Products Rule*. However, these measures are not directly applicable to importation and subscription activities, given that the last paragraph of these measures provides that "[a]fter the release of these Measures, all departments shall sort out and amend rules and regulations that run contrary to them". In fact, the *Imported Publications Subscription Rule* are the rules currently adopted and relied upon by GAPP to regulate the subscription to imported publications. No government approval is required for the subscription to publications in the unrestricted category pursuant to this measure.

(b) Sound recordings intended for electronic distribution

4.598 The United States seeks to assert that its claim "only applies to measures affecting imported hard-copy media containing sound recordings that are <u>intended for electronic distribution</u>" and "does not include a challenge to any measure's treatment of services or service suppliers involved in the electronic distribution of sound recordings".(emphasis added)

4.599 In fact, the US previous complaint has been about allegedly less favourable opportunities for the digital transmission of imported music over the Internet.

4.600 As China has maintained throughout these proceedings, "distribution" within the meaning of Article III:4 of the GATT only relates to the supply of goods, so the US claim must be dismissed.

4.601 Moreover, by redefining the target of its claim as being the imported hard-copy sound recording, the United States is in fact arguing that the Chinese measures affecting the content of imported hard-copy sound recordings should also be considered as measures affecting "the internal sale, offering for sale, purchase, distribution or use of" hard-copy sound recordings and thus fall under Article III:4 of the GATT. Following this erroneous logic of the United States would mean that GATT rules would apply to any measure regulating services related to - intangible - content as long as there exists a physical carrier capable of being traded, since such a measure would always have the alleged effect on its carrier. This interpretation is untenable when one considers, for example, the effect it would have in the context of the broadcasting of foreign music.

(c) Motion pictures for theatrical release

4.602 The United States affirms that its claim is about the distribution of cinematographic film, rather than motion pictures for theatrical release. This allegation is contradictory with the United States' challenges to aspects of the distribution regime which pertain to motion pictures, and not cinematographic film.

4.603 If one accepts that the US claim in fact concerns the distribution of motion pictures for theatrical release, such distribution, which consists of the provision of services for the organization of the release in theatres of intangible artistic works, cannot be characterized as the distribution of goods falling under Article III:4 of the GATT. However, even if the cinematographic film was to be taken into account, the United States itself admits that the imported cinematographic film is not the good being distributed by the motion picture distributor.

4.604 In respect of the United States' attempt to show an alleged discriminatory treatment between imported and domestic motion pictures, China responds as follows.

4.605 Firstly, the allegation that the distribution of imported motion pictures is controlled by a "duopoly" is erroneous. Neither the *Film Regulation*, nor any other Chinese laws or regulations, nor SARFT itself, place any quantitative restriction on the companies that may be approved to distribute imported motion pictures.

4.606 Secondly, imported motion pictures in fact enjoy equivalent, if not better, distribution opportunities. The United States argues that the Panel should not examine the trade impact of the measures, because "consistency with Article III: 4 is not determined on the basis of outcomes or trade effects." However, the Appellate Body in *Korea – Beef* considered that the trade impact of a measure could be a relevant element for the analysis under Article III:4.

4.607 For these reasons, the United States has failed to demonstrate that the Chinese measures entail a less favourable treatment of the distribution of imported motion pictures for theatrical release in the meaning of Article III:4 of the GATT.

6. Conclusion

4.608 China respectfully reiterates its request that the Panel finds all the US claims unfounded and therefore dismisses them in their entirety.

V. ARGUMENTS OF THE THIRD PARTIES

A. AUSTRALIA

1. Introduction

5.1 Australia wishes to address: whether "films for theatrical release" and "unfinished audiovisual products" are "goods" within the meaning of the Protocol; how "China's right to regulate trade in a manner consistent with the WTO Agreement" relates to "the right to trade" in the context of paragraph 5.1 of the Protocol; the applicability and scope of the "public morals" exception of Article XX of the GATT; some matters relating to China's GATS obligations; and a matter relating to the US claims under Article III:4 of the GATT. Australia reserves its position in relation to any matter not addressed in this statement.

2. "Films for theatrical release" and "unfinished audiovisual products"

5.2 China has questioned whether "films for theatrical release" and "unfinished audiovisual products" are "goods" covered by the relevant commitments of its Protocol. Notwithstanding its arguments, the information provided by China indicates that the specific items at issue in the dispute are goods within the meaning of the Protocol.

5.3 China states that "motion pictures for theatrical release" are subject to "customs clearance of the delivery materials for the purpose of the distribution of motion pictures to Chinese distributors and theatres". In Australia's view, that statement presumes that the items are goods.

5.4 China also states that, in respect of "audiovisual products for publication", "the master copy would then be returned or destroyed", and refers to a model Production and Sales Contract. The model contract in turn requires that the master copy be crushed under supervision, or returned to the copyright owner of the master copy. Australia understands that such conditions could only be fulfilled if the master copy exists in physical form, in which case it would be a good.

5.5 However, the Panel may consider that the items at issue in the dispute are not necessarily physical goods. In that event, Australia does not consider content separate from carrier media to be a good to which the right to trade would apply.

3. "China's right to regulate trade in a manner consistent with the WTO Agreement" vis-à-vis "the right to trade"

5.6 Paragraph 5.1 of the Protocol provides in relevant part: "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, … all enterprises in China shall have the right to trade in all goods throughout the customs territory of China … Such right to trade shall be the right to import and export goods. …"

5.7 "The right to trade" within the meaning of the Protocol is a necessary prerequisite for the application of the WTO Agreement. There must be a right to import and export goods to and from China before China can have a right to regulate trade in a manner consistent with the WTO Agreement. Moreover, Australia believes that its view is supported by the opening phrase of paragraph 5.1: "without prejudice to". A right to trade must exist for there to be the possibility of detriment to China's rights under the WTO Agreement.[11]

5.8 Accordingly, in Australia's view, it is not open to China to restrict or limit "the right to trade" within the meaning of the Protocol, that is, the right to import and export goods, on the basis of its "right to regulate trade in a manner consistent with the WTO Agreement".

4. The applicability and scope of the "public morals" exception of Article XX of the GATT

5.9 It follows that Australia does not consider China is able to invoke Article XX of the GATT to justify a restriction or limitation on "the right to trade" within the meaning of the Protocol. Article XX is only potentially available in respect of measures adopted subsequent to the right to trade having been granted.

5.10 Moreover, Australia notes that the Accession Protocol is an integral part of the WTO Agreement, but not of the GATT. The language of Article XX makes clear that it may only be invoked in respect of measures that violate another GATT provision.

5.11 The Panel may nevertheless wish to explore the potential applicability of Article XX in more depth. In that event, Australia notes that the meaning of the term "public morals" was considered by the Panel in *US – Gambling*. That Panel considered that the term denoted "standards of right and wrong conduct maintained by or on behalf of a community or nation". Further, that Panel considered that the concept of "public morals", as well as the concept of "public order" as used in Article XIV of GATS, "can vary in time and space, depending upon a range of factors, including prevailing social,

[11] *The New Shorter Oxford English Dictionary*, Ed. Lesley Brown, Clarendon Press, Oxford, 1993, Vol. 2, page 2333, defines the phrase "without prejudice" as "without detriment to any existing right or claim".

cultural, ethical and religious values". The *US – Gambling* Panel's findings provide useful guidance for consideration of the "public morals" exception in the context of Article XX of the GATT.

5.12 Australia agrees that cultural values can contribute to the public morals prevailing in a WTO Member. However, not all items having genuine cultural value to a Member will automatically be encompassed by the term "public morals" within the meaning of Article XX. Consider the example of books, which have cultural value in Australia. The fact that books have cultural value in Australia would not automatically give Australia the right to control the import of all books to protect public morals in Australia. Rather, Australia would have to show a relationship between the cultural value of books to Australia and the standards of right and wrong conduct maintained in Australia.

5.13 It is incumbent upon China to show that there exists a relationship between the cultural value of the items at issue, that is, between reading materials and audiovisual products, including sound recordings, and the standards of right and wrong conduct maintained in China. In Australia's view, China is not able to rely on the cited UNESCO instruments to demonstrate such a relationship. China has not taken account of the aspirational status of the UNESCO Universal Declaration on Cultural Diversity. At the same time, it has ignored Article 20(2) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Article 20(2) states: "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."

5.14 Further, the Appellate Body has several times considered the standard established by the word "necessary" in Article XX. Most recently, in *Brazil – Retreaded Tyres*, the Appellate Body reaffirmed its earlier findings on the "necessity" test in *US – Gambling* when it said:

> "… the weighing and balancing process inherent in the necessity analysis 'begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure' …, and also involves an assessment of other factors, which will usually include 'the contribution of the measure to the realization of the ends pursued by it' and 'the restrictive impact of the measure on international commerce'."[12]

5.15 Australia does not comment on the level of content review of the items at issue considered necessary by China. However, Australia agrees with the view expressed by the European Communities that it is the content of the material itself which is subject to review, not the entity or individual conducting the review. China has not shown that its desired level of content review cannot be achieved through alternative means that would have a less-restrictive impact on the right to trade.

5. China's GATS obligations

5.16 Australia would like to comment on three matters with respect to China's obligations in relation to the GATS.

5.17 Firstly, China has not scheduled any national treatment limitations on its scheduled commitments in relation to Distribution Services and Audiovisual Services. In relation to its scheduled commitments, China is therefore obliged to extend national treatment as required by Article XVII of the GATS to the services and service suppliers of other Members. Australia notes that China's national treatment obligation applies to a "foreign-invested enterprise" insofar as such an enterprise remains a "juridical person of another Member" as defined in Article XXVIII(m) of the GATS.

[12] Appellate Body Report on *Brazil – Retreaded Tyres*, para. 143.

5.18 Secondly, China claims that is has not scheduled, and "never intended to include", a commitment in relation to a particular type of wholesale distribution channel. Australia recalls that the *US – Gambling* dispute involved an analogous situation concerning whether the United States had scheduled commitments in respect of gambling and betting services. In that dispute, the Appellate Body made a number of relevant findings:

> "… the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members";[13]
>
> … [Article I:3(b) of the GATS] … defines 'services' very broadly, as including 'any service in any sector except services supplied in the exercise of governmental authority";[14]
>
> … the GATS definition of 'sector' provides that any reference to a 'sector' means – unless otherwise specified in a Member's Schedule – a reference to all of the subsectors contained within that sector";[15] and
>
> [t]he Scheduling Guidelines … make clear that parties wanting to use their own subsectoral classification or definitions … were to do so in a 'sufficiently detailed' way 'to avoid any ambiguity as to the scope of the commitment'."[16]

5.19 In Australia's view, if the contested wholesale distribution channel is "generally covered by CPC 61, 62, 63 and 8929" as referred to in Annex 2 to China's Schedule, it is a distribution service in respect of which China has made market access commitments. Having regard to the Appellate Body's findings in *US – Gambling*, China would need to have explicitly excluded the contested wholesale distribution channel from the scope of its commitments for its claim to succeed.

5.20 The third matter on which Australia would like to comment concerns China's claims that "network music services" are not covered by its Schedule commitments for sound recording distribution services. China defines "network music services" as "the dissemination of music in digital format through the Internet to users."

5.21 Australia does not agree that "network music services are … a new service totally different in kind from the 'sound recording distribution services' committed by China …" The sub-sector "sound recording distribution services" is not definitionally limited in regard to the methods of distribution covered. Accordingly, having regard to the Appellate Body's findings in *US – Gambling* as previously outlined, China would need to have expressly limited its commitments to particular methods of distribution for its argument to succeed.

5.22 In any case, distribution of sound recordings over the Internet was occurring for some years before China acceded to the WTO, as China itself acknowledges in its reference to the file-sharing platform "Napster". Not all such distribution infringed copyright or related rights, for example, copyright on some material may have expired. Even when such distribution did infringe copyright and related rights, that infringing activity did not invalidate the Internet's status as a means of distribution.

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[13] Appellate Body Report on *US – Gambling*, para. 160.
[14] Appellate Body Report on *US – Gambling*, para. 180.
[15] Appellate Body Report on *US – Gambling*, para. 180.
[16] Appellate Body Report on *US – Gambling*, para. 203.

6. Article III:4 of the GATT

5.23 With respect to the US claim under Article III:4 of the GATT, Australia has earlier expressed its view that content separate from carrier media is not a good. Accordingly, to the extent that the US claim is based on content being a product distinct from a carrier medium, Australia does not consider that the US claim can succeed.

B. EUROPEAN COMMUNITIES

1. Introduction

5.24 The European Communities makes this third party written submission because of its systemic interest in the correct interpretation of the GATT 1994 and the GATS.

2. Trading rights and China's WTO Accession protocol

5.25 The United States stated in its submission that China has committed to provide all enterprises in China and all foreign enterprises and foreign individuals the right to trade in all goods except those listed in Annexes 2A and 2B of China's Accession Protocol, and that these commitments extend to what the United States terms as "the Products, i.e. reading materials (including books, periodicals, newspapers and electronic publications), AVHE products (including videocassettes, VCDs and DVDs), sound recordings and films for theatrical release, as none of the Products is listed in either Annex." Through a variety of measures, China refuses to permit any foreign enterprises or foreign individuals to import the Products, and likewise only allows a subset of enterprises in China – i.e. wholly state owned Chinese enterprises approved or designated by the Chinese government – to import the Products. This is inconsistent with China's obligations contained in Part I, paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol, as well as in paragraphs 83 and 84 of China's Working Party Report.

5.26 China argues that it has the right, under paragraph 5.1 of the Accession Protocol, to impose restrictions and conditions to the grant of trading rights, such as the limitation of the right to import to a number of selected entities, provided that these measures are consistent with Article XX of the GATT, especially Article XX(a) which relates to measures that are necessary to protect public morals.

5.27 In the view of the European Communities, Article XX of the GATT 1994 does not directly apply to China's Accession Protocol commitments, due to the fact that even if they are an integral part of the WTO Agreement, they are not a part of the GATT 1994. The GATT 1994 is obviously also an integral part of the WTO Agreement, but it is a different part amongst the various "parts" referred to in Article II:2 of the WTO Agreement. This makes sense, as it should only be logically possible to invoke exceptions within the specific agreement in which they are contained.

5.28 However, even in a scenario in which the GATT 1994 regime is deemed to be applicable to the measures at issue, China would still have to satisfy the requirements set out in Article XX of the GATT 1994. In the opinion of the European Communities, what is really at issue in this dispute is not the system of content review in China, but whether the "trading rights" of non-Chinese enterprises and individuals are being adversely affected through the application of Chinese measures which restrict the importation of reading materials and other audiovisual products, specifically, and only, to certain entities. The European Communities contends that this results in a discriminatory treatment against non-Chinese enterprises, which also has the effect of protecting Chinese enterprises from competition from foreign enterprises.

5.29 Moreover, the stringent requirements that the Chinese measures impose on the importing entities, do not meet the "necessity" test criteria as required by Article XX of the GATT 1994 and

further developed by reports of the Appellate Body, and that the Chinese measures in question are having an extremely "restrictive impact on international commerce". The EC contends that it would still be possible for the Chinese authorities to implement a content review system, without almost completely restricting the right to trade in goods subject to content review to a restricted number of Chinese entities.

3. China's commitments in the distribution sector under the GATS and its schedule of specific commitments

5.30 The European Communities refers to China's commitments in the Distribution Sector, as set out in its Schedule of Specific Commitments, and to China's explanations about the meaning of the term "*Fa Xing*", which according to China is a generic term covering different features of distribution, then further sub-divided into "two distinct distribution channels", to which it refers as "*Zong Fa Xing*" and "*Fen Xiao*." It also referred to China's contention that it intended to include "*Zong Fa Xing*" in the scope of its distribution services commitments in the GATS.

5.31 The European Communities recalls that, as observed by the Appellate Body in *US-Gambling*, the task of ascertaining the meaning of a concession in a Schedule, "involves identifying the common intention" of WTO Members. It seems that the attempt to define "*Zong Fa Xing*" as a distinctively Chinese concept with no equivalent in English does no more than to create confusion. It is not uncommon in Europe and elsewhere that publishers sell their products directly to their consumers, or through agency agreements with sub-distributors. Moreover, the use of a "distinctively Chinese concept" or terminology in Chinese legislation does not imply that the services covered under this concept or term do not fall under the relevant GATS sector or sub-sector.

5.32 The European Communities is of the opinion that China's definition of "*Zong Fa Xing*" is not necessarily relevant for the question of whether the relevant activities fall within China's distribution commitments. Entities offering "*Zong Fa Xing*" do conduct activities that would fall under China's distribution commitments, both under wholesaling and retailing services, depending on the factual situation and the users that are supplied. Excluding "*Zong Fa Xing*" commitments would have required an explicit exclusion in China's GATS Schedule. China's measures restricting non-Chinese enterprises in the distribution sector are inconsistent with – at least – Article XVII of the GATS and with China's Schedule of Specific Commitments.

4. "Technological neutrality" under the GATS and the reading of China's Schedule of Specific Commitments on Audiovisual Services

5.33 The European Communities supports the position that the GATS is generally neutral vis-à-vis technology ("technological neutrality"). The GATS principles apply to the delivery of services by electronic means. Market access and national treatment commitments made by WTO Members in their GATS Schedules of Commitments guarantee the market access and national treatment conditions which bind each WTO Member for those services can be provided in a "traditional" format, but also through electronic means.

5.34 This would mean that service suppliers are free to supply these services unrestrictedly, through any means of delivery. Moreover, the rapid changes evident in modern technology essentially mean that there are changes in the way that services are delivered and that these changes are continuous.

5.35 The European Communities cannot agree with the view expressed by China that the new changes in digital technologies and communication networks have necessarily resulted in the emergence of an entirely new type of services sector, which China refers to as "network music

services". It also does not agree with China's argument that the "principle of technological neutrality is irrelevant in the present case".

5. The classification on "videos, including entertainment software and distribution services"

5.36 The European Communities notes with interest the comments of the United States on the coverage of "videos, including entertainment software and distribution services" and argues that these services are regarded as audiovisual services for the purpose of regulatory and support policies of the European Communities.

6. Applicability of Article III.4 of the GATT 1994 to services

5.37 In the opinion of the European Communities, Article III:4 of the GATT 1994 is only applicable to domestic measures subsequent to importation of the goods, and has no relevance to the issue of "trading rights". The European Communities does not support the US line of argument based on the assessment of the discriminatory nature of national measures regarding film distribution for theatrical release and the electronic distribution of sound recording, against the background of Article III:4 of the GATT 1994.

5.38 It considers that these two categories are to be considered a "service" and that it is under the GATS that any assessment of national measures challenged under WTO rules should be carried out. The European Communities also holds the view that electronic "deliveries" or transmissions are part of the supply of a service, and therefore issues arising in this area ought also to be assessed under the GATS.

C. JAPAN

1. Article III:4 of the GATT 1994 is applicable to the measures challenged by the United States

5.39 Japan considers that China's measures affecting audiovisual products (including sound recordings) and films for theatrical release that are imported on tangible media – such as CDs, DVDs, and exposed developed cinematographic film – are measures subject to Articles II, III:4, and XI of the GATT 1994 and paragraphs 5.1, 5.2, and 1.2 of the Accession Protocol.

5.40 Article III:4 of the GATT 1994 by its terms applies to "products … imported into the territory of any other contracting party." The national treatment obligation imposed by Article III:4 applies "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." Transportation and distribution are indeed services, and other services also "use" imported products, but the drafters of Article III:4 decided to include these services in Article III:4 – because banning or discriminating against transportation, distribution or use of imports is one of the most effective ways to shut down the market for imported goods.[17]

5.41 The US claims under Article III:4 concern Chinese laws, regulations, and requirements that "affect" the distribution of imported "products" and accord less favourable treatment to them than to like products of Chinese origin. The classic statement of the meaning of Article III:4, in the GATT panel *Italy – Agricultural Machinery*, explains that by using the word "affecting", the drafters

[17] *See Analytical Index of the GATT* (updated 6th ed. 1995), pp. 181-182 (discussing discrimination in internal transportation of imported goods). As relevant precedents, see Panel Report on *Canada – Periodicals*, paras. 5.32-5.39; this finding was not appealed; Panel Report on *Korea – Various Measures on Beef*, paras. 639, 685, 705; Appellate Body Report on *Korea – Various Measures on Beef*, para. 148.

"intended to cover ... also *any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market*".[18] Endorsing this approach, the Appellate Body has interpreted "affecting" broadly to mean "has 'an effect on.'"[19] By this standard, Article III:4 applies to the Chinese measures at issue.

5.42 The term "distribution" in Article III:4 must also be construed broadly. "Distribution" is defined as "[t]he action of spreading or dispersing throughout a region,"[20] and this meaning suggests no limit to the types of distribution covered by Article III:4. Because Article III:4 addresses any measure that may adversely modify the conditions of competition between domestic and imported products, "distribution" in the sense of Article III:4 must be construed to include all channels by which a good may be "spread[] or dispers[ed]" to consumers.

5.43 The Appellate Body has also found that content does not detract from the conclusion that an object is a good. In *Canada – Periodicals*, the Appellate Body found a periodical to be a good despite the fact that it is comprised of content stating that "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product -- the periodical itself". The fact that tangible media (such as film reels) may be an "accessory" to the provision of a service does not mean that trade in such tangible media is trade in services. A car is a good, not a service, even if it is imported solely for use in a car rental service.

5.44 The GATS does not change the scope of Article III:4 as the Appellate Body settled this question in *Canada – Periodicals*. Japan considers that although the Chinese measures at issue may affect both trade in goods and trade in services, the aspects of those measures that affect trade in goods are appropriately addressed by Article III:4 of the GATT 1994, and there is a "category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS."[21]

5.45 China further argues that Article III:4 is inapplicable because its content review measures stop importation of products into China. This argument reflects a basic misunderstanding of Article III and of the Note Ad Article III. If China maintains a content review regime and enforces content review "at the time or point of importation," these measures are still "subject to the provisions of" Article III:4.

2. It is unclear whether China has demonstrated that its restrictions on trading rights are "necessary to protect public morals"

5.46 China justifies its measures which permit only wholly state-owned Chinese enterprises approved or designated by the Chinese Government to import reading materials and audiovisual products by Article XX(a) of the GATT 1994. While the Appellate Body has consistently held that Article XX requires a two-tiered analysis, China bears in the present dispute the burden of establishing a prima facie case that the measures challenged by the United States are: (1) "necessary to protect public morals"; and (2) not applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade." In order to satisfy its burden under the first part of this analysis, China must establish that the challenged measures are: (a) designed to "protect public morals"; and (b) "necessary" to do so.

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[18] GATT Panel Report on *Italy – Agricultural Machinery*, para. 12 (emphasis added).

[19] Appellate Body Report on *EC – Bananas III*, para. 220; Appellate Body Report on *Canada – Autos*, para. 158; Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 209-210.

[20] *The New Shorter Oxford English Dictionary* (4th ed. 1993), page 709.

[21] Appellate Body Report on *EC – Bananas III*, para. 221. *See also* Appellate Body Report on *Canada – Autos*, para. 159.

5.47 It is not clear whether China has met its burden. First, China has argued only that its broader content review mechanism is consistent with Article XX (a) framing its arguments in reference to the entirety of its censorship regime. Second, it is not clear whether China has established that its measures are "necessary" to protect public morals.[22] China must establish a prima facie case of necessity by weighing and balancing a series of factors, including the importance of prohibiting content that could negatively impact public morals, the contribution made by the challenged measures to the protection of public morals, and the impact of the challenged measures on imports or exports.[23]

5.48 Although China provides a discussion of these factors, the discussion focuses largely on the efficiency and effectiveness of the measures toward achieving its stated goal of preventing the importation of cultural goods with inappropriate content. Japan considers that it is not enough to demonstrate necessity and that the Panel should carefully weigh and balance all factors, including the trade-restrictive effects of the challenged measures. In doing so, the weighing and balancing process must consider "whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available."[24]

5.49 In addition, China relies upon the Cultural Diversity Convention to support its Article XX affirmative defence of its discriminatory and trade-restrictive measures affecting trade in goods.[25] As Article 20 of the Cultural Diversity Convention provides explicitly, the Cultural Diversity Convention cannot modify any of China's rights or obligations under the WTO Agreement or China's Protocol of Accession, including under Articles III, XI, and XX of the GATT 1994. Accordingly, Japan is of the view that the Panel must apply Article XX without taking the Convention into account.

3. Commitments on "sound recording distribution services" include the distribution of digital recordings over the Internet

5.50 China argues that the distribution of sound recordings over the Internet is "a new and radically different category of audiovisual services recently emerged in the course of technological development" and that these "new services" are outside the scope of China's commitments on sound recording distribution services. However, Japan considers that China's existing commitments cover the distribution of sound recordings over the Internet.

5.51 The notion that new services are necessarily unbound is troubling because China's GATS Schedule is largely delineated in reference to the 1991 Provisional CPC, and as the Appellate Body stated in *US – Gambling*, the Provisional CPC is "exhaustive." The only questions are: (1) where within the Provisional CPC a service is covered; and (2) whether a new service falls within the scope of an existing commitment.

5.52 To automatically assume that any new service is outside existing commitments would destroy much of the value of the GATS in providing a stable environment for innovation and growth in trade in services. It should not be necessary to negotiate a new commitment every time a service business invents a new variation on a service. Otherwise, the objective of the GATS negotiations, to "establish a multilateral framework of principles and rules for trade in services with a view to the expansion of

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[22] The Appellate Body has held that a "necessary" measure is not limited to that which is "indispensable"; however, a "necessary" measure is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'." Appellate Body Report on *Korea – Various Measures on Beef*, para. 161.

[23] *See* Appellate Body Report on *US – Gambling*, para. 306; Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

[24] Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[25] China's first written submission, paras. 129-135.

such trade,"[26] would be frustrated, as the GATS would progressively lose its relevance to actual business models in the service economy.

5.53 As the Panel Report on *US – Gambling* concluded that "a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery".[27] Japan agrees that the same logic applies to China's market access and national treatment commitments under mode 3. China's commitment includes distribution of sound recordings through all means, including via the Internet or telecommunications networks.

5.54 In the light of the ordinary meaning of "sound recording distribution", China's assertion that "sound recordings" include only those on physical support, such as a vinyl or optical disk, is incorrect. Also, in the light of the circumstances of conclusion of the treaty, it is concluded that its commitment includes distribution of sound recordings via the Internet. In the case of China's GATS commitments, the relevant period for evaluating China's commitments was the period up to 10 November 2001, the date when China's terms of accession were multilaterally agreed. Although China asserts that Internet distribution of sound recordings emerged as a business only after China negotiated its commitment on sound recording distribution, at the time that China and its WTO trading partners agreed on China's commitments on sound recording distribution in November 2001, there were very substantial activities in China and elsewhere distributing sound recordings over the Internet. Thus, distribution of sound recordings over the Internet was entirely "possible" at the time China concluded its GATS Schedule, and was not a "new service[] or new means of delivery not existing at [that] time".

D. REPUBLIC OF KOREA

1. Introduction

5.55 Korea has systemic interests in the interpretation and application of various provisions of the GATT and GATS, which are extensively discussed in this controversial dispute.

2. Legal arguments

(a) The challenged measures at issue seem to affect both trade in goods and trade in services, and thus could be covered by both GATT and GATS

5.56 One of the key issues contested by the parties in this dispute is whether the challenged measures are to be regarded as affecting both trade in services and trade in goods (as the United States argues), or only trade in services (as China argues). The parties' different views are particularly presented with respect to motion pictures for theatrical release.

5.57 Korea tends to agree that main characteristics of the motion pictures for theatrical release are somewhat closer to services. It is true that motion pictures for theatrical release are not sold as merchandise and the dissemination is usually implemented by standard theatrical distribution contracts where ownership and possession are restricted. Korea is not sure, however, whether these elements necessarily negate the existence of impact on the "product" containing the services to be provided. To the extent a product and services are combined in one physical form, regulation of the one could necessarily affect the other. In short, Korea is not completely persuaded that the motion pictures as goods can be separated from the services associated with the motion pictures.

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[26] GATS preamble, clause 2.

[27] Panel Report on *US – Gambling*, para. 6.285 (finding adopted without appeal). The *US – Gambling* panel also said that this finding was "in line with the principle of technological neutrality," which "seems to be largely shared among WTO Members." *Ibid.*

(b) The measures appear to constitute a violation of national treatment as provided in Article III of the GATT and it is not entirely clear whether the measures can be justified under Article XX of the GATT.

5.58 To the extent that the challenged measures also affect trade in goods, the discriminatory treatment of China concerning the importation of the products could constitute violation of the national treatment under Article III of the GATT. The fact that only Chinese state-owned enterprises are authorized to import these products, that the imported products face state-imposed discriminatory treatment in distribution, and that the imported products go through more stringent content review could apparently lead to the violation the national treatment of these products.

5.59 Previous GATT and WTO precedents indicate that the national treatment principle under Article III is a broad concept which can be implicated when foreign product encounters unfavourable treatment that negatively affects competitive condition in the market. The situation alleged by the United States may well support possible violation of the national treatment principle.

5.60 Assuming the existence of violation of Article III of the GATT, China then argues that its measures are justified under Article XX of the agreement, particularly as a measure necessary to protect public morals. However, Korea submits that the Panel should carefully carry out analyses of specific elements, as pronounced by the precedents, to confirm that the challenged measures are indeed justified as necessary to achieve such goals. Simple assertions that cultural goods are identical with public morals and that permitting only a few state-owned enterprises to import certain product is necessary to protect public morals may not suffice to meet these thresholds.

(c) China's argument based on UNESCO Cultural Diversity Convention and its various domestic legislation is misplaced

5.61 In its first written submission, China refers to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("Cultural Diversity Convention") adopted in October 2005 to stress that cultural goods are different from other non-cultural goods and that the Members preserve more leeway in regulating these goods. Korea, however, notes that reference to the Cultural Diversity Convention fails to support the proposition offered by China. Not only the Cultural Diversity Convention itself precludes a situation where the convention is somehow used as a ground to justify alleged violations of the WTO Agreements, but also relevant provisions of the DSU explicitly prohibits a panel from accepting such an argument.

(d) The challenged measure constitutes a violation of Article XVII of the GATS

5.62 The United States also argues that China violates, *inter alia*, Article XVII of GATS when it applied discriminatory prohibitions in the distribution process of these products. In this area, however, the factual descriptions of the two parties show a significant degree of discrepancy. This discrepancy needs to be carefully examined by the Panel. Only after the factual issues are clarified can the Panel reach a reasonable decision. Korea only offers its comment on some framework issues.

5.63 First, Korea agrees with China that paragraphs (2) and (3) of Article XVII of the GATS make clear that the mere fact that a Member establishes a formally different treatment between domestic and foreign services and service suppliers does not necessarily lead to the violation of Article XVII of the GATS. Instead, what matters is whether conditions of competition have been modified in favour of the domestic services and service suppliers as a result of different treatment.

5.64 In addition, in its submission China points out inaccurate description of different types of distribution activities in China. According to China, there are two types of distribution channels in China: *Zong Fa Xing* and *Fen Xiao*. China then explains that only the latter corresponds to

distribution through wholesaling and retailing. *Zong Fa Xing*, on the other hand, argues China, is distinct and separate from traditional distribution channels in that a single distributor individually and directly faces all the consumers and that there does not exist an equivalent term in English. Korea submits that the Panel needs to look into the terms in the China Accession Protocol and other preparatory documents to determine the exact parameters of the China's obligation under the GATS. Korea reiterates that proper evaluation of the claims based on the GATS requires verification and confirmation of the factual information first.

VI. INTERIM REVIEW

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report must include a discussion of the arguments made by the parties at the interim review stage. This Section of the Panel Report provides such a discussion. As Article 15.3 makes clear, this Section forms part of the Panel's findings.

A. BACKGROUND

6.2 The United States and China separately requested an interim review by the Panel of certain aspects of the Interim Report issued to the parties on 20 April 2009.[28] Neither party requested an interim review meeting. However, the parties made use of the opportunity to submit further written comments on each others' requests.[29] On 23 June 2009, the Panel issued its Final Report to the parties on a confidential basis.

B. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORT

6.3 Below, the **Panel** will address the parties' requests for changes to the Interim Report. Unless otherwise indicated, the references below are to paragraph or footnote numbers appearing in the Interim Report.

1. Terms of reference

(a) Comments by the United States

6.4 The **United States** requests that the Panel make an addition to the last sentence of paragraph 7.35 to fully reflect the United States' argument that the *Film Distribution and Exhibition* Rule was issued subsequent to and is also subsidiary and closely related to the *Film Regulation.*

6.5 **China** argues that the *Film Distribution and Exhibition Rule* was promulgated prior to the *Film Regulation*. China argues that the reference the United States makes to its submissions in support of its request are inapposite because they either refer to the United States' claim under Article III:4 of the GATT 1994 or only refer to both measures as being adopted prior to the date of establishment of this Panel. China therefore requests that the Panel refrains from inserting this particular part of the sentence at the end of paragraph 7.35.

6.6 The **Panel** takes note that the United States did indeed, in its first oral statement and in its answer to Panel question No. 2, argue that the *Film Distribution and Exhibition Rule* was subsidiary and closely related to the *Film Regulation.* We also note that although the United States did put the dates of adoption of the various measures in parentheses next to their names in its response to Panel question No. 2, it made no specific argument about the *Film Distribution and Exhibition Rule* being issued subsequent to the *Film Regulation*. We have reviewed the other submissions and oral

[28] Letters of the parties of 12 May 2009.
[29] Letters of the parties of 2 June 2009.

statements of the United States and cannot find such an argument. Therefore, we have modified the paragraph to include the United States' argument that the *Film Distribution and Exhibition Rule* is subsidiary and closely related to the *Film Regulation*, but we have not included any reference to the *Film Distribution and Exhibition Rule* being issued subsequent to the *Film Regulation*.

6.7 The **United States** requests that the Panel make additions to paragraph 7.62 to reflect more fully its reliance on the reasoning of the panel in *Japan – Film* with respect to why the *2001Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are within the scope of the United States' claim under Article III:4 of the GATT 1994**.**

6.8 **China** notes that the United States at no point seems to have made an argument that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* "are so closely related to measures identified in the US panel request that China was given adequate notice of their inclusion in the US claim". China's review of the United States' submissions finds no wording which suggests such a strong logical relationship as the one incorporated in the statement which the United States requests the Panel to add. China therefore requests the Panel to refrain from any addition with respect to paragraph 7.62 of its Interim Report, or at least to limit such addition.

6.9 The **Panel** has made appropriate changes to paragraph 7.62 to reflect more accurately the arguments of the United States.

6.10 The **United States** asks the Panel to modify the final sentence of paragraph 7.79 because it believes the characterization of the United States' response to Panel question No. 124 is incomplete and may lead to confusion**.**

6.11 The final sentence of paragraph 7.79 in the Interim Report states, "We specifically asked the United States to explain why it included the measures by name in Parts I and II of the panel request and not in Part IV. The United States did not provide a reason for this inconsistency."

6.12 The United States recalls its response to the Panel question No. 124, in which it explained that the *Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were not explicitly *identified*, but that they were nonetheless *included* in Part IV of the US panel request, as part of the narrative and as part of the phrase "any amendments, related measures, or implementing measures". The United States also cited the panel's reasoning in *Japan – Film*, to argue that the *Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were included in the US claim, because these measures are "closely related to measures" specifically identified in the US panel request.

6.13 The United States requests that the Panel delete the sentence "The United States did not provide a reason for this inconsistency" and instead insert a reference to the portion of its response to Panel question No. 124 which refers to the narrative and to the phrase "any amendments, related measures, or implementing measures."

6.14 **China** notes that, here again, the language used by the United States in its response to question 124 appeared to be far less affirmative than the language it would like the Panel to insert in the text of its report. In particular, China submits that the United States was never as categorical as to clearly affirm that the *2001 Audiovisual Products Regulation* and the *Audiovisual Product Importation Rule* were included in part IV of its panel request.

6.15 China therefore respectfully requests the Panel to refrain from making the modification sought by the United States. In addition, China notes that the Panel, in footnote 105 under paragraph 7.79, has already made reference to the explanation provided by the United States in response to question No. 124.

6.16 The **Panel** notes that the United States did provide an explanation in its answer to Panel question No. 124 with respect to its contention that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were included in Part IV of its Panel request via the narrative description in that part and the reference to "any amendments, related measures or implementing measures" and that this was referred to in footnote 107 under paragraph 7.79. The Panel has added this additional elaboration on the United States' answer to the main text of paragraph 7.79. However, the United States did not address the specific issue that the Panel was referring to in paragraph 7.79, namely why the United States included those measures by name in Parts I and II of the panel request but not in Part IV.

6.17 The **United States** requests that the Panel modify the second sentence of paragraph 7.83 to reflect that China has not limited the corporate form of foreign-invested enterprises engaging in the distribution of reading materials in China to Chinese-foreign contractual joint ventures, and that the MOC approval procedures under China's measures apply to all foreign entities.

6.18 **China** notes that the wording of the Interim Report seems to reflect paragraph 238 of China's first written submission, which in turn reflects paragraph 137 of the United States' first written submission. The latter refers clearly to Chinese-foreign contractual joint ventures. The issue raised by China relates to the fact that a specific claim by the United States was not properly before the Panel. Thus, it is unclear for what reason the wording of such US claim, as rebutted by China and analyzed by the Panel, should be subject to any modification.

6.19 The **Panel** notes that the *Several Opinions*, which contains the "decision making criteria" applied by the GAPP in approving foreign-invested entities to distribute reading materials, does not contain a limitation on the corporate form of the foreign-invested enterprises. However, China is correct that in paragraph 138 of the United States' first written submission, the United States recognized that the "decision making criteria" applied by the MOC relate to the approval of Chinese-foreign contractual joint venture. Nevertheless, in order to avoid grouping the regimes governing reading materials and audiovisual products together, the Panel has made the appropriate modification to the paragraph to reflect the two distinct legal regimes being discussed.

6.20 The **United States** requests that the Panel modify paragraph 7.177 to fully reflect all of the relevant provisions of the *Several Opinions* that the United States raised in this dispute. Specifically, the United States requests that the Panel make reference to Articles 1 and 4 of the *Several Opinions* as they relate to the United States' claims that the *Several Opinions* is inconsistent with China's GATS obligations.

6.21 **China** has not commented on the United States' request.

6.22 The **Panel** has made appropriate additions to paragraph 7.177.

(b) Comments by China

6.23 **China** notes that the Panel has explained in footnote 65 to paragraph 7.34 that, as a general rule, when referring to one of China's laws, regulations or documents, it utilized the US translation where the Panel did not identify a translation issue, the resolution of which appeared to be necessary in order to make its findings. China seeks a clarification in this regard. China believes that in the absence of such an issue, a reason for generally favouring one party's translation over the other's needs to be given.

6.24 The **United States** does not agree with China's request regarding footnote 65, particularly given that China has not explained why additional elaboration from the Panel is necessary. First, China has not identified any specific instances in which different translations are available that are

material and that have not already been identified and addressed by the Panel. Second, the United States argues that the Panel's description of the translation review process as well as the Panel's discussion regarding the translation of several key terms, such as distribution, sub-distribution, master distribution, and master wholesale, addresses the issues raised by China.

6.25 The United States views the Panel's discussion of the translation issues in this dispute as sufficient. Accordingly, the United States respectfully requests that the Panel decline China's request.

6.26 The **Panel** recalls that both the United States and China submitted English translations of all of the challenged measures as well as some other Chinese legal documents. China provided the Panel with English translations of some of the measures at issue in this dispute. In some instances, China specifically identified concerns it had with the United States' translation of particular provisions or terms. In other instances, China provided no specific explanation as to why it had provided a differing translation or as to why its translation should be preferred. Neither did the Parties address these particular differences in their joint attempt to resolve the other issues of translation. We also note that the Panel has examined both versions of the translations of China's measures to confirm that, with respect to the relevant provisions, there are no material or significant differences between the translations provided by both parties. Indeed, the Panel in question 150 and Annex A to the second set of Panel questions identified a variety of instances where the parties had provided differing translations of provisions of China's measures or disputed the meaning of particular terms which were material to resolving the dispute. For those provisions, as explained in footnote 65, the Panel referred to either the agreement of the parties to the use of a particular translation or to the independent translator.

6.27 The Panel notes that the fact that it has often referred in its findings to the United States' translations of China's measures does not mean that the Panel is favouring the United States' translation over the one provided by China or concluding that the US translations are definitive or authoritative. At any rate, China did have the possibility to rebut them. Rather, it seemed impractical to systematically refer to both translations throughout the report. The Panel also recalls that the United States as complaining party bears the burden of proving its claim, which includes providing evidence of the content of the challenged measures.

6.28 The Panel has made appropriate changes to footnote 65 to further clarify the reasons stated above.

6.29 **China** requests that the Panel change the last sentence of footnote 67 to paragraph 7.39, to make reference to the date of promulgation of the *Film Regulation* in addition to the date of the State Council decision and the date the measure took effect. China believes this change will properly reflect its argument that the *Film Distribution and Exhibition Rule* pre-dates the *Film Regulation*.

6.30 The **United States** has not commented on China's request.

6.31 The **Panel** has made the appropriate changes to the footnote in question.

6.32 **China** points out that the first sentence of paragraph 7.206 seems to have something missing from it. In the Interim Report the sentence reads as follows: "China argues that the Importation Procedure is merely a webpage which and that all the requirements contained in this webpage are requirements established by applicable published regulations". China requests that the Panel add the phrase "is intended to provide guidance for applicants" after the word "which."

6.33 The **United States** seeks to revise China's request for modification to this paragraph. The United States argues that China did not provide support for, or citations to its argument on the record as part of its request for modification. The United States notes that China argued in its answer to

Panel question 147 that the *Importation Procedure* and the *Sub-Distribution Procedure* are "...aimed at facilitating the application process." In order to reflect the arguments that China has actually made, the United States respectfully requests that the Panel use that phrase in modifying the first sentence of paragraph 7.206.

6.34 The **Panel** recognizes that the sentence was grammatically incorrect and requires modification. However, the Panel does not believe that China's suggested change is the most appropriate. We also note that the United States' suggested change is contained in the immediately succeeding sentence and would therefore result in a redundancy. The Panel has simply deleted the word "which" from the sentence. We believe this accurately reflects China's argument with respect to the particular point being discussed in paragraph 7.206 and fixes the grammatical error in the sentence.

2. US claims regarding China's trading rights commitments

(a) Comments by the United States

6.35 The **United States** requests that the Panel modify paragraphs 7.251 and 7.252. The United States points out that wholly foreign-owned enterprises are not referenced. The United States considers that they should be mentioned to avoid potential confusion about the scope of the phrase "all enterprises in China".

6.36 **China** has not commented on the United States' request.

6.37 The **Panel** notes that wholly foreign-owned enterprises are referenced at paragraph 7.251. The Panel has nonetheless made appropriate changes for greater clarity at paragraphs 7.251 and 7.252.

6.38 The **United States** requests that the Panel clarify the summary of the United States' position at paragraph 7.278 by making three suggested additions to the paragraph.

6.39 **China** submits that paragraph 7.278 appears to adequately reflect the content of the United States' responses to question No. 160(a) and (b). China is of the view that this particular paragraph of the Interim Report is not about providing another presentation or a reiteration of the US arguments, but about the Panel's perception of these arguments and the reasoning the Panel has chosen to adopt in response. China notes that the arguments developed by the United States have already been summarized previously in the Panel's Interim Report, e.g., at paragraphs 7.242 and 7.243. China does not find anything inaccurate in the Panel's findings, in particular in light of the United States' answer to question No. 160(a). China is therefore of the view that there is no need to amend this particular paragraph of the Interim Report.

6.40 The **Panel** has accepted two of the suggested changes to paragraph 7.278 and rejected a further suggested change, as the relevant argument is reflected at paragraph 7.279.

6.41 The **United States** believes that the summary of its claims at paragraphs 7.326 and 7.327 would benefit from additional clarification. The United States therefore requests that the Panel make specified changes to its summary of the US claims.

6.42 **China** considers that it is unclear whether the United States has properly made a claim that the measures in question prohibit "all enterprises in China (other than Chinese wholly state-owned enterprises)" from importing reading materials, AVHE products, sound recordings and motion pictures for theatrical release. Absent a more explicit reference to such claim in the US first written submission, China is of the view that the Panel should exert caution and refrain from amending its Report on that particular point.

6.43 The **Panel** has made appropriate changes at paragraphs 7.326-7.328. The Panel recalls in this connection that paragraphs 7.326-7.328 merely provide an overview of the US claims and that the specific claims are addressed in greater detail at paragraphs 7.333 and following. The Panel also notes that the United States' response to questions Nos. 1 and 151 indicate that for some of the measures at issue the US claims relate to trading rights of foreign-invested enterprises in China and privately invested enterprises in China.

6.44 The **United States** notes that the Panel's discussion of the *Catalogue* at paragraphs 7.346-7.349 concludes, *inter alia*, that Articles X.2 and X.3 of the *Catalogue* cannot, by themselves, give rise to a breach of the provisions cited by the United States. According to the United States, this conclusion is based on the Panel's incorrect view that the *Catalogue* has no independent legal effect. The United States asserts that the legally operative nature of Articles X.2 and X.3 is uncontested between the parties. The United States also comments on the Panel's statement that China in its response to a Panel question[30] did not substantiate its assertion that the *Catalogue* has independent legal effect, saying that the Panel's question did not request substantiation. The United States requests, therefore, that the Panel revise its discussion of the *Catalogue* to eliminate the implication in paragraph 7.346 that the *Catalogue* has no independent legal effect and find that Articles X.2 and X.3 are inconsistent with 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a) and 84(b).

6.45 **China** believes that the conclusions reached by the Panel fall within its margin of appreciation and should therefore be left unchanged. China further states that while the *Catalogue* has independent legal effects, China does not see any material misrepresentation in the Panel's reasoning that it is the combined reading of both the *Catalogue* and the *Foreign Investment Regulation* which seems to give rise to the alleged breach of China's obligations.

6.46 The **Panel** begins by recalling that pursuant to Article 11 of the DSU, the function of panels is to make an "objective assessment" of the matter before them. Consequently, the parties' common assessment in relation to a particular issue is, therefore, not in and of itself dispositive.

6.47 In the present case, the Panel's analysis takes account of the views expressed by the parties and the evidence on the record, which consists of the texts of the *Catalogue* and the *Foreign Investment Regulation*. In considering these elements, the Panel noted that little or no substantiation was provided by the parties in support of their respective views. It should be observed in this connection that the United States is wrong to assert that the Panel did not request substantiation of responses to Panel questions. The Panel's questions were sent to the parties with a general introductory note instructing them, *inter alia*, "to provide sufficient elaboration of all replies". Nevertheless, the Panel has made appropriate changes at paragraphs 7.346-7.349 so as to focus its analysis on the United States' assertion that the *Catalogue* forbids, or bans, foreign-invested enterprises from engaging in the importation of relevant products into China. Corresponding changes were made at paragraph 7.362 which deals with the *Foreign Investment Regulation*.

6.48 The **United States** believes that the summary of its position at paragraph 7.381 would benefit from additional clarification. The United States therefore requests that the Panel make specified changes to its summary of the United States' position.

6.49 **China** refers the Panel to its comments on the US comments on paragraphs 7.326-7.327, which appear to be also applicable to the US comments on paragraph 7.381. China requests the Panel to refrain from inserting any wording which does not seem to be explicitly supported by appropriate references to the parties' submissions as made in the course of the Panel proceedings and which would result in making the scope of the US claims broader than it actually was or has explicitly been debated before the Panel.

[30] China's response to question No. 173.

6.50 The **Panel** notes that its summary is based on paragraph 35 of the United States' first written submission, which the United States fails to reference in its comment. Nevertheless, the Panel has made appropriate changes at paragraph 7.381.

6.51 The **United States** requests that the Panel make explicit at paragraph 7.385 the two inconsistencies referred to in the third sentence of the paragraph in order to clarify their nature.

6.52 **China** responds that it does not necessarily object to the request by the United States to insert additional clarification of its claim, provided the suggested amendments correspond to the way these arguments have been laid down in the various US submissions made in the course of the Panel proceedings. China submits that there would be a need to amend the proposed modified text in order to reflect more accurately the content of paragraphs 254 and 255 of the United States' first written submission.

6.53 The **Panel** has made appropriate changes at paragraph 7.385.

6.54 The **United States** requests that the Panel modify paragraphs 7.465 and 7.467 to reflect the fact that the US claim with respect to Articles 50 and 51 of the *1997 Electronic Publications Regulation* is not limited to the commitment concerning the "non-discretionary" grant of trading rights under paragraph 84(b), but also covers paragraphs 5.1, 5.2, 83(d) and 84(a) as well. According to the United States, Articles 50 and 51 amount to a prohibition on the right to import electronic publications for all enterprises in China (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals. The United States submits that by conditioning trading rights on the state plan, which only Chinese wholly state-owned enterprises can satisfy, China denies the right to import electronic publications to all enterprises in China (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals. In the United States' view, Articles 50 and 51 are, therefore, inconsistent with paragraphs 5.1, 5.2, 83(d) and 84(a).

6.55 The United States argues that this reading of the US claim is confirmed in paragraphs 45 and 46 of the US first written submission, which according to the United States explain that conditioning the right of to import electronic publications on the plan for total number, structure and deployment "... reconfirms the prohibition on any foreign-invested enterprise or foreign individual, or any privately-owned enterprise, engaging in the importation of electronic publications". The United States further points to paragraph 259 of the US first written submission (which states that Articles 50 and 51 "... limit which enterprises may engage in the importation of electronic publications..."), paragraph 227 (which states that "China refuses to permit any foreign enterprises or foreign individuals to import the Products, and likewise only allows a subset of enterprises in China – *i.e.*, wholly state-owned Chinese enterprises approved or designated by the Chinese Government – to import the Products" and that "[t]he measures establishing China's current trading rights regime for the Products are, therefore, inconsistent with China's obligations contained in … paragraphs [5.1, 5.2, 83 and 84]") and paragraph 270 (which states that "[t]he foregoing sections of this Part IV have demonstrated that China's measures restricting the right to import into China reading materials, AVHE products, sound recordings, and films for theatrical release, are inconsistent with Part I, paragraphs [5.1, 5.2, 83 and 84]" and that the United States, therefore, "requests that the Panel find that China's measures identified in this Part IV are inconsistent with China's trading rights obligations under the Accession Protocol, which are an integral part of the *WTO Agreement*").

6.56 **China** observes, firstly, that it is totally unclear, especially from paragraph 46 of the United States' first written submission, whether the United States has made a claim that Articles 50 and 51 impose a prohibition. China points out that at paragraph 46 of its first written submission, the United States draws the general conclusion, with respect to the *1997 Electronic Publications Regulation* as a whole, that it "reconfirms the prohibition of any foreign-invested enterprise or foreign individual or any privately-owned Chinese enterprise, engaging in the importation of electronic publications".

However, China considers that it is impossible to infer from this very broad and general allegation whether it refers specifically to Articles 50 and 51 of the *1997 Electronic Publications Regulation*, or to Article 8 of the *1997 Electronic Publications Regulation*, which is also described under paragraph 45 of the US first written submission.

6.57 China further notes that paragraph 227 of the United States' first written submission, to which the United States refers, contains only a very general introductory statement concerning the alleged effects of the challenged Chinese measures on trading rights. In China's view, it is interesting to note that in its quotation of paragraph 227 of its own first written submission, the United States has omitted to reproduce the very first words of that paragraph: "Through a variety of measures, however, China refuses to permit […]". China notes that here again, the United States fails to link any of the claims it describes specifically to Articles 50 and 51 of the *1997 Electronic Publications Regulation*.

6.58 China considers that in view of the lack of a basis behind the United States' contention that it has raised a claim that Articles 50 and 51 are inconsistent with paragraphs 5.1, 5.2, 83 and 84, the Panel should reject the United States' request for modification of paragraphs 7.465 and 7.467. China submits that the United States should not be allowed to distort the presentation of its arguments in order to derive benefits from the Panel's Report with respect to claims which it has failed to make in the first place in the course of the Panel proceedings.

6.59 The **Panel** begins by noting that paragraph 259 of the United States' first written submission specifically addresses the alleged inconsistency of the *1997 Electronic Publications Regulation* with China's trading rights commitments. Paragraph 259 states in relevant part: "By conditioning trading rights on Chinese Government plans for structuring these activities …, the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments. It injects qualifying criteria and government discretion into a process that China committed to be "non-discretionary".

6.60 As we also point out at paragraph 7.467 of the Interim Report, paragraph 259 identifies only one commitment with which China is alleged to be acting inconsistently – the commitment concerning the "non-discretionary" grant of trading rights. We further note that the sentence identifying this particular commitment does not begin with a word like "and", "in addition", "moreover", "also", etc. Such a word would have indicated that additional commitments are relevant to the US claim concerning Articles 50 and 51. We note that paragraph 269 of the US first written submission uses precisely such an approach – it contains the phrase "not only, but also". We further observe that paragraph 259 does not use words like "first", "second", etc. to indicate multiple bases for the US claim. This is what the United States did in the paragraphs immediately preceding paragraph 259, in the context of its claims concerning the *Publications Regulation*.[31] Therefore, the text of paragraph 259 does not indicate to us that commitments other than the commitment to grant trading rights in a "non-discretionary" way are relevant to the claim concerning Articles 50 and 51.

6.61 As we also point out at footnote 349 of the Interim Report, Panel question No. 154(b) specifically inquired about paragraph 259 and the US claim concerning Articles 50 and 51. The United States' response re-stated the claim based on the commitment concerning the "non-discretionary" grant of trading rights. In addition, it identified one further claim based, it seems, on paragraphs 5.2 and 84(b), since the United States alleged "discrimination" against foreign importers and privately-held importers in China. Having identified the two commitments, the United States' response concluded as follows: "Thus, by conditioning trading rights on GAPP's plan for the structuring of these importation activities, the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments". Thus, there is no suggestion in the United States' response that other commitments are alleged to have been breached. In contrast, as we note at paragraph 7.459

[31] United States' first written submission, paras. 255-257.

of the Interim Report, in its response to Panel question No. 153, the United States did suggest that Article 8 is inconsistent with, *inter alia*, paragraphs 5.1, 83(d) and 84(a).

6.62 Regarding the United States' reference to paragraphs 45 and 46 of its first written submission, we note that paragraph 45 refers to Articles 8 and 50-60 of the *1997 Electronic Publications Regulation*. Paragraph 46 states that "[t]hus, the *1997 Electronic Publications Regulation* implements the restrictive approval and licensing requirements contained in the [*Publications Regulation*] and the Importation Procedure" and that "[i]n so doing, it reconfirms the prohibition on any foreign-invested enterprise or foreign individual, or any privately-owned Chinese enterprise, engaging in the importation of electronic publications". As an initial matter, we have difficulty understanding how the existence of a licensing and approval requirement confirms the existence of a prohibition on "any" of the enterprises or individuals mentioned. Furthermore, we note that neither paragraph 45 nor paragraph 46 puts forward a claim of inconsistency. Also, we recall that the United States' response to Panel question No. 154(b) does not mention any claim under paragraphs 5.1, 83(d) or 84(a), nor does it assert that the State plan imposes, or amounts to, a "prohibition".

6.63 The United States also refers to paragraphs 227 and 270 of the US first written submission. Paragraph 227 refers to "the measures establishing China's current trading rights regime". Paragraph 227 does not, however, state that each of the measures at issue is inconsistent with each of the provisions identified. Similarly, paragraph 270 refers to "the measures identified in this Part IV" as being inconsistent with "China's trading rights obligations". Here again, paragraph 270 does not say that each of the measures at issue is inconsistent with each of the trading rights obligations identified.

6.64 Finally, we note that in response to Panel question No. 1, the United States identified Articles 8 and 50-55 of the *1997 Electronic Publications Regulation* as provisions claimed to be in breach of China's trading rights commitments and paragraphs 5.1, 5.2, 83(d) and 84(a)-(b) as relevant commitments. As explained above, in its subsequent responses to Panel questions, the United States did not indicate that paragraphs 5.1, 83(d) and 84(a) were relevant to its claim concerning Articles 50 and 51. It did suggest, however, that these paragraphs were relevant to its claim concerning Article 8.

6.65 In the light of the above considerations, the Panel declines to modify paragraphs 7.465 and 7.467.

6.66 The **United States** requests that the Panel reconsider its views expressed at paragraphs 7.470-7.477. The United States recalls that Article 50 of the *1997 Electronic Publications Regulation* directs GAPP to draw up plans for the total number, structure and deployment of importers of electronic publications. The United States argues that Article 50 provides no guidelines or other criteria for drawing up those plans, so they are formulated and applied according to the unknown preference of GAPP. In addition, the United States argues that China itself has confirmed to the Panel that the designation process is exclusively at the government's own initiative and on the government's own initiative and discretion. The United States asserts that at paragraphs 7.470 and 7.471 the Panel did not take into account these arguments. The United States requests the Panel to find that Articles 50 and 51 of the *1997 Electronic Publications Regulation* are discretionary in a manner inconsistent with paragraph 84(b).

6.67 **China** submits that the request by the United States for review by the Panel of its findings with respect to these paragraphs is misplaced. The Panel findings under paragraphs 7.470 and 7.471 are clear in establishing that in carrying out the approval process, GAPP has to apply the criteria which are laid down in Articles 50 and 51 of the *1997 Electronic Publications Regulation*. China argues that the United States does not provide any elements establishing that the GAPP would approve import entities by applying different criteria than the ones which are laid down in Articles 50 and 51 of the *1997 Electronic Publications Regulation*, and is therefore not establishing that such

entities would be approved in a discretionary way. China therefore considers that the request by the United States for a finding that Articles 50 and 51 are discretionary in a manner inconsistent with paragraph 84(b) is unwarranted and should be rejected by the Panel.

6.68 The **Panel** notes that a similar issue is addressed at paragraphs 7.429-7.431, which explains the somewhat less detailed treatment of the issue at paragraphs 7.471 and 7.472. At any rate, the Panel has taken the first argument concerning the absence of specific guidelines into account. This said, in an effort to make this more explicit, the Panel has made appropriate changes at paragraphs 7.471 and 7.472 in response to the United States' comment. Regarding the second argument concerning designation, the Panel notes that the provisions at issue do not provide for a designation system, which has been confirmed by China in response to a question from the Panel.[32] The Panel does not therefore find it appropriate to address this argument.

6.69 The **United States** requests that the Panel revise paragraphs 7.529, 7.536, 7.542 and 7.643 where the Panel stated that the *Film Regulation* and the *2001 Audiovisual Products Regulation*, by regulating the activity or business of importing films or audiovisual products, regulate the supply of a service. The United States argues that the statements raise a number of questions which were not addressed by the parties. The United States submits that deleting the statements would in no way interfere with the Panel's analysis and conclusions regarding the arguments made by China. The United States notes that the Panel's reasoning does not rely on the view that the business of importing constitutes the supply of a service.

6.70 **China** submits that the request of the United States, which would lead to the suppression of important parts of the Panel's reasoning, is based on a misrepresentation of both China's arguments and the reasoning of the Panel. The Panel's reasoning does not seem to be based on a general analysis of whether importation, in the abstract, is a service. Rather, the Panel appears to have limited its analysis and conclusion to the question whether the activity of importing films or audiovisual products intended for publication is a service, and to have reached a positive conclusion in this respect. China finds this part of the Panel's reasoning to reflect the arguments made by China that films and audiovisual products intended for publication are imported into China as part of a service. China also notes that, even if the relevant excerpts of the Panel's reasoning could be viewed as considering that importation, in general, is a service, a substantial amount of support could be found in this respect. China notes, for instance, that footnote 6 of China's Services Schedule, under Sector 4B, provides that "the restrictions on Mode 1 shall not undermine the rights of WTO Members to the right to trade as stipulated in Chapter 5 of China's Protocol of Accession to the WTO". According to China, this explicit exclusion suggests that importation may be regulated as a service activity. China is therefore of the view that the United States' request for modification of the relevant paragraphs of the Interim Report should be rejected by the Panel.

6.71 The **Panel** has made appropriate changes at paragraphs 7.529, 7.536, 7.542 and 7.643, taking into account that some of the statements are not essential.

6.72 The **United States** requests that Panel add a clarification in footnote 382 which is attached to paragraph 7.529. The United States considers that without the clarification, confusion could potentially arise because the United States challenged the relevant aspect of Article 5 – that in accordance with Article 5 only films which have been approved may be imported – under Article III:4 of the GATT 1994.

6.73 **China** is of the view that it is sufficiently clear that this particular finding of the Panel relates to the wider context of the United States' claims concerning trading rights. In addition, it is unclear on what basis the United States considers that the relevant aspects have been challenged under its

[32] China's response to question No. 40.

Article III:4 claim. China notes in this regard that the United States does not make any explicit reference to any of its submissions before the Panel in support of its contention. China therefore believes that there is no reason for granting the requested modification.

6.74 The **Panel** has added the requested clarification in footnote 382 which accompanies paragraph 7.529. The Panel notes that the United States referenced Article 5 of the *Film Regulation* in the footnotes of the section of its first written submission dealing with its claim under Article III:4 of the GATT 1994.

6.75 The **United States** requests that the Panel delete the last sentence of paragraph 7.609 which originated in paragraph 53 of the United States' first written submission.

6.76 **China** has not commented on the United States' request.

6.77 The **Panel** has deleted the last sentence of paragraph 7.609.

6.78 The **United States** requests changes at paragraphs 7.612 and 7.626 which concern the United States' claims regarding the *2001 Audiovisual Products Regulation*. The United States would like the Panel to add at paragraph 7.612 that, in the United States' view, the designation and approval requirements are also inconsistent with paragraphs 5.1, 5.2, 83(d) and 84(a) because they deny all enterprises (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals the right to import audiovisual products. With regard to paragraph 7.626, the United States submits that it has identified the relevant provisions of the *2001 Audiovisual Products Regulation* to which the US claim relates and why inconsistencies arise under these provisions. Thus, the United States requests the Panel to find that Articles 8-10 and 27-28 of the *2001 Audiovisual Products Regulation* are inconsistent with paragraphs 5.1, 5.2, 83(d), 84(a) and 84(b).

6.79 The United States asserts that its claim is that Articles 8-10 and 27-28 impose prohibitions on the right to trade by subjecting all importers seeking to import audiovisual products to approval and designation requirements. More specifically, the United States asserts that its claim is that China's approval process for unfinished audiovisual product importers (Articles 8-10 and 28) and its designation process for finished audiovisual product importers (Article 27) deny all enterprises in China (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals the right to import AVHE products and sound recordings into China. The United States points out that in paragraphs 261 and 266-267 of its first written submission, it argues that only Chinese wholly state-owned enterprises can be approved to import unfinished audiovisual products. Likewise, paragraphs 261 and 267 of the US first written submission state that only one Chinese wholly state-owned enterprise – the CNPIEC – has been designated to import unfinished audiovisual products.

6.80 In the United States' view, Articles 8-10 and 27-28 are inconsistent with paragraphs 5.1 and 5.2 and paragraphs 83 and 84, because they amount to a prohibition on the right to import audiovisual products for all enterprises in China (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals, and because they introduce discretion into the process of granting trading rights.

6.81 **China** notes that this United States' request is very similar to that raised with respect to paragraphs 7.326 and 7.327 and rests largely on the same references to the United States' first written submission. China would like to recall that paragraphs 261 and 266-267 of the United Sates' first written submission do not support the allegation that the United States has properly made a claim that "all enterprises in China (other than wholly state-owned enterprises), all foreign enterprises and all foreign individuals" are being denied the right to import audiovisual products intended for publication and finished audiovisual products. China submits that here again, the United States is trying to

substantiate a claim which it did not properly raise in its various submissions and that the Panel should refrain from letting the United States derive benefits from the Panel Report with respect to claims which were not properly made in the first place. More specifically, China requests that the Panel refrain from accepting any of the proposed modifications and from making the additional determinations which are requested by the United States.

6.82 The **Panel** begins with the US claim concerning audiovisual products imported for publication ("unfinished" audiovisual products). The United States asserts that it raised a claim with respect to Articles 8-10. This assertion directly contradicts the United States' response to Panel question No. 1. Question No. 1 *inter alia* asked the United States to indicate or clarify which specific provisions of the measures being challenged were in breach of China's trading rights commitments. In relation to the *2001 Audiovisual Products Regulation*, the United States identified Articles 5, 27 and 28. It made no mention of Articles 8-10.

6.83 In its first written submission[33], the United States had mentioned Articles 8-10 and contended that they provide that importers of audiovisual products intended for publication must by approved by the Chinese Government. However, Articles 8-10 are contained in Chapter II of the *2001 Audiovisual Products Regulation* which is entitled "Publishing". Specifically, Articles 8-10 deal with the establishment of "audiovisual publishing entities". They do not speak to the activity of importing or audiovisual products imported for publication. This is not surprising since the activity of importing is addressed in Chapter IV of the *2001 Audiovisual Products Regulation*, which includes Articles 27 and 28, and also in Chapter I, namely in Article 5 which distinguishes between the activities of publishing and importing.

6.84 The United States has never explained why and how Articles 8-10 in its view are relevant to the activity of importing audiovisual products intended for publication. Footnote 476 of the Panel's Interim Report already indicates that it is not clear to the Panel that Articles 8-10 are relevant. Furthermore, as noted, the United States, when asked to identify the specific provisions being challenged, made no mention of Articles 8-10, but included Article 5. The Panel inferred from these elements that with respect to audiovisual products intended for publication, the United States was raising a claim under Articles 5 and 28, and not Articles 8-10 and 28. This made sense since Article 5 plainly deals with who may import the relevant products and establishes an approval requirement ("licensing" requirement).[34] Moreover, the Panel subsequently asked another question of the United States regarding "the US claim in relation to Article 5 of the Audiovisual Regulation".[35] The United States in its response did not state that it was not raising any claim under Article 5.

6.85 Based on these considerations, we see neither a need nor a justification to make findings on whether Articles 8-10 are inconsistent with China's trading rights commitments.

6.86 Having regard to the US claim concerning audiovisual products imported for publication, the United States also requests the Panel to find that Article 28 is inconsistent with paragraphs 5.1, 5.2, 83(d), 84(a) and 84(b) in the same way as Articles 8-10 and 27, namely because it amounts to a prohibition on the right to import audiovisual products for all enterprises in China (other than Chinese wholly state-owned enterprises), all foreign enterprises and all foreign individuals, and because it introduces discretion into the process of granting trading rights. In our view, paragraphs 7.661 and 7.662 of the Interim Report adequately address the US claim concerning Article 28. As a result, we also do not see any need to modify paragraph 7.626 of the Interim Report.

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[33] United States' first written submission, footnote 166.

[34] We note that the United States itself seems to confirm this at para. 55 of its comments on the Interim Report when it says that "Article 7 of the *Audiovisual Products Importation Rule* imposes the same approval requirement as is contained in Articles 5 and 28 of the *2001 Audiovisual Products Regulation* …".

[35] Panel question No. 155.

6.87 Regarding the US claim concerning Article 5, which claim also relates to audiovisual products imported for publication, we note that the United States' comments are quite confusing. At paragraph 50 of its comments, the United States mentions the Panel's findings with respect to Articles 5, 27 and 28. It then refers to its comments on paragraph 7.612 of the Interim Report, which are about Articles 8-10 and 27-28, and says that the Panel should therefore find that Articles 5, 27 and 28 are inconsistent with paragraphs 5.1, 5.2, 83 and 84. Paragraph 51 of the US comments then goes on to request that "[f]or the reasons explained above", the Panel should find that Articles 8-10 and 27-28 are inconsistent with paragraphs 5.1, 5.2, 83 and 84. It is not clear to us from these comments that the United States requests the Panel to find that Article 5 is inconsistent with paragraphs 5.1, 5.2, 83 and 84(a).

6.88 At any rate, as we point out at paragraph 7.626 of the Interim Report, the United States' response to question No. 1 mentions paragraphs 5.1, 5.2, 83 and 84(a), but provides no explanation as to why a breach is claimed to occur. The United States' first written submission specifically addresses the alleged inconsistency of the *2001 Audiovisual Products Regulation* with China's trading rights commitments at paragraphs 261 and 262. Only paragraph 262 explains why an inconsistency is alleged to arise with China's trading rights commitments, and the only commitment that is identified at paragraph 262 is the commitment to grant trading rights in a "non-discretionary" way (paragraph 84(b)). As we point out in footnote 462 of the Interim Report, paragraph 261 argues that the approval requirement serves a gate-keeping function. However, as we also explain, paragraph 261 does not put forward any claim of inconsistency based on this argument. Indeed, paragraph 262 does not open with words like "also", "moreover", "in addition", etc.[36] In other words, there is no indication that paragraph 261 is intended to put forward a claim of inconsistency that is separate from the United States' claim that China fails to grant trading rights in a "non-discretionary" way.

6.89 We also note paragraphs 227 and 270 of the US first written submission which we have discussed in relation to a different US comment. To recall, paragraph 227 refers to "the measures establishing China's current trading rights regime". Paragraph 227 does not, however, state that each of the measures at issue is inconsistent with each of the provisions identified. Similarly, paragraph 270 refers to "the measures identified in this Part IV" as being inconsistent with "China's trading rights obligations". Here again, paragraph 270 does not say that each of the measures at issue is inconsistent with each of the trading rights obligations identified.

6.90 We, therefore, see no reason to modify paragraph 7.626 of the Interim Report insofar as it concerns Article 5. In any event, it is difficult to see how Article 5 could be said to impose a "prohibition" on the right to trade for all importers except Chinese wholly state-owned enterprises. In fact, the United States itself points to measures other than the *2001 Audiovisual Products Regulation* – namely, the *Publications Regulation* and the *Imported Cultural Product Rule* – in support of its assertion. It is those other measures which appear to establish that the business of importing audiovisual products intended for publication is to be conducted by wholly state-owned enterprises.

6.91 We now turn to the US claim concerning finished audiovisual products, i.e., the claim with respect to Article 27. The United States requests the Panel to find that Article 27 is inconsistent with paragraphs 5.1, 5.2, 83 and 84(a). In considering this request, we refer to what we have said above at paragraphs 6.88-6.89 with regard to Article 5. We further recall that in footnote 456 of the Interim Report we point out the US argument that the designation requirement serves a gate-keeping function. However, as the footnote also explains, paragraph 261 does not put forward any claim of inconsistency based on this argument.

[36] We recall our earlier observation that, elsewhere, the United States' first written submission does use such words, or indicates multiple claims by making a numbered list (e.g., at para. 254 of the US first written submission).

6.92 Therefore, as with respect to Article 5, we see no reason to modify paragraph 7.626 of the Interim Report insofar as it concerns Article 27. And as with Article 5, it is at any rate difficult to see how Article 27 could be said to impose a "prohibition" on the right to trade for all importers except Chinese wholly state-owned enterprises. We note that the United States' first written submission states that only the CNPIEC "has been designated"[37]. This is different from what the United States now says in its comments, which is that Article 27 prohibits importers other than wholly state-owned enterprises from being designated. Furthermore, the United States itself points to measures other than the *2001 Audiovisual Products Regulation* – namely, the *Imported Cultural Product Rule* and the *Circular on Uniform Anti-Fake Logo on Audiovisual Products* – in support of its assertion. It is those other measures which appear to establish that the business of importing finished audiovisual products is to be conducted exclusively by the CNPIEC.

6.93 Finally, since paragraphs 261 and 262 of the United States' first written submission do not contain any statement to the effect that an inconsistency with China's trading rights commitments is claimed on the grounds that the designation and approval requirements deny all enterprises in China (other than Chinese wholly state-owned ones), all foreign enterprises and all foreign individuals the right to import audiovisual products, we do not find it appropriate to add such a statement to paragraph 7.612 of the Interim Report. We also note that paragraph 7.613 already refers to the US claim under paragraphs 5.1, 5.2, 83 and 84(a).

6.94 The **United States** makes a related comment on paragraph 7.670 which concerns the United States' claims regarding the *Audiovisual Products Importation Rule*. Paragraph 7.670 parallels paragraph 7.626 concerning the *2001 Audiovisual Products Regulation*. The United States submits that it disagrees with the Panel and that it has demonstrated that Articles 7, 8, 9 and 10 of the *Audiovisual Products Importation Rule* are inconsistent with paragraphs 5.1, 5.2, 83(d) and 84(a). The United States therefore requests the Panel to find that Articles 7-10 are inconsistent with the aforementioned paragraphs. The United States asserts that the approval requirement in Article 7 (concerning audiovisual products intended for publication) and the designation requirement in Articles 8, 9 and 10 (concerning finished audiovisual products) deprives all enterprises in China (other than wholly state-owned enterprises), all foreign enterprises and all foreign individuals of the right to import these products into China, and treats all foreign individuals and enterprises less favourably than Chinese wholly state-owned enterprises.

6.95 **China** notes at the outset that the United States' allegation that it has raised a claim of inconsistency with paragraphs 5.1, 5.2, 83(d) or 84(a) with respect to the *Audiovisual Products Importation Rule* appears to be based on the assumption that it has also raised such claim with respect to the *2001 Audiovisual Products Regulation*. However, as explained in China's comments on the United States' comments on paragraph 7.612, China considers that the United States has not properly raised such a claim. Thus, in China's view, it has to be assumed that the United States has also failed to raise a similar claim with respect to the *Audiovisual Products Importation Rule*. China considers that the Panel's finding in this respect is correct and accurately reflected in paragraph 7.670, especially considering the Panel's reference to the United States' response to question No. 1. China therefore requests the Panel to dismiss the United States' comments on paragraph 7.670.

6.96 The **Panel** recalls that paragraph 7.670 refers to the United States' response to question No. 1. The response mentions a claim under paragraphs 5.1, 5.2, 83 and 84(a), but provides no explanation as to why a breach is claimed to occur. The United States' first written submission specifically addresses the alleged inconsistency of the *Audiovisual Products Importation Rule* with China's trading rights commitments at paragraph 263. It only states, however, that the *Audiovisual Products Importation Rule* is inconsistent with China's commitments in the same way as the *2001 Audiovisual Products Regulation.*

[37] United States' first written submission, para. 261.

6.97 Since we have declined to modify paragraph 7.626 of the Interim Report, which parallels paragraph 7.670, we see no reason to modify paragraph 7.670. In any event, it is difficult to see how Articles 7-10 could be said to impose a "prohibition" on the right to trade for all importers except Chinese wholly state-owned enterprises. As noted above, the United States itself points to measures other than the *2001 Audiovisual Products Regulation* or the *Audiovisual Products Importation Rule* in support of its assertion. It is those other measures which appear to establish that the business of importing audiovisual products is to be conducted by wholly state-owned enterprises.

6.98 The **United States** requests that the Panel modify paragraph 7.654 so as to take into account that the second sentence of Article 27 of the *2001 Audiovisual Products Regulation* refers to individuals.

6.99 **China** has not commented on the United States' request.

6.100 The **Panel** has made appropriate changes at paragraph 7.654.

6.101 The **United States** requests changes at paragraphs 7.725, 7.728, 7.733, 7.750-7.751, 7.753, 7.755, 7.757, 7.762, 7.764-7.767, 7.789-7.790, 7.795-7.796, 7.818-7.819, 7.834, 7.882, 7.889, 7.895, 7.901-7.903, 7.916-7.917 as well as paragraph 2.1. Specifically, the United States notes that the Panel and parties define the term "reading materials" as including electronic publications. To avoid creating the impression that electronic publications are not a type of reading material for the purpose of this dispute, the United States requests that the Panel clarify the above-noted paragraphs.

6.102 **China** has not commented on the United States' request.

6.103 The **Panel** has made appropriate changes at paragraphs 7.725, 7.728, 7.733, 7.750-7.751, 7.753, 7.755, 7.757, 7.762, 7.764-7.767, 7.789-7.790, 7.795-7.796, 7.818-7.819, 7.834, 7.901-7.903, 7.916-7.917 as well as paragraph 2.1.

6.104 The **United States** requests that the Panel modify the first sentence of paragraph 7.744 in order to reflect more precisely the US reference to the Appellate Body's approach to Article XX in *US – Customs Bond Directive*.

6.105 **China** notes that it fails to see to what extent the requested modification would have the merit of making the United States' position clearer than it is already reflected in the finding of the Panel. Thus, China suggests that there is no need for the Panel to modify this particular finding.

6.106 The **Panel** has made appropriate changes at paragraph 7.744.

6.107 The **United States** requests that the Panel modify the first sentence of paragraph 7.765 in order to reflect the GAPP's review of the catalogue of publications which publication import entities must submit before importing them. The United States recalls that this is provided for in Article 45 of the *Publications Regulation*.

6.108 **China** notes that the Panel's statement at paragraph 7.765 is not made by reference to the United States' submissions, but reflects the Panel's own reasoning which appears to be sufficiently clear. Thus, China submits that the addition suggested by the United States does not seem to be necessary. Further, China argues that the suggested addition appears also to be incorrect and somewhat misleading, since nothing in Article 45 of the *Publications Regulation* provides for any review by the GAPP of the catalogue of publications intended for importation to which the importer's review and its subsequent decision to import would be subject. China notes that Article 45 of the *Publications Regulation* only provides that the importer must submit the catalogue of publications intended for importation for registration purpose. China agrees that in case the GAPP finds prohibited

content, it may intervene by notifying the importer of any publications which shall be prohibited or deferred from being imported. However, China notes that the importer's review and its subsequent decision to import are not generally dependent upon any GAPP decision. China points out in this context that Article 45 does not use words such as "subject to" or "review". Thus, China considers that the Panel should refrain from making the modification sought by the United States.

6.109 The **Panel** has made appropriate changes at paragraph 7.765 to take account of Articles 44 and 45 of the *Publications Regulation*.

6.110 The **United States** requests that the Panel delete the second sentence of paragraph 7.817. The United States considers that the sentence in question, which comments on the fact that the exception in relation to "public morals" is the first exception identified in Article XX, could give rise to possible misinterpretation. The United States also argues that the Panel's analysis would be unaffected by the requested deletion.

6.111 **China** suggests that the Panel has adequately characterized the importance of public morals in this particular paragraph and does not consider that there is a need to amend the Panel's findings in this respect.

6.112 The **Panel** notes that the United States has not explained how the sentence in question could give rise to misinterpretation. The Panel does not consider that the said sentence lends itself to misinterpretation and, therefore, does not agree to delete it. The Panel has, nonetheless, slightly rephrased the sentence in question.

(b) Comments by China

6.113 **China** requests that the Panel modify paragraph 7.330 in order to describe more accurately China's argument as relating to the fact that the measures regulating the importation of motion pictures for theatrical release should not be scrutinized under the rules applicable to trade in goods.

6.114 The **United States** has not commented on China's request.

6.115 The **Panel** has made appropriate changes at paragraph 7.330.

6.116 **China** requests that at paragraph 7.410 the Panel use the word "layout" rather than the word "distribution", since that term is used in the translation of the relevant Chinese regulations. China also argues that the term "distribution" has multiple meanings and may cause confusion.

6.117 The **United States** does not agree with China's suggested change to paragraph 7.410 to replace the term "distribution" with the term "layout". The United States submits that the term "distribution" is the most appropriate term in this context and, unlike the term "layout", will not lead to confusion. In contrast, the United States considers that the term "layout"" – e.g., the internal arrangement of constituent parts, such as in a circuit board or an office space – does not accurately convey the appropriate meaning in this context. The United States notes that while China indicates that it used the term "layout" in its translation of the relevant Chinese regulations, the United States notes that the US translation uses the term "distribution". The United States recalls that China had the opportunity to identify any translation concerns during the extensive translation review process, and chose not to raise this issue.

6.118 The **Panel** does not consider that the English term "layout" is less likely to create confusion than the term "distribution". Nonetheless, the Panel has deleted the term "distribution" at paragraph 7.410.

6.119 **China** requests that the fourth sentence at paragraph 7.434 should be changed so as to reflect the fact that China's confirmation was given with respect to newspapers and periodicals and to avoid any ambiguity.

6.120 The **United States** has not commented on China's request.

6.121 The **Panel** has made appropriate changes at paragraph 7.434.

6.122 **China** requests that the Panel add a reference to China's response to question No. 25(b) in footnote 325, which is attached to paragraph 7.434.

6.123 The **United States** does not agree with China's suggested change to footnote 325. In the United States' view, footnote 325 is correct as written. The United States notes that China's answer to Panel question No. 25(b) does not support the proposition that the "GAPP designates publication import entities at its own initiative and that there is no application process". The United States points out that China's answer to Panel question No. 25(b) addresses a different issue, i.e., which importers are subject to what government selection process. Accordingly, the United States requests that the Panel decline China's request to modify footnote 325.

6.124 The **Panel** notes that China's response to question No. 25(b) is referenced in footnote 324 of the Interim Report. Also, the response to question No. 25(b) does not seem to be directly relevant to the sentence to which footnote 325 is attached. As a result, the Panel does not find it appropriate to make the requested change.

6.125 **China** requests that the Panel add to its summary of China's position at paragraph 7.502 in order to reflect fully China's arguments.

6.126 The **United States** has not commented on China's request.

6.127 The **Panel** has made appropriate changes at paragraph 7.502.

6.128 **China** requests that footnote 383, which is attached to paragraph 7.530, should be completed by adding a reference to paragraph 35 of China's second written submission.

6.129 The **United States** has not commented on China's request.

6.130 The **Panel** has made the requested change in footnote 383 which accompanies paragraph 7.530.

6.131 **China** requests that the Panel delete the last sentence of footnote 402 which relates to paragraph 7.552. China considers that its comments on the United States' response to question No. 199(b) do not make a similar point.

6.132 The **United States** has not commented on China's request.

6.133 The **Panel** has deleted the last sentence of footnote 402, which is attached to paragraph 7.552.

6.134 **China** requests that the Panel change the second sentence of paragraph 7.569 to reflect that China made no mention of the role of the SARFT. China further requests that the Panel clarify footnote 415 along similar lines.

6.135 The **United States** does not agree with China's suggested change to paragraph 7.569. The United States notes that China's request suggests that SARFT's role as the initiator of the designation

process has not been confirmed. According to the United States, this is contradicted by China's own measures and its answers to Panel question No. 25(a) and 25(b) as well as Panel question Nos. 170 and 171. The United States argues that in its answers to Panel question No. 25(a) and 25(b), China confirms that designation occurs exclusively through the government's own initiative. The United States further notes that China reiterates in its answers to Panel question Nos. 170 and 171 that those seeking to import films must be designated by SARFT. Accordingly, the United States requests that the Panel decline China's request to modify the second sentence of paragraph 7.569.

6.136 The **Panel** has made appropriate changes at paragraph 7.569 and the attached footnote 415 to reflect the fact that China has not explicitly mentioned the SARFT.

6.137 **China** requests the Panel to change the third sentence of paragraph 7.637 and the accompanying footnote 460. China submits that its responses to question Nos. 25(b) and 40 did not mention the scope of Article 5. China contends that it did not indicate in its responses that Article 5 applies only to audiovisual products imported for publication. China considers it worth noting, however, that its response to question No. 31(a) pointed out that "audiovisual products" in the *2001 Audiovisual Products Regulation* encompass audiovisual products used for publication. China thus requests that the Panel state that China appears to acknowledge that Article 5 applies to audiovisual products imported for publication. China also requests that the Panel in footnote 460 refer to China's response to question No. 31(a).

6.138 The **United States** requests that the Panel decline China's request. At the same time, the United States notes that the Panel assessed China's approval process with respect to importers of audiovisual products imported for publication. The United States submits that China's comments on paragraph 7.637 result in the need for the Panel to assess the consistency of Article 5 of the *2001 Audiovisual Products Regulation* with paragraph 84(b) also with respect to finished audiovisual products.

6.139 The United States notes that at paragraph 7.637, the Panel concluded that it would analyse Article 5 as it applies to audiovisual products imported for publication, but not to finished audiovisual products. The United States asserts that in support of this conclusion, the Panel relied on its understanding of China's apparent view that Article 5 applies only to audiovisual products imported for publication. The United States considers that China's comments on the Interim Report clarify that its arguments do not support the Panel's conclusion.

6.140 The United States further argues that in addition to its understanding of China's apparent view of the scope of Article 5, the Panel also relied on the apparent limitations of the US claim with respect to that article. The United States contends that its claim is not, however, limited to audiovisual products imported for publication. The United States notes that the Panel refers to paragraphs 261 and 262 of the US first written submission in support of its view regarding this perceived limitation. Yet, according to the United States, paragraphs 261 and 262 do not limit the US claim in respect of Article 5 to audiovisual products imported for publication. Rather, these paragraphs address China's designation and approval requirements set forth in the *2001 Audiovisual Products Regulation*. The United States notes that it explained in paragraphs 52 through 54 of its first written submission that Article 5 applies to all audiovisual products, with the importation of finished audiovisual products and audiovisual products imported for publication covered by specific articles. In addition, the United States recalls that the US answer to Panel question No. 155 confirms that Article 5 applies to both finished audiovisual products and audiovisual products imported for publication.

6.141 In the light of China's clarification, the United States requests that the Panel decline China's request and that the Panel revise its analysis and findings (under paragraph 84(b)) with respect to Article 5 to include finished audiovisual products.

6.142 The **Panel** begins by noting that China incorrectly describes its response to question No. 31(a). That response refers to Article 2 of the *Publications Regulation*. It does not refer to the *2001 Audiovisual Products Regulation*. The regulation at issue, however, is the latter one. The Panel does not, therefore, find it appropriate to reference China's response to question No. 31(a). In response to China's comment, the Panel has, however, deleted footnote 460 and has made appropriate changes to paragraph 7.637. The Panel notes that China does not seem to disagree that Article 5 applies to audiovisual products imported for publication.

6.143 Regarding the US comments, the Panel recalls that the United States was given an opportunity to request changes. Thus, the United States could have requested the Panel to revise its analysis and findings with respect to Article 5 to include finished audiovisual products. The United States did not do so. We fail to see how the changes requested by China "result in the need" for the Panel to make changes not requested by China. Indeed, as is clear from paragraph 7.637, even before China's comments, the United States' position has been that Article 5 covers both finished audiovisual products and audiovisual products imported for publication.[38] Thus, China's comments do not result in a change in the United States' own position. Moreover, the United States is incorrect in saying that the Panel's analysis of the claim concerning Article 5 depended on the Panel's understanding of China's apparent view that Article 5 applies only to audiovisual products imported for publication. Paragraph 7.637 merely addresses the issue of whether Article 5 covers audiovisual products imported for publication because they are the products at issue in the United States' claim. Thus, we see no basis for accepting the United States' request, made for the first time in response to China's comments, that the Panel revise its analysis and findings with respect to Article 5 so as to include finished audiovisual products.

6.144 We also note that in its comments on China's comments, the United States contends that its claim concerning Article 5 is not limited to audiovisual products imported for publication. As indicated above, we decline the United States' request to make changes in response to this comment. At any rate, we do not agree with the United States' contention. It is clear from paragraphs 261 and 262 of the US first written submission that the United States is challenging a designation requirement for finished audiovisual products and an approval requirement for audiovisual products intended for publication. The United States identified Article 27 as the relevant designation requirement and Articles 8-9 as the relevant approval requirement.[39] As our discussion above concerning the US comment on paragraphs 7.612 and 7.626 explains, Articles 8-9 do not appear to be relevant to the activity of importing audiovisual products intended for publication. In any event, the United States subsequently identified, in its response to question No. 1, Article 5 as a provision being challenged, and it no longer identified Articles 8-9 as provisions being challenged. In our view, Article 5 can be considered an approval requirement inasmuch as it states that a permit, or licence, is needed in order to import audiovisual products. Also, the text of Article 5 is different from, e.g., Article 27 which uses the concept of "designation". The United States in its first written submission could have identified Article 5 alongside Article 27 as a designation requirement. However, the United States chose not to do so.[40] The fact that China in our view enjoys discretion as to the entities to be licensed does not make it wrong to refer to Article 5 as an approval requirement, particularly considering the fact that only Article 27 uses the concept of "designation".

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[38] United States' response to question No. 155.

[39] United States' first written submission, footnote 166.

[40] We also recall that the United States' response to question No. 1 continued to identify Article 27. The change indicated by the United States' response concerned Articles 8-10, which were no longer identified as provisions being challenged, and Article 5, which was identified for the first time as a provision being challenged. Thus, it is reasonable to assume that Article 5 replaced Articles 8-10, since the latter provisions were no longer identified.

6.145 This understanding, i.e., that the US claim in respect of Article 5 concerns audiovisual products intended for publication and that the US claim in respect of Article 27 concerns finished audiovisual products is consistent with, and parallels, our understanding of the US claims in respect of Articles 7 and 8 of the *Audiovisual Products Importation Rule*. We further note that we asked the United States whether its claim concerning Article 5 "relate[s] to finished or unfinished AVHE products". The United States did not reply to this question about the US claim. Instead, the United States addressed the product scope of Article 5, stating that Article 5, in its view, relates to both finished audiovisual products and audiovisual products intended for publication.[41] Since paragraphs 261 and 262 of the US first written submission clearly limit the claim regarding the approval requirement to audiovisual products intended for publication, and since Article 5 in our view can be considered to set forth an approval requirement, and taking account of the other circumstances mentioned, including the fact that the United States identified only Article 27 as a designation requirement and that only Article 27 uses the concept of "designation" as well as the US claims concerning Articles 7 and 8 of the *Audiovisual Products Importation Rule*, we consider that the US claim concerning Article 5 is limited to audiovisual products intended for publication.

6.146 **China** requests that the Panel change the second sentence of paragraph 7.708 in order to reflect more accurately China's position. China notes that it is correct that it has not invoked the provisions of Article XX(a) to justify its measures regulating the importation of motion pictures for theatrical release and audiovisual products intended for publication, and that it has not developed specific arguments in this respect. China states, however, that this does not mean that it does not view these specific measures as also covered by its "right to regulate trade" in a WTO-consistent manner as laid down in paragraph 5.1 of the Accession Protocol. In order to avoid any ambiguity, China therefore suggests to modify the sentence.

6.147 The **United States** does not agree with China's suggested change to paragraph 7.708. The United States notes that China's proposed revision is entirely inconsistent with its arguments before the Panel. The United States observes that at no point did China express a view that its measures regulating the importation of films for theatrical release and audiovisual products intended for publication are covered by its "right to regulate trade" in a WTO-consistent manner. The United States considers that the Panel accurately explains that China argued on numerous occasions that its trading rights commitments do not apply to the importation of films for theatrical release and audiovisual products intended for publication. The United States notes that China similarly argued that audiovisual products intended for publication are not covered by its trading rights commitments, contending that, as the challenged measures regulate a service, i.e., the licensing of copyrights for publication of audiovisual content, China's commitments concerning the right to import goods do not apply to such measures. Accordingly, the United States requests that the Panel decline China's request to modify the second sentence of paragraph 7.708.

6.148 The **Panel** declines to make the requested changes at paragraph 7.708. The Panel notes that China has not argued that its measures regulating the importation of motion pictures for theatrical release and audiovisual products intended for publication are covered by its "right to regulate trade" under paragraph 5.1. Indeed, China's comment fails to identify any such earlier argument. As is pointed out, *inter alia*, at paragraphs 7.493, 7.620 and 7.725 of the Interim Report, on which China has not commented, China's position in respect of the relevant measures has been that they regulate services and, therefore, are not subject to the trading rights commitments set forth in the Accession Protocol. The Panel notes that the interim review stage is not the appropriate time to present new arguments that could have been put forward earlier. The Panel therefore refrains from addressing this

[41] United States' response to question No. 155. At para. 18 of the US comments on China's comments, the United States appears to confirm that its response does not discuss the US claim when it says that "the US answer to Panel question 155 confirms that Article 5 applies to both finished audiovisual products and audiovisual products imported for publication".

new argument. In any event, China provides no explanation as to why and how the relevant measures are covered by China's "right to regulate trade".

6.149 **China** requests that the Panel add a reference to Article 3 of the *2008 Electronic Publications Regulation* at paragraphs 7.753 and 7.757, since Article 3 also contains a reference to prohibited contents.

6.150 The **United States** has not commented on China's request.

6.151 The **Panel** recalls paragraph 7.726 of the Interim Report which lists the measures covered by China's Article XX defence. Neither the *1997 Electronic Publications Regulation* nor the *2008 Electronic Publications Regulation* are among these measures. The Panel also recalls paragraph 7.453, where it is explained that the measure to be examined in this case is the *1997 Electronic Publications Regulation*, not the *2008 Electronic Publications Regulation.* For these reasons, the Panel does not find it appropriate to refer to the *2008 Electronic Publications Regulation*. Nevertheless, the Panel has added a clarification at paragraphs 7.753 and 7.757.

6.152 **China** points out that at paragraph 7.778 the Panel uses the term "sub-distribution". China submits that the term "sub-distribution" does not appear in China's translation of the *Audiovisual (Sub-)Distribution Rule*. China instead uses the term "distribution".

6.153 The **United States** recalls the Panel's discussion at paragraph 7.931 of the Interim Report, which specifically addresses the term "(sub-)distribution". In that paragraph, the Panel stated that it will use the term "(sub-)distribution" with respect to the title of certain measures which contain the term *Fen Xiao*, as does the *Audiovisual (Sub-)Distribution Rule*. Moreover, the United States notes that the Panel explained that it would use "wholesale and retail" to specify the relevant activities under discussion with respect to (sub-)distribution. The United States further argues that to the extent that China's comment is understood as a request to re-open the translation discussion regarding this term so as to replace the term "sub-distribution" with "distribution" or *Fen Xiao* at paragraph 7.778, the United States notes that this translation issue has been resolved as described in paragraph 7.931. Accordingly, the United States requests that the Panel not replace "sub-distribution" with "distribution" or *Fen Xiao*.

6.154 The **Panel** notes that the US claim in respect of Article 21 concerns the right to import and not the type of "distribution" in which Chinese-foreign contractual joint ventures may engage. Having said this, the Panel at paragraph 7.778 has added a footnote to note China's different view, indicating China's proposed translation of Article 1 and referring to paragraph 7.931 regarding the translation of the Chinese term *Fen Xiao*.

6.155 **China** requests that at paragraph 7.829 the Panel replace the term "distribution" with the term "layout".

6.156 The **United States** argues that for the reasons set forth in its comments on China's comments on paragraph 7.410, it requests that the Panel decline China's request to modify the second sentence of paragraph 7.829.

6.157 The **Panel** does not consider that the term "layout" is less likely to create confusion than the term "distribution". Paragraph 156 of China's first written submission refers to "geographical coverage". In order to avoid any potential confusion, the Panel at paragraph 7.829 has added the term "geographical coverage" in brackets.

6.158 **China** requests that the Panel correct a reference to China's second written submission in footnote 565 which accompanies paragraph 7.854. China points out that the reference should be to China's first written submission.

6.159 The **United States** has not commented on China's request.

6.160 The **Panel** has made appropriate changes to footnote 565, which is attached to paragraph 7.854.

3. Claims under the GATS

(a) Comments by the United States

6.161 The **United States** requests that the Panel modify the first sentence of paragraph 7.1012 to specify that the wholesaling of reading materials (e.g. books, newspapers, periodicals, electronic publications) is covered by China's commitments under "Wholesale Trade Services" (Sector 4.B).

6.162 **China** has not commented on the United States' request.

6.163 The **Panel** notes that the claim with respect to master distribution concerns only books, newspapers and periodicals and that what needs to be determined is whether these products fall within the scope of China's commitments on "Wholesale Trade Services" (Sector 4.B). The Panel therefore considers that the original text of paragraph 7.1012 is appropriate.

6.164 The **United States** requests that the fourth sentence of paragraph 7.1037 be modified so that it does not state that the *Foreign Investment Regulation* gives legal effect to the *Catalogue*.

6.165 **China** has not commented on the United States' request.

6.166 The **Panel** has made appropriate changes to paragraph 7.1037.

6.167 The **United States** requests that the Panel replace the term "publications" with the term "reading materials" in paragraph 7.1068 for the sake of consistency.

6.168 **China** has not commented on the United States' request.

6.169 The **Panel** has made appropriate changes to paragraph 7.1068.

6.170 The **United States** requests that the last sentence of paragraph 7.1117 be modified because it is not clear as a general matter that by inscribing limitations in their Services Schedule WTO Members necessarily consider those inscriptions to be discriminatory.

6.171 **China** has not commented on the United States' request.

6.172 The **Panel** has made the requested clarification.

6.173 The **United States** requests that the second sentence of paragraph 7.1174 be modified so as to more accurately track the US statements regarding the meaning of the term "sound recording".

6.174 **China** has not commented on the United States' request.

6.175 The **Panel** has made the requested clarification.

6.176 The **United States** requests that the sixth sentence of paragraph 7.1204 and the first sentence of paragraph 7.1340 be modified, with respect to the scope of Sector 4 of China's Services Schedule because, in its view, a decision on the full scope of this sector is unnecessary in order to decide the meaning of China's commitments in Sector 2.D of its Schedule.

6.177 **China** responds that China's GATS Schedule, in particular Sector 4, provides relevant context for the interpretation of the entry "sound recording distribution services" in Sector 2.D.

6.178 The **Panel** has not made the requested modification. The original text properly reflects the Panel's understanding of the scope of Sector 4 of China's Services Schedule.

(b) Comments by China

6.179 **China** requests that the Panel modify the first sentence of paragraph 7.1068 to use the past tense because the measure in question was repealed.

6.180 The **United States** has not commented on China's request.

6.181 The **Panel** has made the requested modification.

6.182 **China** requests that the Panel make changes to the summary of China's argument provided at paragraph 7.1235 to add that China also denies the commercial reality of network music services.

6.183 The **United States** has not commented on China's request.

6.184 The **Panel** has made appropriate changes to paragraph 7.1235.

6.185 **China** requests that the Panel make changes to the summary of China's argument provided at paragraph 7.1238 to reflect China's position more accurately. According to China, it did not assert that the common intention regarding China's services commitments was formed by the time the bilateral negotiations were concluded, i.e., by 15 November 1999. Rather, China merely defined the time-period within which the negotiations on its GATS Schedule took place.

6.186 The **United States** disagrees with China's comments on this paragraph. Referring to China's first written submission, the United States notes that China did consider that 15 November 1999 was the relevant date for determining the intention of the parties regarding the meaning of China's services commitments for sound recording distribution services.

6.187 The **Panel** has modified the first sentence of paragraph 7.1238 by quoting China's answer to a Panel question. The Panel has made further changes to this paragraph so as to enhance clarity and to indicate that the negotiations of China's GATS Schedule were not concluded on 15 November 1999 as claimed by China.

6.188 **China** requests that the Panel modify paragraph 7.1254 to ensure that China's position is reflected in a more accurate manner. China explains that it relied on those "factors", not in support of its interpretation of "sound recording distribution services", but only to rebut the United States' argument.

6.189 The **United States** responds that no revisions to the Interim Report are necessary based on China's comment related to this paragraph. The United States indicates that China merely provides a point of clarification, without providing the Panel with any suggestions for modifying the Interim Report.

6.190 The **Panel** has deleted the wording "and not from other external tests or theories" in the second sentence of paragraph 7.1254 and made an editorial change.

6.191 **China** requests that paragraph 7.1259 be modified because China had recourse to those "factors" only to rebut the United States' argument. China indicates that it has never contended that two distinct services could not be classified under the same entry.

6.192 The **United States** responds that no revisions to the Interim Report are necessary based on China's comment related to this paragraph. The United States indicates that China merely provides a point of clarification, without providing the Panel with any suggestions for modifying the Interim Report.

6.193 The **Panel** has deleted the last two sentences of paragraph 7.1259, for clarity, and has made some editorial changes to the paragraph.

6.194 **China** requests that the Panel modify paragraph 7.1262 to avoid any ambiguity about China's position when referring to CPC version 2.

6.195 The **United States** responds that no revisions to the Interim Report are necessary based on China's comment related to this paragraph. The United States indicates that China merely provides a point of clarification, without providing the Panel with any suggestions for modifying the Interim Report.

6.196 The **Panel** has not modified paragraph 1262. The Panel considers that the original text clearly reflects its view and gives rise to no confusion or ambiguity about China's position.

4. Claims under Article III:4 of the GATT 1994

(a) Comments by the United States

(i) Reading materials

6.197 The **United States** requests that the Panel modify the first sentence of paragraph 7.1504 to reflect that the *Publications (Sub-) Distribution Rule* governs not only foreign-invested enterprises seeking to engage in the sub-distribution of books, but also those foreign-invested enterprises seeking to engage in the sub-distribution of newspapers and periodicals.

6.198 **China** has not commented on the United States' request.

6.199 The **Panel** has made the appropriate modification to the first sentence of paragraph 7.1504.

6.200 The **United States** suggests that the Panel replace the term "publications" in paragraph 7.1530 with "reading materials" in order to maintain the consistent use of the latter term as explained in footnotes 111 and 775 of the Interim Report.

6.201 **China** has not commented on the United States' request.

6.202 The **Panel** has replaced the term "publications" in paragraph 7.1530 with the term "reading materials".

(ii) Sound recordings

6.203 The **United States** requests that the Panel clarify in the second sentence of paragraph 7.1546 that the United States arguments with respect to the content review process applicable to imported products relate to that process being "more onerous" than the one applicable to domestic products**.**

6.204 **China** understands that in paragraph 7.1546 the Panel refers to the United States' response to Panel question No. 123(b), which only refers to a "more onerous" regime with respect to the *Network Music Opinions*.

6.205 China recalls that the *2001 Audiovisual Products Regulation* imposes a content review requirement for sound recordings to be imported in hard copy format, such content review taking place prior to importation. In turn, pursuant to the *Network Music Opinions*, the digitalized version of the music previously embedded in the hard copy format also undergoes a content review.

6.206 According to China, it follows that what the United States complains about is, on the one hand, the existence of a content review imposed exclusively on imported hard copies prior to importation and, on the other hand, an allegedly more onerous content review regime for the digitalized content previously embedded in an imported hard copy which is in the marketplace. Therefore, the Panel's statement is correct and complete insofar as it relates to the content review undergone by the hard copy sound recording.

6.207 China respectfully submits that the request by the United States to insert additional wording is likely to result in confusion concerning the existence of two distinct content review processes. Should the Panel accept the request for modification suggested by the United States, the Panel should clarify that this statement is valid only in connection with digitalized products and insofar as the *Network Music Opinions* is concerned, in accordance with the full statement of the United States.

6.208 The **Panel** notes that in paragraphs 369-372 of its first written submission the United States refers to the content review processes for imported hard-copy sound recordings under both the *Network Music Opinions* and the *2001 Audiovisual Products Regulation* as being "more onerous" than the ones applied to domestic products. The Panel does recognize that the paragraph as originally worded could lead to some confusion as to whether there are actually two different content review regimes being referred to. The Panel has modified paragraph 7.1546 in a manner which it believes accurately reflects the United States' argument as well as clarifies that two different content regimes are being challenged.

6.209 The **United States** requests that the Panel add additional portions of its response to Panel question No. 247(c) to paragraph 7.1638 so as not to omit certain important context.

6.210 **China** acknowledges that the United States' response to Panel question No. 247(c) encompasses the relevant sentence. However, China believes that this sentence does not reflect the context in which the United States' statement was made, but only aims at creating confusion.

6.211 China maintains that the Panel rightly notes in paragraph 7.1641 of the Interim Report that the United States uses the term "product" interchangeably to refer both to the hard copy (which is the imported product subject of its claim) and the digitalized content.

6.212 According to China, due to this lack of precision, this sentence does not add anything to the Panel's reasoning, but would create confusion. China submits that insofar as the "distribution" of the hard-copy is concerned, which is the subject of the Panel's examination under this paragraph, the statement of the Panel is sufficient.

6.213 The **Panel** recognizes that the sentence referred to by the United States is part of the United States' response to Panel question No. 247(c). For this reason, in an effort to fully reflect the United States' argument we will add the sentence to paragraph 7.1638. However, as China points out, the statement highlights the United States' lack of consistency with respect to its use of the term "the product" to refer to both the like "imported product" that is the subject of its claim as well as further processed or downstream products. This lack of clarity can be confusing. The Panel addressed the confusion caused by the United States' response to Panel question No. 247(c) as well as other instances in the United States' submissions in paragraph 7.1641. However, in the interest of completeness, the Panel has modified the footnote accompanying paragraph 7.1638 to reflect its interpretation of the additional sentence that has been added to the paragraph.

(iii) Films for theatrical release

6.214 The **United States** considers that a brief summary of its argument with respect to discriminatory treatment of imported films for theatrical release resulting from the alleged imported film distribution duopoly should be included in paragraph 7.1658.[42] The United States also requests that its arguments with respect to the *Domestic Film Distribution and Exhibition Rule* be introduced in paragraph 7.1658.[43]

6.215 Specifically, the United States requests that the Panel refer to its argument that the *Domestic Film Distribution and Exhibition Rule* confirms that China Film Group and Huaxia are the only two distributors of imported films in China. The United States also suggests that the texts of Article III(1), IV(II)(1) and V(1) of the *Domestic Film Distribution and Exhibition Rule* be included in a footnote to paragraph 7.1658.

6.216 **China** recalls that the paragraph of the Interim Report for which the United States requests modification, as well as the part of the Interim Report it belongs to, only concerns what allegedly creates a duopoly, not whether or how this duopoly allegedly discriminates against imported films. China argues that arguments related to the alleged discriminatory treatment of imported films should not be included in this part of the report. China also submits that the references quoted by the United States do not support any of the United States' requests for modification.

6.217 With respect to the United States' request concerning the alleged establishment of the duopoly, China submits that the Panel has fully reflected the United States' argument that the challenged measures create a duopoly, by notably citing the content of such measures. Consequently, China submits that granting the United States' request is unnecessary.

6.218 Additionally, China submits that quoting the content of the full articles of the Chinese measures as the United States proposes would create inconsistency with the rest of the Panel Report. China would also like to stress that the United States itself does not cite the content of these articles in any of its submissions. In any case, the United States has never cited Article V(1) of Exhibit US-40 to support its argument that Exhibit US-40 confirms the duopoly. China respectfully requests the Panel, should it decide to insert the proposed footnote, not to introduce any reference to Article V(1) of Exhibit US-40.

6.219 Considering the above, China submits that introducing the requested modification (with a plethora of quotations of this regulation in footnotes) in paragraph 7.1658 of the Interim Report would only misrepresent the United States' claim.

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[42] See e.g. United States' first written submission, paras. 201-222 and 397-409.

[43] United States' first written submission, para. 203 (footnote 136) and 220; United States' response to Panel questions Nos. 125(d) (paras. 247(footnote 168), 248, 251(footnote 172)); United States' second written submission, paras. 202 and 213; and United States' response to Panel question No. 248 (para. 230).

6.220 The **Panel** first notes that paragraph 7.1658 already generally refers to the United States' argument that the alleged "duopoly" results in discriminatory treatment of imported films for theatrical release. We are not persuaded by China's submission that arguments related to discriminatory treatment should not be included in this part of the Report. We think that including more explanation of the United States' argument on this point may promote clarity. We also note that the United States, in paragraph 202 of its second written submission and in its response to Panel question No. 248, referred to the *Domestic Film Distribution and Exhibition Rule* as confirming the existence of the "duopoly".

6.221 With respect to the suggested footnote, we agree with China that it is unnecessary to cite the full texts of each of these articles as it would be inconsistent with the rest of the Report and because Exhibit US-40 is part of the Panel record. We also note that in support of its arguments with respect to the *Domestic Film Distribution and Exhibition Rule* confirming the existence of the duopoly the United States only cited Articles III.1 and IV.II.1. There is a reference to Article V.1 in footnote 136, but this relates to the less favourable treatment that the United States believes the measure provides through the requirement that China Film Group and Huaxia give priority to domestic films. Therefore, the Panel only cites Articles III.1 and IV.II.1 in the new footnote. As the Panel is including additional argumentation by the United States in the Final Report, we also consider that it is appropriate to explain our understanding of the relevance of the *Domestic Film Distribution and Exhibition Rule* to our analysis. Therefore, we have also made appropriate changes to paragraph 7.1682 of the Report.

(b) Comments by China

(i) Sound recordings

6.222 **China** believes that the Panel's summary in paragraph 7.1547 misrepresents China's argument. China contends that it did not argue that "the distribution of sound recordings imported in hard copy, but intended for so-called "electronic distribution" cannot be scrutinized under the rules governing trade in goods", but rather that what the United States actually targets is not the distribution of the hard copy intended for so-called "electronic distribution", but the "distribution" of digitalized content, and that such "distribution" of the digitalized content cannot be scrutinized under the rules governing trade in goods.

6.223 Therefore, China requests that the Panel modify paragraph 7.1547 and adopt the above more accurate representation of China's argument.

6.224 The **United States** has not commented on China's request.

6.225 The **Panel** has reviewed paragraph 7.1547 and the ensuing paragraphs of the Interim Report. The Panel has also reviewed China's arguments in its submissions. The Panel notes that the sentence China requests the Panel to modify is based on paragraph 550 of China's first written submission. Specifically, paragraph 550 reads:

> "Contrary to what the United States is alleging, the distribution of sound recordings imported in hard copy, but intended for so-called "electronic distribution", cannot be scrutinized under the rules governing trade in goods."

6.226 The Panel also notes that the argument that China would like the Panel to insert in paragraph 7.1547 is already reflected in paragraph 7.1550. The Panel does not believe the requested modification is necessary or useful.

6.227 **China** maintains that the Panel's statement in paragraph 7.1551 that "China identifies a systemic concern that, pursuant to the United States' logic, GATT rules would apply to any measure regulating services related to – intangible – content as long as there exists a physical carrier capable of being traded, since such a measure would always have the alleged effect on its carrier" does not accurately reflect China's concern which was actually expressed in respect of the United States' argument that measures affecting an intangible must be considered as affecting *inter alia* the distribution of its physical carrier. Therefore, China respectfully requests the Panel to modify its statement to reflect China's submissions.[44]

6.228 The **United States** has not commented on China's request.

6.229 The **Panel** notes that the first sentence of paragraph 7.1551 is meant to reflect China's arguments in paragraph 201 of its second written submission which reads:

> "The formally different treatment identified by the United States does not affect the 'distribution' of hard copies and can therefore not be scrutinized under Article III:4 of the GATT. In fact, what the United States suggests should be compared is the allegedly different treatment applied to digitalized products. Following the United States' logic would entail major systemic implications, insofar as it would amount to applying rules on trade in goods to services provided over the Internet."

6.230 The Panel also notes that the second sentence of paragraph 7.1551 reflects China's arguments in paragraphs 152 and 153 of its second oral statement, which read:

> "Moreover, by redefining the target of its claim as being the imported hardcopy sound recording, the United States is in fact arguing that the Chinese measures affecting the content of imported hardcopy sound recordings should also be considered as measures affecting "the internal sale, offering for sale, purchase, distribution or use of" hardcopy sound recordings and thus fall under Article III:4 of the GATT.
>
> Following this erroneous logic of the United States, would mean that GATT rules would apply to any measure regulating services related to – intangible - content as long as there exists a physical carrier capable of being traded, since such a measure would always have the alleged effect on its carrier."

6.231 The Panel has made appropriate modifications to paragraph 7.1551 to reflect more accurately the arguments made by China.

(ii) Films for theatrical release

6.232 **China** requests that the Panel delete the reference to designated distributors of imported films in the last sentence of paragraph 7.1667 because the relevant measures set up an approval system, not a designation system.

6.233 The **United States** has not commented on this request.

6.234 The **Panel** has made the requested deletion.

6.235 **China** notes that the Panel, in paragraphs 7.1668-7.1691 when analyzing the United States' claim based on Article III:4 of the GATT 1994 with respect to films for theatrical release, considers that the United States has brought a claim that China's rules and regulations, *as applied*, also create a

[44] See China's second oral statement, paras. 152-153.

duopoly of film distribution. China notes that the United States' claim, as contained in particular in the US consultation requests, the panel request and the United States' written submissions, always appeared to be linked to the content of the Chinese measures at stake, and not to their application.[45]

6.236 China therefore submits that the US did not raise the "*as applied"* claim which has been analyzed by the Panel. Since this "claim" was not brought before the Panel, there appears to be no need for the Panel to reflect it and make a corresponding analysis in the Interim Report. If the Panel believes that such analysis is necessary, China respectfully requests the Panel to clarify the basis on which it considers that there is a properly raised *"as applied"* claim requiring the analysis it has carried out.

6.237 The **United States** does not agree with China's contention that the United States' claim under Article III:4 of the GATT 1994 with respect to films for theatrical release is limited to China's measure as such, thereby excluding an "as-applied" challenge. At no time, whether in its consultation requests, panel request or submissions, did the United States confine its Article III:4 claim to China's measures at issue as such. The United States relies on its supplemental Consultation Request and on its panel request to support its position that its claim was not limited to an "as such" claim.

6.238 The United States also points to its arguments in its first written submission as well as its subsequent submissions to the Panel to argue that it did indeed raise the issue of the application of China's measures with respect to the distribution of imported films.

6.239 The United States maintains that it did raise a claim under Article III:4 with respect to the application of China's measures governing the distribution of imported films as compared to domestic films. Accordingly, the United States asks that the Panel decline China's request with respect to paragraphs 7.1668 through 7.1691.

6.240 The **Panel** first recalls its finding in paragraph 7.1667, which China has not commented on, that the "measure" challenged by the United States is the distribution "duopoly" which it claims provides for discriminatory treatment of imported films. The United States' claim is based on the operation of the three challenged measures. China has argued that the "duopoly" was created by circumstance and not by any action attributable to China. As noted in the Interim Report, for the United States to prove that the "duopoly" is a "measure" attributable to China it must demonstrate either that the measures on their face establish the alleged "duopoly" or that through their operation and decisions made by the government of China that China has, in fact, created the alleged "duopoly". We note that the United States did not explicitly limit its claim to an "as-such" one. We also note that the United States provided argumentation in its written submissions to the Panel with respect to the distribution duopoly being discriminatory regardless of whether it was mandated by China's measures.[46] Therefore, the Panel considers that it is appropriate to address whether the measures, even if they do not create a duopoly on their face, are operated by China in such a manner that they create a duopoly in fact. We recognize that the term "as applied" carries with it certain connotations that might cause confusion. Therefore, although we have not deleted the discussion in paragraphs 7.1668–7.1691 we have made modifications in paragraphs 7.1671, 7.1684, 7.1685, 7.1689, 7.1690 and in the heading to section VII.E.4(a)(ii) to reflect that we are discussing whether China established a *de facto* "duopoly" for the distribution of imported films for theatrical release.

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[45] For instance, the US supplementary request for consultations mentions that: *"The measures at issue appear to establish a dual distribution system for films for theatrical release"*. The panel request is equally silent concerning the inclusion of a claim concerning the way the Chinese measures are applied. The US first written submission (see for example para. 398) also makes clear that in the US view, the dual distribution system is established by the measures, as such.

[46] United States' second written submission, para. 201; United States' response to question No. 258.

5. Other changes to the Interim Report

6.241 The **Panel** has made a number of other changes which were not specifically requested by the parties. These changes were made to eliminate typographical errors or to edit the Report.

VII. FINDINGS

A. GENERAL ISSUES

1. Burden of proof

7.1 We recall the general principles applicable to burden of proof in WTO dispute settlement, i.e., that a party claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.[47] We also recall that any party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. This is in conformity with generally accepted canons of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[48]

7.2 These general canons also apply in WTO dispute settlement, such that once a complaining party has made a prima facie case, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.[49] The Appellate Body explained, in *Canada – Dairy (Article 21.5 New Zealand and US II)* that:

> "as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a prima facie case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[50]

7.3 It is also well to remember that "a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."[51]

7.4 The Appellate Body also has clarified that in the context of WTO dispute settlement "[a] prima facie case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[52]

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[47] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323 at 337.
[48] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at 335.
[49] Appellate Body Report on *EC – Hormones*, para. 98.
[50] Appellate Body Report on *Canada – Dairy (Article 21.5 New Zealand and US II)*, para. 66.
[51] Appellate Body Report on *EC – Hormones*, para. 104.
[52] Appellate Body Report on *US – Gambling*, para. 140.

7.5 Precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.[53]

7.6 Given this general rule, it is the complainant in a given case who initially bears the burden of proof to establish a prima facie case of inconsistency of a measure with a provision of a WTO covered agreement, before the burden of showing consistency with a provision or defending it under an exceptional provision (e.g. Article XX of the GATT 1994) shifts to the defending party.

7.7 In the present case, therefore, it is the United States who has the initial burden of proof to establish a prima facie case of alleged inconsistencies of China's measures with the various provisions it has cited, including China's Protocol of Accession, Article XVI and XVII of the GATS and Article III:4 of the GATT 1994. With respect to the US claims regarding China's trading rights commitments in the Protocol of Accession, China, as the party making an affirmative defence of its measures under Article XX(a) of the GATT 1994, bears the initial burden of proof.

2. Treaty interpretation

7.8 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") are such customary rules.[54] These provisions read as follows:

> "Article 31: General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> any relevant rules of international law applicable in the relations between the parties.

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[53] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at 335.

[54] Appellate Body Report on *US – Gasoline*, p. 17, DSR 1996:I, 3 at 15-16; Appellate Body Report on *India – Patents (US)*, para. 45; and Appellate Body Report on *US – Shrimp*, para. 114.

> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32: Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> leaves the meaning ambiguous or obscure; or
>
> leads to a result which is manifestly absurd or unreasonable."[55]

7.9 We shall apply these principles in interpreting the relevant provisions of the covered agreements.

B. PRELIMINARY ISSUES

7.10 In its first written submission to the Panel on 20 June 2008, **China** raised a number of objections. First, China argued that several measures challenged by the United States are outside the Panel's terms of reference. Second, China argued that several requirements named by the United States in its first written submission were likewise outside the Panel's terms of reference. Third, China argued that the US claim under Article III:4 of the GATT 1994 with respect to China's treatment of "reading materials" was outside the Panel's terms of reference because it was not consulted on. China went on to argue that if the Panel found the claim within its terms of reference, the US aspects of that claim dealing with electronic publications and with subscription requirements on purchasers of reading materials were nevertheless outside the Panel's terms of reference. Finally, China asked the Panel to refrain from examining three "measures" identified in the US panel request.

7.11 The **United States** has disputed each of these objections and argues that all of the measures, requirements, claims, and products are properly before the Panel.

7.12 China did not request that the Panel make a preliminary ruling on these matters. Nevertheless, the resolution of these objections is a prerequisite for the Panel moving forward with a substantive analysis of the US claims. Therefore, we will address these issues first, before moving on to the substance of the US claims.

1. Article 6.2 of the DSU

7.13 China's objections centre, primarily around whether the US panel request, in light of the claims and arguments presented by the United States in its first written submission and subsequent submissions, is consistent with the obligations set forth in Article 6.2 of the DSU. Therefore, we will first undertake an analysis of the obligations set forth in Article 6.2 and then turn to whether the United States has complied with those obligations in its panel request in this case.

7.14 Article 6.2 of the DSU provides as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and

[55] The Vienna Convention on the Law of Treaties (the "Vienna Convention"), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

> provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference".

7.15 In *Korea – Dairy*, the Appellate Body explained that Article 6.2 contains four distinct obligations with respect to the panel request:

> "The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[56]

7.16 The two obligations that have been implicated by China's arguments in this dispute are the latter two. Therefore, we will examine what is required of a party to satisfy the obligations to: (i) identify the specific measures at issue; and (ii) provide a brief summary of the legal basis of the complaint. The Appellate Body has explained that these two requirements are intended to ensure that the complainant present[s] the problem clearly in the panel request.[57]

(a) Identify the specific measure at issue

7.17 For purposes of compliance with Article 6.2 it is necessary for the complaining party to identify the measures at issue. Although it may be sufficient to identify a measure by its form, (i.e., by the name, number, date and place of promulgation of a law, regulation, etc. ...) this is not the only manner of identification which could serve to satisfy the obligation in Article 6.2 of the DSU. A measure may also be identified by its substance[58], e.g. by providing a narrative description of the nature of the measure, so that what is referred to adjudication by a panel may be discerned from the panel request.[59]

7.18 Additionally, references in a panel request to amendments, related measures, or implementing measures have been considered to sufficiently identify measures not specifically named within a panel request to fulfil the requirements of Article 6.2, such that the un-named measures were considered to be within a panel's terms of reference. [60]

7.19 The Panel in *Japan – Film* also examined this issue. In that case Japan requested that the panel determine that eight measures were outside its terms of reference because they were not mentioned in either the consultations or the panel request. The panel ultimately determined that because the measures implemented a broad framework law that was identified in the panel request and because the panel request specified the form and circumscribed the possible content and scope of such implementing measures that the eight measures were within its terms of reference. In its finding that panel reiterated that, even in such circumstances, the identification of the measure must be such that the responding party has been adequately notified of the case against it. Specifically, the panel reasoned that:

> "To fall within the terms of Article 6.2, 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

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[56] Appellate Body Report on *Korea – Dairy*, para. 120

[57] Appellate Body Report on *US – Continued Zeroing*, para. 160.

[58] Panel Report on *Argentina – Footwear (EC)*, para. 8.40; *also* Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.47.

[59] Appellate Body Report on *US – Continued Zeroing*, para. 168.

[60] Appellate Body Report on *European Communities – Bananas III*, para. 140.

> '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. The two key elements -- close relationship and notice -- are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate."[61]

7.20 Therefore, in determining whether a reference to measures which amend, are related to, or implement measures explicitly listed in a panel request is sufficient to satisfy the requirements of Article 6.2 a panel must analyse whether the measures that the complaining party is contesting were identified such that the respondent party received "adequate notice."[62] In conducting its analysis of whether the respondent party received "adequate notice" a panel must remain mindful of its obligation to examine the panel request as a whole and in light of attendant circumstances.[63]

(b) Provide a brief summary of the legal basis of the complaint

7.21 Article 6.2 of the DSU requires a complainant to provide a brief summary of the legal basis of its complaint. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that the term legal basis in Article 6.2 of the DSU refers to the claim made by the complaining party.[64]

7.22 The Appellate Body has also clarified that a claim "sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."[65]

7.23 Although a complainant must provide a "summary" of the legal basis of its complaint, this does not mean, however, that the complainant is required, in its request for establishment, to set out the arguments in support of a particular claim. We consider that there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims. While a claim sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement, arguments are what is adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[66] The arguments in support of a claim may be set out and progressively clarified in the first written submission, the rebuttal submission and the first and second panel meetings with the parties.[67] By contrast a party may not use its submissions to "cure" a deficient panel request.[68]

(c) Sufficient to present the problem clearly

7.24 The Appellate Body has explained that the requirements in Article 6.2 to identify the specific measures at issue and the provision of a brief summary of the legal basis of the complaint "are intended to ensure that the complaining party 'present[s] the problem clearly' in its panel request."[69]

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[61] Panel Report on *Japan – Film*, para. 10.8.
[62] Panel Report on *EC – Bananas III*, para. 7.27; also Panel Report on *US – Carbon Steel*, para. 8.41.
[63] Appellate Body Report on *Korea – Dairy*, paras. 124-127; *also* Appellate Body Report on *US – Carbon Steel*, para. 127.
[64] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[65] Appellate Body Report on *Korea – Dairy*, para. 139.
[66] Appellate Body Report on *Korea – Dairy*, para. 139.
[67] Appellate Body Report on *EC – Bananas III*, para. 141.
[68] *Ibid*., para. 143; Appellate Body Report on *United States – Carbon Steel*, para. 127.
[69] Appellate Body Report on *US – Continued Zeroing*, para. 160.

7.25 The "problem" is not solely the obligations in the covered agreements nor the respondent Member's measures but rather whether the respondent Member's measures comport with those obligations. Therefore, to sufficiently present the problem clearly, a complaining Member must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits." [70] As the Appellate Body has explained, "[o]nly by such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and ... begin preparing its defence".[71]"[72]

(d) Relationship between the panel request and the Panel's terms of reference

7.26 The particular importance of compliance with the two latter obligations in Article 6.2 was highlighted by the Appellate Body which has explained that together the identification of the specific measure and the legal basis of the complaint comprise the "matter referred to the DSB" which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[73]

7.27 The terms of reference have two essential purposes: first, to give the parties and third parties sufficient information concerning the claims at issue in the dispute to allow them an opportunity to respond to the complainant's case; and second, to establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[74] The first of these purposes is concerned with the due process rights of the respondent and third parties involved in a particular dispute, while the second is concerned with ensuring that a panel does not exceed its limited mandate as set forth in the DSU.

7.28 The Appellate Body has previously found that the obligation to afford due process is "inherent in the WTO dispute settlement system"[75] and it has described due process requirements as "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[76] It has concluded that:

> "[T]he protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute."[77]

7.29 Moreover, as confirmed by the Appellate Body in *US – Gambling*, ensuring that the due process rights of parties are respected is required by Article 11 of the DSU. [78]

7.30 With respect to the second purpose of the obligations set forth in Article 6.2 of the DSU to delineate the four corners of a panel's mandate, the Appellate Body has observed that the vesting of

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[70] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162.

[71] (*footnote original*) Appellate Body Report on *Thailand – H-Beams*, para. 88.

[72] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162; see also Appellate Body Report on *Brazil – Dessicated Coconut*, p.20, DSR 1997:I, 167 at 186.

[73] Appellate Body Report on *Guatemala – Cement I*, paras. 69-76; see also Appellate Body Report on *US – Carbon Steel*, paras. 125-127.

[74] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167 at 186.

[75] Appellate Body Report on *Chile – Price Band System*, para. 176. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

[76] Appellate Body Report on *Thailand – H-Beams*, para. 88.

[77] Appellate Body Report on *US – Continued Suspension*, para. 433.

[78] The Appellate Body in *US – Gambling* held that "[A]s part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter" before them, panels must ensure that the due process rights of parties to a dispute are respected." (Appellate Body Report on *US – Gambling*, para. 273.)

jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[79] Therefore, a panel must scrutinize carefully the request for establishment of a panel to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.[80]

7.31 Compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[81] When reviewing a panel request, "it is important when examining the consistency of part of the request for establishment with Article 6.2 of the DSU, not to examine parts of this request in isolation. . . . the request must be considered as a whole, and the different claims in the request for establishment must be read in their context."[82]

7.32 In this case the Panel's terms of reference, consistent with Article 7.1 of the DSU, are:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS363/5, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[83]

2. Measures China alleges are outside the Panel's terms of reference

7.33 **China** alleges that, because the United States did not identify the *Film Distribution and Exhibition Rule* with respect to its claim regarding China's trading rights commitments under the Accession Protocol in its panel request, the measure is outside the Panel's terms of reference.

7.34 China also argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are not properly before the Panel with respect to the US claims on China's compliance with Article III:4 of the GATT 1994 with respect to sound recordings intended for electronic distribution.[84]

7.35 The **United States,** in its first oral statement presented two arguments as to why the disputed measures are in fact identified in the US panel request and therefore included within the Panel's terms of reference. First, because of the narrative description that accompanied the list of measures that were identified by name. Second, because the US at the end of the list of measures included the phrase "as well as any amendments, related measures or implementing measures." The United States relies on the panel reports in *EC – Bananas III* and *Japan – Film* for the proposition that use of such

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[79] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

[80] Appellate Body Report on *EC – Bananas III*, para. 142.

[81] Appellate Body Report on *Korea – Dairy*, paras. 124-127; *also* Appellate Body Report on *US – Carbon Steel*, para. 127

[82] Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).

[83] United States' panel request WT/DS363/5.

[84] The Panel notes that its analysis will, of course, require reference to the content of China's laws, regulations, and other documents. Because the United States is the complaining party and bears the burden of providing evidence of the content of the Chinese measures being challenged, as a general rule, when referring to one of China's laws, regulations or documents the Panel will utilize the US translation, unless the specific provision is one which the parties agreed to utilize China's translation or if based on the advice of the independent translator the Panel finds that the US translation is inappropriate. However, we have reviewed both translations and may refer to China's versions to confirm our understanding of the measures. Our citation to the US translation should not be construed as necessarily implying that it is an authoritative translation of China's measures or that we believe the United States is in a better position to provide an English translation of China's internal measures. For a list of the measures as well as the corresponding exhibit numbers please see Annex A-2 to this Report.

phrases in panel requests can serve to adequately identify measures for the purposes of Article 6.2 even if they are not explicitly listed in the panel request.[85] The United States also argues that the *Film Distribution and Exhibition Rule* is subsidiary and closely related to measures specifically identified in Part I of the US panel request, such that it can be said to be included in these measures.

7.36 **China** responds that a measure cannot be identified with precision based on a description of the alleged effects of a measure. In China's view the US approach would imply that the complaining party may smuggle into the terms of reference any measure not previously identified by alleging that it shares the same effects as a measure originally identified in its panel request. This would leave scope for ambiguity and misinterpretation of the claim which is not permitted by Article 6.2 of the DSU.

7.37 Additionally, China argues that the alleged effects of the measure as set forth in the narrative are precisely the subject of the dispute at hand. China maintains that as the responding party normally disputes that the measures have the effects alleged by the complaining party, it is unreasonable to expect the responding party to establish which measures may have such alleged effect. As a matter of systemic concern, China submits that such a burden as is implied by the United States is not imposed by any provision in the DSU.

7.38 As to the use of such phrases as "any amendments, related measures or implementing measures" to include measures not explicitly listed in a panel request, China considers that measures cannot properly be put in issue merely because the United States refers to "related" or "implementing" measures in the panel request, as this would prejudice China and other parties' due process right to be sufficiently informed of the measures which are challenged by the United States. China argues that the United States' argument would have the effect of minimizing unreasonably the burden of the complaining party in this regard, so that it would only be required to identify one specific measure followed by a "catch-all" expression such as *"as well as any amendments, related measures, or implementing measures"*, as used by the United States in its panel request in the present dispute.

7.39 China argues that the United States' reliance on the Appellate Body Report in *EC – Bananas III* is inapposite. China argues that all the measures which were considered to be within the Panel's terms of reference in that case through the use of the phrase "subsequent EC legislation, regulations and administrative measures [. . .] which implement, supplement and amend that regime" were *subsequent* to the named EC regulation, which is not the case with respect to the *Film Distribution and Exhibition Rule* which pre-dates both the *Film Regulation* and the *Film Enterprise Rule*.[86] Additionally, China contends that all the measures at issue in *EC – Bananas III* included a specific reference to the regulation named in the panel request thus allowing one to make an explicit link between the subsequent measure and the original regulation on which it is based or to which it relates.

(a) Whether the *Film Distribution and Exhibition Rule* is within the Panel's terms of reference

7.40 **China** argues that the *Film Distribution and Exhibition Rule* was not explicitly, or even implicitly, referred to in the United States' panel request in relation to United States' claim concerning

[85] Specifically, the United States relies on the Panel Report on *EC – Bananas III*, paras. 7.22-7.27 and Panel Report on *Japan – Film*, paras. 10.8-10.9)

[86] We note that the Exhibit US-21 does not contain the date of promulgation of the *Film Distribution and Exhibition Rule*. Exhibit CN-12 which contains China's version of the same document lists the promulgation date as 18 December 2001. We note that both Exhibit US-20 and Exhibit CN-11 which contain the *Film Regulation* list the date of the State Council decision as 12 December 2001 with the promulgation date being 25 December 2001 and the measure taking effect on 1 February 2002.

trading rights and therefore cannot be considered to have been adequately identified in the meaning of Article 6.2 the DSU.

7.41 The **United States** maintains that the measure was identified in the narrative description of its claim as well as by its reference to any amendments, related measures or implementing measures in its panel request.

7.42 The **Panel** notes that it is undisputed that the United States, in the section of the panel request regarding China's trading rights commitments, did not explicitly name the *Film Distribution and Exhibition Rule*. Therefore, we must determine if it was identified in some other way which would be consistent with the requirement in Article 6.2 of the DSU to identify the specific measures at issue.

(i) The narrative

7.43 The United States' claim with respect to China's trading rights commitments under the Accession Protocol is listed in Section I of the panel request under the heading "Trading Rights". The section has the following introductory paragraph:

> "The United States considers that China is acting inconsistently with its obligations under its protocol of accession to the World Trade Organization[87] ('WTO') and under the GATT 1994 by not allowing all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China the following products (collectively, the 'Products'): films for theatrical release, publications (*e.g.*, books, magazines, newspapers, and electronic publications), audiovisual home entertainment products (*e.g.*, video cassettes and DVDs), and sound recordings."[88]

7.44 The **United States** contends that the *Film Distribution and Exhibition Rule* is a legal instrument that falls within the scope of the measure described by this narrative. In response to a question from the Panel, the United States also argued that the *Film Distribution and Exhibition Rule* also falls within the scope of "the second sentence of the second paragraph of Part I of the US panel request"[89], which reads "China reserves to certain Chinese state-designated and wholly or partially state-owned enterprises the right to import the Products."[90]

7.45 **China** contends that the United States cannot use a statement which alludes to the effects of a measure to serve the purpose of identifying that measure to the respondent party as the respondent party will naturally believe that its measure does not have such effects.

7.46 The **Panel** agrees that this might be true if a measure were described merely by an alleged WTO-inconsistency, however we do not think that is the case with this particular narrative.[91] Rather the two paragraphs in the US panel request refer to the substantive nature of the specific measures at issue i.e., the prohibition on enterprises other than Chinese state-designated and wholly or partially state-owned enterprises from importing films for theatrical release.

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[87] *Protocol on the Accession of the People's Republic of China*, WT/L/432, 23 November 2001 (the "Accession Protocol").

[88] United States' panel request, WT/DS363/5.

[89] United States' response to question No. 2.

[90] United States' panel request, WT/DS363/5.

[91] For example if the United States had merely identified those Chinese measures which provide less favourable treatment to imported products without specifying the manner or content of the alleged less favourable treatment, China could not be expected to have had notice of which particular measures the United States was concerned with.

7.47 The Panel recalls, as noted in paragraph 7.25 above, the important aspect of compliance with the requirement to identify the specific measure at issue is to identify it with sufficient particularity that the responding party can discern from the panel request what has been referred to a panel for adjudication.[92] It is also important to consider all aspects of the panel request when determining whether such identification has taken place. Therefore, we will look not just at the formal names of measures, but also at the narrative descriptions provided by the complaining party in its panel request.

7.48 Therefore, the question before us is whether that narrative describes the *Film Distribution and Exhibition Rule* with sufficient precision that China could discern from the panel request what the United States referred to this Panel for adjudication.

7.49 The first two Articles of the *Film Distribution and Exhibition Rule* read as follows:

> "I. The purpose of reforming the film distribution and projection mechanisms is to establish effective mechanisms that are beneficial to the distribution and projection of outstanding domestically produced films so that they occupy a strong position in the market, layers of distribution are reduced, channels for distribution are increased, the circulation of films is promoted, and the interests from film production, distribution, and projection are reasonably distributed. The reform shall uphold and promote micro-level competitiveness, and ensure enhancement of the principle of macro-management, give full play to the backbone role played by State owned channels for film distribution and projection, and increase the impact of films and their radiation capacity on the market.
>
> "II. Continue to uphold the principles of "unifying imports and using imports to generate exports" and "relying on our own and using it for our own." Taking examination of the distribution and projection of domestically produced films as a prerequisite, adjust the supply mechanism for imported films and maintain the separation of importing and distribution of films. Establish China Film Group film import/export company, and entrust it to unify importing of films consigned from foreign countries, Hong Kong, Macao, and Taiwan, while also fulfilling part of the administrative functions such as selecting films, preliminary examinations, submission for examination at higher levels, contract negotiations, customs and taxes, payments and settling accounts, supplying films, box office figures, and market supervision. An appropriate amount should be taken from the overall box office receipts of each imported film and used to offset the circulation and administrative costs of rural films, children's films, and for the development and import and export of science and educational films."[93]

7.50 The second article of the *Film Distribution and Exhibition Rule* establishes the China Film Group film import/export company and entrusts it to "unify importing of films consigned from foreign countries, Hong Kong, Macao and Taiwan." The New Shorter Oxford English Dictionary defines "unify" as to "make, form into, or cause to become one; reduce to unity or uniformity."[94] It therefore, seems to us, in this context, that entrusting China Film Group film import/export company to "unify" imports of foreign films means that only China Film Group film import/export company may import films.[95]

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[92] Appellate Body Report on *US – Continued Zeroing*, para. 168.

[93] *Film Distribution and Exhibition Rule*, (Exhibit US-21).

[94] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press 1993), Vol. II, p. 3489.

[95] We note that China has not disputed the US contention that only the China Film Group import/export company is designated to import films for theatrical release.

7.51 The narrative description of the US claim in the panel request is concerned with China "not allowing all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China" films for theatrical release. Given that the *Film Distribution and Exhibition Rule* provides that all imports of films will be unified by the China Film Group film import/export company, the *Film Distribution and Exhibition Rule* fits within the narrative description of the specific measures at issue set forth by the United States in Part I of its panel request. However, this does not mean that the *Film Distribution and Exhibition Rule* was adequately identified as a specific measure at issue in this dispute as required by Article 6.2 of the DSU.

7.52 We must also determine whether taking the panel request as a whole and in light of the attendant circumstances, the narrative description in Part I of the US panel request means that China could reasonably conclude, that the *Film Distribution and Exhibition Rule* was a specific measure at issue with respect to the United States' complaint regarding China's trading rights obligations.

(ii) Adequate notice

7.53 **The Panel** recalls that one of the essential purposes of the requirements in Article 6.2 of the DSU is to "give the parties and third parties sufficient information concerning the claims at issue in the dispute to allow them an opportunity to respond to the complainant's case."[96] This information includes the measures which are being challenged. We note that this requirement serves to fulfil the due process rights of the respondent. Due process requires that a panel, in any dispute, ensure that "one party is not unfairly disadvantaged with respect to other parties in a dispute"[97] otherwise the panel risks acting inconsistently with its own obligations as set forth in Article 11 of the DSU.[98]

7.54 Adequate notice to a respondent is not determined by examining one part of the panel request in isolation, but rather by considering the request as a whole, and in the light of attendant circumstances.[99] We also recall that the Appellate Body has explained that the different claims in the request for establishment must be read in their context.[100]

7.55 Looking at the US panel request as a whole and not examining the claim with respect to China's trading rights obligations in isolation, raises concerns as to whether China received adequate notice that United States was challenging the *Film Distribution and Exhibition Rule*. In particular we note that the United States listed the measure by name in Part III of its panel request which relates to the US claims under Article III:4 of the GATT 1994.

7.56 The inclusion of the measure in Part III of the panel request is an indication to us as well as to China and the third parties that the United States was aware of and capable of identifying the *Film Distribution and Exhibition Rule* through its formal name.[101] The United States, in response to a question from the Panel, regarding why the measure was included in Part III of the panel request and not Part I states that "it became clear upon further refinement of the translation that it also directly regulates the importation of films into China." We find this justification unavailing. The United States had other options available to it to account for any uncertainty in the content of the Chinese measures which would not have left China unsure as to the nature of the case against it.

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[96] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167 at 186.
[97] Appellate Body Report on *US – Continued Suspension*, para. 433.
[98] Appellate Body Report on *US – Gambling*, para. 273.
[99] Appellate Body Report on *US – Carbon Steel*, para. 127.
[100] Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).
[101] We note that the panel in its report on *India – Additional Duties*, noted that the United States argued that the use of phrases such as "any amendments, related measures or implementing measures" were meant to refer to any measures of which the complaining party was not aware at the time of the panel request. (Panel Report on *India – Additional Duties*, para. 7.50.)

7.57 First, the United States could have referenced the *Film Distribution and Exhibition Rule* in its claim with respect to China's Trading Rights commitments to ensure that it was within the Panel's terms of reference and then, upon "further refinement of the translation" made a final decision whether to present argumentation on that measure under that claim. We note that nothing prevents a party from not pursuing a claim that is within a panel's terms of reference.

7.58 Alternatively, the United States could have held off filing a panel request when it did not have a full understanding of the measures it wished to challenge and what alleged inconsistencies with the covered agreements might be caused by those measures. Unlike in many domestic court systems, there is no statute of limitations in WTO dispute settlement that would require the United States to file its case by a date certain or lose its standing to bring its claim. Therefore, the United States could have waited until it was comfortable with the accuracy of its translation of China's measures before it brought its claim.

7.59 In addition to the panel request itself we also look to the attendant circumstances which include the fact that the United States and China consulted on this measure as well as the *Film Regulation* and the *Film Enterprise Rule*.[102] China knew, therefore, that the United States was aware of the *Film Distribution and Exhibition Rule* and its contents. More importantly, China also saw that the United States had explicitly included a challenge to that very measure in Part III of its panel request.

7.60 Considering the text of the panel request as a whole as well as the attendant circumstances, it was reasonable for China to reasonably infer that the exclusion of the *Film Distribution and Exhibition Rule* from Part I of the panel request was deliberate in view of its explicit inclusion in Part III.[103] Therefore, China could infer in good faith that the omission of reference to the *Film Distribution and Exhibition Rule* in Part I meant that the United States was *not* challenging the *Film Distribution and Exhibition Rule* under this claim.[104] Accordingly, despite the description in the narrative or even the reference to "amendments, related measures, or implementing measures"[105],

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[102] Although, the United States consulted on this measure with respect to its claim under Article III:4 of GATT 1994, as noted by the United States with respect to China's objection to the inclusion of the Article III:4 of GATT 1994 claim with respect to "reading materials" *infra,* this does not detract from the fact that such consultations demonstrate that the United States was aware of the *Film Distribution and Exhibition Rule* and that China knew and relied on this awareness.

[103] We note that our interpretation is consistent with the general legal canon of construction *expressio unius est exclusio alterius* which holds that to express or include one thing implies the exclusion of the other or of the alternative (Black's Law Dictionary, 8th ed., B.A. Garner (ed) (West Group 2004), p. 620); *also* Ian Brownlie, *Principles of Public International Law*, 6th ed. (2003) p. 602, 604. We note that in its response to question No. 17, the United States itself relies on this principle with respect to whether "motion pictures" are audiovisual products under Chinese law. Specifically, the United States argued

> "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 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."

[104] Panel Report on *US – Upland Cotton*, paras. 7.151 -7-152 (finding that after consultations on cottonseed payments for the years 1999 and 2000 the lack of a reference to the appropriating law for the 1999 payments in Brazil's panel request indicated that it was not challenging those payments and they were therefore, outside the panel's terms of reference).

[105] We are cognizant that the United States put forward two reasons as to why the *Film Distribution and Exhibition Rule* was identified as a specific measure at issue in its panel request. Because we determined that the *Film Distribution and Exhibition Rule* fit within the narrative description in the panel request we did not examine whether it also fit within the US reference to "any amendments, related measures, or implementing measures." We note however, that even if the *Film Distribution and Exhibition Rule* could fit within the category of an amendment, related measure, or implementing measure of the *Film Regulation* and/or the *Film*

China in our view did not receive adequate notice that the *Film Distribution and Exhibition Rule* is within the scope of the US claim with respect to China's commitments on trading rights in the Accession Protocol. As notice to the respondent of the claims being made against it is a fundamental purpose of the obligations in Article 6.2 of the DSU, we conclude that the US panel request, in this respect, does not comply with Article 6.2 of the DSU and that the *Film Distribution and Exhibition Rule* is outside our terms of reference with respect to the US claim regarding China's trading rights commitments under the Accession Protocol.

(b) Whether the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are within the Panel's terms of reference

7.61 **China** argues that because the United States in its panel request, only mentioned the "*Interim Regulations on Internet Culture Administration*", the "*Circular of the Ministry of Culture on Relevant Issues of Implementation of the Interim Regulations on Internet Culture Administration*", the "*Catalogue for Guidance of Foreign Investment Industries*", the "*Several Opinions* […] *on Introducing Foreign Investment into the Cultural Sector*", and the "*Several Opinions on the Development and Regulation of Network Music*" it did not properly identify the *2001 Audiovisual Products Regulation* and *Audiovisual Products Importation Rule*.[106] Therefore, China requests that the Panel should therefore conclude that these measures do not fall within its terms of reference.

7.62 The **United States** maintains that the narrative description of its claim as well as its reference to any amendments, related measures or implementing measures in the panel request fulfilled its obligations under Article 6.2 to identify the specific measures at issue. The United States recalls the panel report in *Japan – Film* and argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are closely related to measures identified in the US panel request such that they can be said to be included in these measures, including those that fall within the scope of the term "amendments, related measures, or implementing measures" in the panel request. Thus, according to the United States, China had adequate notice that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were included in the US claim under Article III:4 with respect to sound recordings.

7.63 The **Panel** notes that it is undisputed that the United States, in the section of the panel request regarding China's conformity with its obligations under Article III:4 of the GATT 1994, did not explicitly name the *2001 Audiovisual Products Regulation* or the *Audiovisual Products Importation Rule*. Therefore, we must determine if they were identified in some other way which would be consistent with the requirement in Article 6.2 of the DSU to identify the specific measures at issue.

(i) The narrative

7.64 The US claim with respect to the distribution of sound recordings is contained in Section IV of the panel request, which reads:

> "The United States considers that China is acting inconsistently with its obligations under the GATT 1994 and the Accession Protocol by providing distribution opportunities for sound recordings imported into China in physical form that are less favourable than the distribution opportunities for sound recordings produced in China.

Enterprise Rule, we would still have had to conduct the same analysis with respect to whether China had received adequate notice and would have reached the same conclusion with respect to that element of the case.

[106] See United States' panel request WT/DS363/5, p.8.

> China appears to require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review by the Chinese Government prior to such distribution within China. However, domestically produced sound recordings appear not to be subject to this requirement, but can instead be digitally distributed immediately. It thus appears that sound recordings imported into China in physical form are treated less favourably than sound recordings produced in China in physical form."

7.65 **The Panel** notes that the *2001 Audiovisual Products Regulation* provides, generally, for the regulation of audiovisual products including the publishing and reproduction of audiovisual products. The narrative description of the US claim specifically identifies the content review by the Chinese Government as applied to imports prior to digital distribution[107] as the measure it is challenging. In this respect, Chapter IV of the Regulation is entitled "Import" and within it, Article 28 provides for content review of imports.[108] Specifically, Article 28 states:

> "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. The cultural administration under the State Council shall, within 30 days of receiving the application for review of the contents of audiovisual products, reach a decision as to whether to approve it or not and notify the applicant accordingly. Upon approval, approval documents shall be issued. Upon rejection, reasons shall be given.
>
> 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."[109]

7.66 All imported sound recordings are required to undergo the content review procedures in the *2001 Audiovisual Products Regulation*, prior to any kind of distribution in China. We note that this regulation does not contain specific details about the content review procedures required by Article 28, and that pursuant to the legal hierarchy in China it is the *Audiovisual Products Importation Rule*, which is based on the authority in the *2001 Audiovisual Products Regulation*[110], which interprets and implements the *2001 Audiovisual Products Regulation*.[111]

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[107] We note that in its panel request the United States refers to "digital" distribution and in its subsequent submissions before the Panel to "electronic" distribution. It is our understanding that the United States uses these terms interchangeably.

[108] We note that in its first written submission, this is the provision of the *2001 Audiovisual Products Regulation* that the United States identifies as that which gives rise to the violation of Article III:4 of the GATT 1994 (see United States' first written submission, para. 372).

[109] *2001 Audiovisual Products Regulation*, (Exhibit US-16). We note that China's translation of the measure states that importation entity shall "go through the importation formalities." (Exhibit CN-2).

[110] *Audiovisual Products Importation Rule*, Article 1 (Exhibit US-17).

[111] *See* Article 72 of the *Legislation Law* (Exhibit US-72) which states that "[m]atters governed by the rules of departments shall be those for the enforcement of the laws or administrative regulations, decisions and orders of the State Council."; *see also* Article 1 of the *Audiovisual Products Importation Rule* which states that the rules therein are "based" on the *2001 Audiovisual Products Regulation* and "are drawn up in order to strengthen management over the import of audiovisual products, promote international cultural exchange, and enrich the cultural life of the people.

7.67 The *Audiovisual Products Importation Rule* explains that the procedures therein apply to "all finished audiovisual products imported from abroad and imported audiovisual products used in publishing, information network transmission, and other purposes."[112]

7.68 The *Audiovisual Products Importation Rule* requires audiovisual product importing units to submit imported products to the Ministry of Culture ("MOC") for content review. Article 14 sets forth the content review application procedures for audiovisual products imported for publication.[113] These procedures consist of an application form, the copyright agreement and other copyright related documentation, samples of the program, and other necessary documents. Article 16 clarifies that the procedures in Article 14 are also applicable for audiovisual products imported for use in network information transmission.[114] The Rule also states that once approval documentation has been received it may only be used once with Customs and is not for accumulated use.

7.69 Additionally, Article 19 explicitly states that "No unit or individual may publish, reproduce, wholesale, retail, rent out, show for business purposes or use the information network to transmit audiovisual products which have not been approved for import by the Ministry of Culture."

7.70 Reading the provisions of the *Audiovisual Products Importation Rule* as an interpretation and implementation of Article 28 of the *2001 Audiovisual Products Regulation*, we conclude that these measures require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review by the Chinese Government prior to such distribution within China. Our understanding is confirmed by China in its response to a question from the Panel when it states "that the relevant Chinese measures require any audiovisual product used for information network dissemination to go through content review of the MOC before it may be imported."[115] As content review occurs prior to importation and products may not be distributed within China before they are imported into China, regulations that apply at the time or point of importation necessarily apply prior to distribution within China.

7.71 China however argues that the measures govern only the import of sound recordings in physical form and not their distribution. China maintains that because these measures apply at the importation stage they cannot by any means be considered as affecting the distribution of products that have already been imported. In China's views these measures have to be considered as "border measures" at the importation stage and Article III:4 of GATT governing the treatment of imported goods cannot be interpreted as applying to the requirements in the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*.

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[112] *Audiovisual Products Importation Rule*, Article 3 (Exhibit US-17).

[113] *Ibid.*, Article 14 (Exhibit US-17).

[114] The parties have used a variety of terms to describe the distribution of sound recordings over the Internet. The United States has referred to digital distribution as well as electronic distribution interchangeably in the panel request and in its written submissions. The United States defines "electronic distribution" as "the distribution of sound recordings using any electromagnetic means, (*i.e.*, not physical copies), including distribution to other distributors or to end users over, *e.g.*, the Internet or mobile telecommunications networks." The United States contends that China's restrictions on electronic distribution are maintained *inter alia* through the *Internet Culture Rule* and the *Network Music Opinions*. China has referred to this type of distribution in its submissions as "network music services". China has defined "network music services" as "the dissemination of music in digital format through the Internet to users." China refers the Panel to Article 3 of the *Internet Culture Rule* for its understanding of "network music services." Article 3 refers to "[p]utting cultural products online on the Internet, or sending cultural products through the Internet to end user's computers." Additionally, the *Network Music Opinions*, which implement and are based upon the *Internet Culture Rule* refer to the "digitization and network transmission of outstanding music products." We therefore conclude that references to "network transmission" or transmission over the network in China's measures refer to what the United States has described as "electronic distribution of sound recordings.

[115] China's response to question No. 133.

7.72 The **United States**, however, argues that the *Ad Note* to Article III provides that simply because a measure is enforced at the time or point of importation does not mean that it is outside the disciplines of Article III of the GATT 1994.

7.73 We recall the reasoning of the panel in *India – Autos* that "the fact that a requirement is imposed as a condition on importation is not necessarily in itself an obstacle to its falling within the scope of Article III:4."[116] Given the *Ad Note* and the prior interpretation thereof, without making any substantive determination on whether the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are subject to Article III, we believe that the fact that the US claim was made under Article III:4 would not, in and of itself, indicate to China that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were not specific measures at issue.

7.74 The narrative description provided in Part IV of the US panel request refers to government content review requirements which apply to the imported hard-copy sound recording which must be complied with prior to digital distribution. As the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, when read together, contain just such rules, we conclude that they fit within the broad narrative description in Part IV of the Panel. However, this does not mean that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are adequately identified in the panel request as specific measures at issue in this dispute as required by Article 6.2 of the DSU.

7.75 We must also determine whether taking the panel request as a whole and in light of the attendant circumstances, the narrative description in Part IV of the panel request means that China could reasonably conclude, that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are specific measures at issue with respect to the United States' complaint regarding China's obligations under Article III:4 of the GATT 1994.

(ii) Adequate notice

7.76 We recall that one of the essential purposes of the requirements in Article 6.2 of the DSU is to "give the parties and third parties sufficient information concerning the claims at issue in the dispute to allow them an opportunity to respond to the complainant's case."[117] This information includes the measures which are being challenged. Additionally, due process is "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[118] Due process requires that a panel ensure that "one party is not unfairly disadvantaged with respect to other parties in a dispute"[119] or risk acting inconsistently with its own obligations as set forth in Article 11 of the DSU.[120]

7.77 We also recall that in determining the consistency with Article 6.2 of a particular panel request we must consider it as a whole, and in the light of attendant circumstances.[121] We must also not read parts of the request in isolation, but rather consider the request as a whole, and the different claims in the request for establishment must be read in their context.[122]

7.78 Given the importance of due process in the WTO dispute settlement system as a whole and in particular when evaluating a panel request for consistency with Article 6.2, one particular aspect of the panel request gives rise to concerns as to whether China received adequate notice that the United

[116] Panel Report on *India – Autos*, para. 7.306 (original footnotes omitted).
[117] Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167 at 186.
[118] Appellate Body Report on *Thailand – H-Beams*, para. 88.
[119] Appellate Body Report on *US – Continued Suspension*, para. 433.
[120] The Appellate Body Report, on *US – Gambling*, para. 273.
[121] Appellate Body Report on *US – Carbon Steel*, para. 127
[122] Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).

States was challenging the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* as being inconsistent with China's obligations under Article III:4 of the GATT 1994, regardless of the description of the specific measures at issue in the narrative portion of Part IV of the panel request or even if the measure could fall within the scope of the US reference to "related" measures in its panel request. Specifically, we note that the United States listed the relevant measures by name in Part I of the panel request which relates to the US claims regarding China's trading rights obligation in the Protocol of Accession and in Part II of the panel request which relates to the US claims under Article XVII of the GATS.

7.79 The inclusion of the measure in Parts I and II of the panel request is an indication both to us and to China and the third parties that the United States was aware of and capable of identifying the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* through their formal names.[123] We specifically asked the United States to explain why it included the measures by name in Parts I and II of the panel request and not in Part IV. The United States did not provide such an explanation. The United States responded that it believed that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* fall within the scope of the measure described by the narrative found in the second paragraph of section IV of the US panel request and are "related measures" that are encompassed by the phrase "any amendments, related measures, or implementing measures. The United States also argued, relying on the panel's reasoning in *Japan – Film*, that these measures were included in the US claim under Article III:4 of the GATT 1994 because these measures are "closely related to" measures specifically identified in the United States' panel request.

7.80 In addition to examining the panel request as a whole and the various claims in context, we must also look to the attendant circumstances. To that end, we note that the United States and China consulted on both the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*.

7.81 Based on the panel request and the attendant circumstances, China knew that the United States was aware of the measures and their contents. China also saw that the United States had explicitly included a challenge to those very measures in both Parts I and II of its panel request. China, based on the panel request as a whole and in light of the attendant circumstances, could reasonably infer from the decision of the United States to exclude the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* from Part IV of the panel request that the United States was *not* challenging the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* under this claim.[124] China therefore, despite the description in the narrative or the reference to "amendments, related measures, or implementing measures"[125], did not

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[123] We note that the panel in *India – Additional Duties*, noted that the United States argued that the use of phrases such as "any amendments, related measures or implementing measures" were meant to refer to any measures of which the complaining party was not aware at the time of the panel request. (Panel Report, *India – Additional Duties*, para. 7.50.)

[124] Panel Report on *US – Upland Cotton*, paras. 7.151 -7-152 (finding that after consultations on cottonseed payments for the years 1999 and 2000 the lack of a reference to the appropriating law for the 1999 payments in Brazil's panel request indicated that it was not challenging those payments and they were therefore, outside the panel's terms of reference). We note, once again, that this reading of the meaning of the inclusion of measures in one part of the panel request and their exclusion from another is consistent with the canon of *expressio unius est exclusio alterius*.

[125] We are cognizant that the United States put forward two reasons why the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* were identified as a specific measure at issue in its panel request. Because we determined that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* fit within the narrative description in the panel request we did not examine whether they were also fit within the US reference to "any amendments, related measures, or implementing measures." We note however, that even if the *2001 Audiovisual Products Regulation* and the

receive adequate notice of the scope of the US claim with respect to its obligations under Article III:4 of the GATT 1994.

7.82 As the United States did not satisfy the requirements of Article 6.2 of the DSU by identifying the specific measures at issue such that China was adequately notified of the case that it had to defend, we find that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are not within our terms of reference with respect to the US claim regarding the consistency of China's measures regarding sound recordings intended for electronic distribution with Article III:4 of the GATT 1994.

3. Certain requirements China alleges are outside the Panel's terms of reference

7.83 **China** argues that certain aspects of measures that were identified in the panel request are also outside the terms of reference because these aspects of the measures were not identified in the narrative portion of the US panel request. Specifically, China argues that, in its panel request, the United States did not challenge the so-called "pre-establishment legal compliance" requirement; the approval process to engage in distribution of reading materials and audiovisual products; or the "decision making criteria" that the GAPP would apply in approving foreign entities for the distribution of reading materials and that the MOC would apply in the approval of Chinese-foreign contractual joint ventures for the distribution of audiovisual products.

7.84 China relies on the panel report in *Japan – Film* for the premise that a reference to a general regulation in relation to specific issues covered by this regulation could not be considered as covering other distinct issues not mentioned in the panel request. China argues that in its panel request, the United States made just such a general reference. China contends that the United States first referred to regulations dealing with a broad range of issues in relation with the activity of distribution of reading materials and audiovisual products, and then made specific and limited claims with regard to certain requirements. China maintains that the reference to the regulations governing publications and audiovisual products cannot be sufficient for considering that the measures concerning the "*pre-establishment legal compliance*", approval process requirements and "*decision-making criteria*" have been adequately identified within the meaning of Article 6.2 of the DSU.

7.85 Additionally, China cites the Appellate Body report in *US – Carbon Steel*, to argue that a reference to "certain aspects" of a general regulation is not sufficient to identify a specific issue covered by this regulation. Therefore, according to China, even if the reference to the regulations was considered not to be limited to the claims concerning capital requirements, operating terms and limitations based on the nature, content and origin of publications, such a broad and unspecified reference to measures covering a broad range of issues could not be read as referring specifically to the issues of "*pre-establishment legal compliance*", "*approval process requirements*" and "*decision-making criteria*".

7.86 The **United States** maintains that it complied with the obligation in Article 6.2 to identify the specific measures at issue. Specifically, the United States argues that consistent with this requirement, Part II of the US panel request identified all of the measures that provide for these three problematic requirements – *i.e.*, the *Publications (Sub-)Distribution Rule*, the *Sub-Distribution Procedure*, the *Audiovisual (Sub-)Distribution Rule*, and the *Several Opinions*. The United States argues that it also identified the WTO obligation that these measures breached. According to the United States, it has satisfied Article 6.2 of the DSU by identifying each of the measures relevant to

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Audiovisual Products Importation Rule could fit within the category of amendments, related measures, or implementing measures of the *Internet Culture Rule* and/or the *Network Music Opinions*, we would still have had to conduct the same analysis with respect to whether China had received adequate notice and would have reached the same conclusion with respect to that element of the case.

its claim. The United States maintains that contrary to China's contentions, Article 6.2 does not require the party requesting a panel to identify each individual provision of the relevant measures that may be inconsistent with the other party's obligations.

7.87 The United States contends that China's reliance on *Japan – Film* and *US – Carbon Steel* is inapposite. According to the United States, in both of those disputes, the complaining party sought to incorporate measures not identified in the panel request into the terms of reference.[126] This situation is not an issue in this dispute, since the US panel request identified each of the measures relevant to the three discriminatory requirements at issue here. This, together with identification of the relevant WTO obligation being breached, provided China with sufficient notice regarding the measures and claims at issue.

7.88 **China** maintains that the United States' argument that entirely different "discriminatory requirements" which were not mentioned at all in its panel request, are properly raised simply by virtue of the fact that they are complaints made in relation to measures mentioned in the panel request is not supported by the wording of Article 6.2 or by past WTO practice.

7.89 China argues that the mere reference by the United States to regulations in a list appearing at the beginning of their claims, and which could relate to any one of a number of issues, cannot be considered to satisfy the "requirement of precision" of a panel request and to respect "the letter and the spirit of Article 6.2 of the DSU".

7.90 China contends that, contrary to the assertions of the United States it is not arguing that a complaining party should "identify each individual provision of the relevant measures that may be inconsistent with the other party's obligations", but rather that Article 6.2 of the DSU requires the party requesting a Panel to identify the basis of its complaint by identifying the issues that arise in relation to particular regulations, by at least mentioning them.

7.91 China maintains that if a complaining party can fulfil the requirements of Article 6.2 merely by naming a measure in its panel request, and where the measure that is named covers a range of issues, the other parties would be unable to understand clearly from the panel request the case being made, this would be contrary to the *letter and spirit* of Article 6.2 of the DSU. To China, the United States is attempting to extend the scope of the dispute in a manner inconsistent with the due process objective of notifying the parties and third parties of the nature of a complainant's case pursued by Article 6.2 of the DSU.

7.92 The **United States** responds that its panel request explicitly refers to "discriminatory requirements" and "discriminatory limitation" in the context of the US claims regarding reading materials and "requirements" and "discriminatory limitation" in the context of the US claims regarding AVHE products. The United States maintains that its panel request describes in detail the discriminatory requirements and the less favourable treatment they accord, and includes illustrative lists of those requirements for greater precision. The United States argues that, contrary to China's contention, Article 6.2 does not require panel requests to identify each individual provision of each challenged measure.

7.93 The **Panel** recalls, as noted in paragraphs 7.14-7.16 above, that Article 6.2 requires that the complaining part identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We also recall that when a panel looks to a panel request to determine its consistency with Article 6.2 of the DSU it must look to the panel request as a whole and the attendant circumstances.

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[126] Panel Report on *Japan – Film*, paras. 10.7-10.20; and Appellate Body Report on *US – Carbon Steel*, para. 171.

7.94 The United States argues that the ordinary meaning of the requirement in Article 6.2 of the DSU for a panel request to "identify the specific measures at issue" does not require the identification of the "specific aspects" of those "specific measures".[127]

7.95 However, China is not arguing that all specific aspects of specific measures must be listed, but that by listing certain aspects the United States indicated that these were the only ones that were the subject of its claim and thus are the only ones within the panel's terms of reference.

7.96 We find the circumstances of, and the panel and Appellate Body's findings in, the *US – Carbon Steel* case to be helpful in our own analysis. In *US – Carbon Steel*, the European Communities challenged a particular sunset review of a US countervailing duty order as well as "certain aspects" of the regulations governing sunset reviews that led to the decision not to revoke the countervailing duty order. The European Communities correctly referred to the relevant section of the US Code of Federal Regulations which contained a provision governing the conduct of sunset reviews. During the panel proceeding, the European Communities attempted to include in its claim an aspect of the regulation dealing with the submission of evidence during sunset reviews. The panel read the European Communities' panel request in its entirety and found that the European Communities could only have been referring to those aspects of the regulation which were actually applied in the sunset review of carbon steel products and therefore other aspects of the same regulation, including those relating to the submission of evidence, which were not applied were outside the panel's terms of reference. In affirming the panel, the Appellate Body agreed that no explicit reference to opportunity to present evidence during a sunset review was contained in the panel request. The Appellate Body reasoned that:

> "[T]he references in the panel request to 'certain aspects of the sunset review procedure', to the United States statutory provisions governing sunset reviews, to related regulatory provisions, and to the Sunset Policy Bulletin, can be read to refer, generally, to United States law regarding the determination to be made in a sunset review. However, we do not believe they can be read to refer to *distinct* measures, consisting of United States law, as such, and as applied, relating to the submission of evidence. Accordingly, we agree with the Panel that the matters relating to the submission of evidence in a sunset review were not within its terms of reference because the *specific measures at issue were not adequately identified* in the request for the establishment of the panel, as required by Article 6.2 of the DSU." [128]

7.97 The United States attempts to distinguish that case from the situation presented here by saying the panel in *US – Carbon Steel* was looking at whether particular "measures" were within its terms of reference. We do not find this argument convincing. That case specifically dealt with the question of whether two different sub-parts of the same regulation were included within that panel's terms of reference because of the European Communities' general reference to that regulation in its panel request. We find this directly relevant to the situation here, where the United States has specifically cited certain requirements of particular government measures in its panel request and China is disputing whether certain other requirements in the same measures were also included in our terms of reference by virtue of that reference.

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[127] Panel Report on *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2; Panel Report on *US – Upland Cotton*, para. 7.127 (finding that the explicit listing of various pieces of legislation by name along with a reference to the "subsidies" granted thereunder was sufficient to identify specific types of payments granted under the laws).

[128] Appellate Body Report on *US – Carbon Steel*, para. 171 (original footnotes omitted).

7.98 Following the logic of the panel and Appellate Body in *US – Carbon Steel*, we examine the narratives in the US panel request to see whether they indicate that the United States challenge is not limited to the certain named discriminatory requirements.

(a) Distribution services for reading materials

7.99 In Part II of its panel request, the United States listed 14 measures and then at the end of the list provided a narrative setting out the nature of its claim. Section A of Part II deals with the US claim regarding China's treatment of the suppliers of distribution services for reading materials.[129] It reads in relevant part:

> "Furthermore, to the extent that some foreign service suppliers are allowed to engage in some aspects of the distribution of publications, there appear to be discriminatory requirements concerning such suppliers' registered capital and such suppliers' operating term, as well as discriminatory limitations (e.g., limitations by type, content, or origin of publication) on the publications that such suppliers may distribute."

7.100 The US panel request does not merely identify "discriminatory requirements" in the broad sense, but discriminatory requirements concerning registered capital and operating terms. This reference does not seem to us to be inclusive of the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision-making criteria applied by the approving agency. Indeed, there is no indication that the enumeration of alleged discriminatory requirements was not intended to be exhaustive. The narrative does not say, for instance, that there "appear to be discriminatory requirements, e.g., concerning …". This view is reinforced by the fact that the above-quoted narrative provides another enumeration which is indicated to be illustrative only. The narrative refers to "discriminatory limitations (e.g., limitations by type, content, or origin of publication)".

7.101 The use of the parenthetical (e.g., limitations by type, content, or origin of publication) serves to explain what types of "discriminatory limitations" are subject to the US complaint. The limitations referenced in the US panel request relate to the publications being distributed once a service supplier has obtained permission to distribute reading material, not to any requirements with respect to obtaining that permission, such as the pre-establishment legal compliance, approval process requirements, or decision-making criteria applied by the approving agency.

(b) Distribution services for AVHE products

7.102 Part II.B deals with the US claim regarding China's measures which govern the distribution of AVHE products. It reads in relevant part:

> "The measures at issue, however, appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging in a type of distribution described in these measures as the 'master distribution' or 'master wholesaling' of audiovisual home entertainment products. In addition, to the extent that foreign services suppliers are permitted to engage in any distribution of those products, the measures at issue appear to impose requirements that the service be supplied through a form of entity that Chinese persons control, or in which Chinese persons have a dominant position, or for which there are limitations

[129] We note that in its panel request the United States referred to "publications" while in its submissions before the Panel it referred to "reading materials". For consistency, unless we are directly quoting the United States, we will refer to the products as "reading materials".

> concerning the participation of foreign capital. The measures at issue also appear to impose discriminatory limitations on foreign service suppliers' operating term in China; such limitations do not appear to be applied to Chinese suppliers of distribution services for audiovisual home entertainment products."

7.103 The US panel request refers to requirements on the control of the entity that supplies the distribution services and the participation of foreign capital in such entities. Additionally, the United States refers, in its panel request, to discriminatory limitations on the operating term in China of foreign service suppliers. None of these requirements or limitations identified as the specific measures at issue are related to the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision-making criteria applied by government agencies for approving a request for permission to provide distribution services for AVHE products within China. In addition, we note that the narrative does not contain qualifying language that would indicate that the listing of requirements and limitations was illustrative, merely a listing of examples, or non-exhaustive.

(c) Conclusion

7.104 Reading the panel request as a whole, we do not find that the mere reference to the legislative instruments in which the disputed requirements were contained identified the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision making criteria applied by the approving agency as specific measures at issue such that China could reasonably conclude that they were included within the US claims. The United States did not inform China that it was challenging every possible discriminatory requirement in its measures, but rather the specific ones described in the narratives. Just as the European Communities did in *US – Carbon Steel*, the United States has, through its description of its claim in the panel request, only notified China that its claim concerned the specific requirements set forth in the panel request. Therefore, we find that these additional requirements (pre-establishment legal compliance, approval process requirements, and decision-making criteria) are outside our terms of reference.

4. The US claim with respect to reading materials under Article III:4 of the GATT 1994

7.105 **China** makes several objections with respect to the US claim that its measures dealing with reading materials are inconsistent with its obligations under Article III:4 of the GATT 1994. First, China argues that the entire claim is outside the Panel's terms of reference because the parties did not consult on it. Second, China argues that in the event the claim is within the Panel's terms of reference, that the United States did not properly identify that it was concerned with the treatment of electronic publications and that the treatment of these products is outside the Panel's terms of reference. Finally, China also argues that the US panel request did not identify the subscription requirements for imported newspapers and periodicals as well as books in the limited category as being the subject of its claim and that these requirements are, likewise, outside the Panel's terms of reference.

7.106 The **United States** maintains that its claim that China's measures dealing with reading materials are inconsistent with its obligations under Article III:4 of the GATT 1994 is within the Panel's terms of reference, including its concerns with regard to the treatment of electronic publications and the subscription requirements for imported newspapers and periodicals as well as books in the limited category.

(a) The lack of consultations

7.107 **China** argues that because the United States' claim under Article III:4 GATT with regard to different distribution opportunities for imported reading materials was not addressed during consultations it is not within the Panel's terms of reference.

7.108 The **United States** argues that China's objection is without merit, as the legal bases contained in a party's consultation request and panel request need not be identical. The United States goes on to explain that the United States and China consulted extensively on the Chinese distribution regime for reading materials. As a result of those consultations the United States argues that it became clear to it that China's regime raised additional concerns with respect to the discriminatory distribution restrictions placed on imported reading materials. The United States contends that its actions are consistent with the Appellate Body's recognition that an important rationale of consultations is to afford the parties the opportunity to engage in an "exchange of information necessary to refine the contours of the dispute, which are subsequently set out in a panel request".[130] The United States, therefore, maintains that its claim under Article III:4 regarding different distribution opportunities for imported reading materials is therefore included in the Panel's terms of reference.

7.109 The **Panel** notes that neither party disputes that a claim under Article III:4 of the GATT 1994 with respect to reading materials was not included in either the first or the supplemental request for consultations.[131]

7.110 We note that "pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel" not the request for consultations.[132] However, the Appellate Body has explained that "as a general matter, consultations are a prerequisite to panel proceedings"[133] and has underscored the importance and benefits of consultations:

> "We agree ... on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole."[134]

7.111 The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part that any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

7.112 The Appellate Body observed in *Brazil – Aircraft*, that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[135]

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[130] Appellate Body Report on *Mexico – Anti-dumping Measures on Rice*, para. 138.

[131] United States' request for consultations, WT/DS363/1 and Supplemental request for consultations, WT/DS363/1/Add.1.

[132] Appellate Body Report on *US – Carbon Steel*, para. 124.

[133] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

[134] *Ibid*., para. 54.

[135] Appellate Body Report on *Brazil – Aircraft*, para. 131. We note that in certain instances panels and the Appellate Body have recognized that a responding party may be considered to have waived its objection to a lack of consultations if it does not object in a timely manner. Appellate Body Report on *Mexico – Corn Syrup*, para. 63; Appellate Body Report on *US – FSC*, paras. 165-166. However, the United States did not allege that China's objection was untimely. Therefore, we do not consider "waiver" as a possible basis for why the United States' claim under Article III:4 of the GATT 1994 with respect to reading materials might be included in our terms of reference despite the admitted absence of the claim from the consultations requests.

7.113 However, the Appellate Body has recognized that, Articles 4 and 6 of the DSU do not require a precise and exact identity between the request for consultations and the panel request

> "As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity"[136] between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request."[137]

7.114 The Appellate Body expanded on this reasoning, in *Mexico – Anti-Dumping Measures on Rice*, when it explained that:

> "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. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that *takes into account new information such that additional provisions of the covered agreements become relevant*. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the *DSU*, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations—namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. 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 from the 'legal basis' that formed the subject of consultations*. In other words, the addition of *provisions must not have the effect of changing the essence of the complaint*."[138] (emphasis added).

7.115 It seems to us that the above statement by the Appellate Body indicates that in some circumstances, a claim based upon a WTO provision of a covered agreement which was not contained in the request for consultations, can nevertheless be considered to be within a panel's terms of reference. If through consultations the complaining party obtains a better understanding of the operation of a challenged measure such that additional provisions of the covered agreements become relevant it may reformulate its complaint to include these other provisions so long as the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations. This means that the addition of provisions must not have the effect of changing the essence of the complaint.

7.116 The **United States**, for its part, argues that its claim under Article III:4 of the GATT 1994 regarding "different distribution opportunities" for imported reading materials resulted precisely from the sort of exchange of information identified by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* as well as in *Mexico – HFCS (Article 21.5)* and *India – Patent Protection*. The United States contends that it revised the list of WTO provisions with which the challenged measures are inconsistent to include Article III:4, so as to incorporate information obtained during consultations regarding China's discriminatory treatment of imported reading materials.

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[136] (*footnote original)* Appellate Body Report on *Brazil – Aircraft*, para. 132. (emphasis omitted)
[137] Appellate Body Report on *US – Upland Cotton*, para. 293.
[138] Appellate Body Report on *Mexico – Anti-Dumping Measures on Rice*, para. 138.

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

7.118 **China**, argues that in the case of reading materials, there cannot have been any evolution in the legal basis between the consultations and the panel request, as the United States had failed to present a claim based on Article III:4 of the GATT 1994 with respect to reading materials in its request for consultations. Moreover, the United States' claim under Article III:4 of the GATT 1994 in its panel request could in no way be "reasonably" understood as having evolved from the claim it made, in its request for consultations, concerning distribution services for reading materials under the GATS. Indeed, China submits that the standard of "reasonable evolution" flowing from the Appellate Body's statement in *Mexico – Rice* could not lead the Panel to consider that a claim under Article III:4 of the GATT 1994 could be said to have evolved from a claim under the GATS, a different agreement dealing with totally distinct aspects, i.e. which concerns services and services suppliers.[139]

7.119 China further argues that while consultations may allow a "clearer understanding derived from the exchange of information", this very aspect should not lead to a situation where the defending party "discovers" claims on a new legal basis at the stage of the panel request, arguing that this would be inconsistent with the "reasonable evolution" standard set by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*.[140]

7.120 To the **United States**, however, detailed discussions with China in the consultation phase allowed it to develop a "better understanding of the operation of the challenged measures during consultation".[141] As a result of the discussion the United States "revised the list of provisions with which the challenged measures are inconsistent to include Article III:4 ... while leaving the essence of the US complaint the same".[142]

7.121 The **Panel** does not agree with China's reading of the Appellate Body's jurisprudence. The Appellate Body did not limit its reasoning to different provisions within the same covered agreement, although that may have been the factual situation before it in the *Mexico – Anti-Dumping Measures on Rice* dispute. Indeed the Appellate Body referred to "provisions of the covered agreements" in the plural. The relationship between the obligations in the provision contained in the consultations request and that ultimately cited in the panel request is certainly relevant to a determination of whether the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations. However, we can envision a variety of examples where two covered agreements may contain provisions sufficiently related to each other that the fact that they are contained in different agreements is not a bar to concluding that consultations on the provision of one agreement might lead to a reformulation of a complaint to include a provision of another. For example, consultations regarding a measure under Article III:4 of the GATT 1994 could evolve into a complaint with respect to obligations in the *TRIMS Agreement* if the measure being consulted upon was an investment measure. Likewise, consultations regarding a TBT measure related to marking or labelling under the *TBT Agreement* might evolve into a complaint with respect to obligations under Article IX of the GATT 1994.

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[139] China's response to question No. 148.
[140] China's comments on the United States' response to question No. 146(a).
[141] United States' response to question No. 146(b).
[142] United States' response to question No. 120.

7.122 We believe that the legal basis that formed the subject of consultations under one provision of a covered agreement can evolve into the legal basis for a claim under another provision, whether of the same or another agreement, without changing the "essence" of a complaint. While we agree with the United States that the products and activities governed by the challenged measures under both claims is relevant to a determination of whether one has evolved from the other, these are not the only considerations: a panel must also examine the types of products, measures, the obligations cited, and the relationship between those obligations referred to in the consultations request and those referred to in the panel request.

7.123 Part II of the US consultations request identifies China's commitments on services as set forth in its GATS Schedule and states that despite those commitments, various measures taken by China impose market access restrictions or discriminatory limitations on foreign service providers seeking to engage in the distribution of publications and certain audiovisual home entertainment products.[143]

7.124 With respect to "publications" the United States maintains that:

> "The measures at issue appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging at least in a type of distribution described in these measures as the 'master distribution' of publications. The measures at issue also appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging at least in the wholesaling of 'electronic publications' (a term that refers to a subset of publications). Moreover, the measures at issue may extend this prohibition more broadly to all distribution of all publications (whether at the 'master distribution' level or otherwise). Furthermore, to the extent that some foreign service suppliers are allowed to engage in some aspects of the distribution of publications, there appear to be discriminatory requirements concerning such suppliers' registered capital, such suppliers' operating term, and the particular publications that such suppliers may distribute."[144]

7.125 The United States then identifies Articles XVI and XVII of the GATS as provisions of the covered agreements that China's measures are inconsistent with. Article XVI of the GATS relates to market access commitments, while Article XVII of the GATS provides for "national treatment" to services and service suppliers in the sectors inscribed in a Member's Schedule.

7.126 The US panel request repeats the GATS claim contained in the consultations request and then contends that the measures are also inconsistent with the national treatment obligations with respect to like products contained in Article III:4 of the GATT 1994. Specifically, the US panel request identifies the restrictions on distribution opportunities for imported books, newspapers and periodicals and also notes that "[c]ertain foreign service-suppliers that are allowed to distribute books, newspapers and periodicals are not allowed to distribute imported books, newspapers and periodicals."

7.127 Both the claim in the consultations request and the claim in the panel request relate to limitations on the distribution of reading materials within China. We note additionally, that both claims deal with the national treatment obligations contained in the GATS and the GATT 1994, which prohibit discrimination that results in "less favourable treatment" of imports (either services, service suppliers, or products) vis-à-vis their domestic counterparts. While the national treatment obligation in the GATS is limited to services and service suppliers in sectors inscribed in a Member's *GATS* Schedule, the national treatment obligation in Article III:4 of the GATT 1994 is quite broad. It

[143] United States' consultations request WT/DS363/1.
[144] *Ibid.*

includes any laws, regulations, or requirements which *affect* the internal sale, offer for sale, purchase, transportation, distribution or use. Although they appear in two different agreements, the two obligations are not unrelated. The Appellate Body has recognized in the past that the scope of application of the two agreements may overlap, depending on the nature of the measures at issue.[145]

7.128 Specifically, the Appellate Body report on *EC – Bananas III*, reasoned that:

> "Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis."[146]

7.129 In this case, both the GATS claim in the consultations request and the GATT 1994 claim in the panel request challenge the same limitations on service suppliers with respect to the distribution of imported reading materials as being inconsistent with China's national treatment obligations under the WTO agreements. By virtue of the scope of application of the two agreements, the US claim under the GATS from the Consultation Request relates to the national treatment of the service suppliers, while the US claim under the GATT 1994 in the panel request relates to the national treatment of the reading materials. However, the essence of both the GATS and GATT 1994 claims is the allegation that China's internal measures restrict the distribution of imported reading materials in a way that fails to provide national treatment either to the services, service suppliers, or to the imported products themselves.

7.130 We, therefore, believe that it can reasonably be said that the legal basis of the GATT 1994 claim in the panel request evolved from the legal basis of the GATS claim in the consultations request that alleged that China was failing to provide national treatment to foreign service suppliers by denying them access to certain segments of the market for distribution services for reading materials and that the addition of the GATT 1994 provisions does not have the effect of changing the essence of the complaint.

7.131 Because the US claim with respect to the consistency of China's measures with Article III:4 of the GATT 1994 in its panel request can reasonably be said to have evolved from the US claim with respect to the consistency of China's measures with Article XVII of the GATS in its consultations request without changing its essence, we find that the US claim under Article III:4 of the GATT 1994 is within our terms of reference.

7.132 **China** argues that, if the Panel decides that the main claim under Article III:4 of the GATT 1994 with respect to reading materials is included within its terms of reference, there are additional aspects of the US claim that would therefore be outside the Panel's terms of reference.

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[145] Appellate Body Report on *EC – Bananas III*, para. 221.
[146] *Ibid.*

First, China argues that the US claim with respect to a subset of reading materials, electronic publications, is outside the terms of reference because the US did not identify the specific product in its panel request. Second, China argues that the US claim with respect to subscription requirements are likewise not identified in the panel request and are not properly before the Panel.

7.133 As the **Panel** has decided that the US claim under Article III:4 of the GATT 1994 with respect to reading materials is included in our terms of reference we now address each of China's alternative objections in turn.

(b) Electronic publications

7.134 **China** argues that the US panel request does not include a claim with respect to China's treatment of electronic publications within its claim on the inconsistency of China's measures governing "reading materials" with China's obligations under Article III:4 of the GATT 1994. According to China, the US panel request only targets "different distribution opportunities for imported and domestically produced books, newspapers and periodicals". Electronic publications, which are a different product, cannot be considered to be included in this limitative list. This is further confirmed by the fact that the United States, in other parts of the panel request, expressly included electronic publications in the list of reading materials.[147]

7.135 China maintains that the general references to regulations applying to electronic publications are not sufficient to consider that measures governing distribution opportunities for electronic publications have been adequately identified within the meaning of Article 6.2 of the DSU.

7.136 China therefore requests the Panel to find that this aspect of the US claim is outside of its terms of reference and refrain from making a ruling or recommendation on this particular subgroup of reading materials.

7.137 The **United States**, in its first oral statement, argues that its panel request specifically identified the measures at issue, noting that the discriminatory treatment of electronic publications is provided for in the *1997 Electronic Publications Regulation* and in the *Publications Regulation*.[148] According to the United States, this means that China's argument that the measures governing electronic publications should be considered outside the Panel's terms of reference for purposes of the US claim under Article III:4 of the GATT 1994 should be dismissed.

7.138 The **Panel,** in question No. 120, asked the United States to respond to China's contention that the specific product group "electronic publications" within the claim on reading materials is not properly before the Panel. The United States responds:

> "[A]s required by Article 6.2 of the DSU and as confirmed by the Appellate Body,[149] 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

[147] (*footnote original)* In its claim concerning trading rights for reading materials as well as in its claim concerning distribution services for reading materials, the United States referred to "*reading materials (e.g., books newspapers, periodicals, and* <u>*electronic reading materials*</u>*)*" (Emphasis added).

[148] We note that the US claim with respect to Article III:4 of the GATT 1994 is founded in the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule* and not in the *1997 Electronic Publications Regulation* or the *Publications Regulation*.

[149] (*footnote original) See Korea – Dairy (AB)*, para. 120; *US – German Steel (AB)*; para. 125; and *Guatemala – Cement (AB)*, para. 69.

> thereon. Rather, and consistent with Article 6.2, the discriminatory impediments imposed on imported electronic publications are identified in the US panel request by way of the measures incorporating them.
>
> The US 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[150] by a select few GAPP-designated Chinese wholly state-owned enterprises.[151]"[152]

7.139 We note that China has not contended that the measures which govern electronic publications were not properly identified in the panel request. Instead, China has argued that by presenting a limited list of the products the US claim was concerned with, the United States has, by implication, excluded electronic publications from that coverage.

7.140 Part II.A of the panel request is entitled "Publications (e.g., books, newspapers, periodicals, and electronic publications)". It then contains the four paragraphs dealing with the US claims under the GATS,

> "In Sectors 4A-4E of its Schedule, China undertook market access and national treatment commitments with respect to the supply through commercial presence in China by service suppliers of other Members of, *inter alia*, distribution services for publications.
>
> The measures at issue, however, appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging at least in types of distribution described in these measures as the 'master distribution' or 'master wholesaling' of publications. The measures at issue also appear to prohibit foreign service suppliers (including wholly or partially foreign-owned or foreign-invested enterprises) from engaging in the distribution of 'electronic publications' (a term that refers to a subset of publications) generally, whether at the 'master wholesale' level, the 'wholesale' level, or otherwise.
>
> Furthermore, to the extent that some foreign service suppliers are allowed to engage in some aspects of the distribution of publications, there appear to be discriminatory requirements concerning such suppliers' registered capital and such suppliers' operating term, as well as discriminatory limitations (e.g., limitations by type, content, or origin of publication) on the publications that such suppliers may distribute.
>
> The measures at issue therefore appear to accord to foreign suppliers of distribution services for publications treatment less favourable than that accorded to Chinese suppliers of distribution services for publications. Moreover, the measures at issue do not appear to fall within the terms, limitations, conditions, or qualifications on market access or national treatment that China has specified in its Schedule for the distribution of publications through commercial presence in China by service suppliers of other Members. Accordingly, the measures at issue appear to be inconsistent with China's obligations under Article XVII of the GATS."

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[150] (*footnote original) Imported Publications Subscription Rule*, Article 3 (Exhibit US-30).
[151] (*footnote original) Imported Publications Subscription Rule*, Article 4 (Exhibit US-30).
[152] United States' response to question No. 120.

7.141 The panel request then contains a final paragraph dealing with the US claim under the GATT 1994:

> "In addition, the measures at issue also appear to establish different distribution opportunities for imported and domestically produced books, newspapers and periodicals. Imported books, newspapers and periodicals are restricted in their distribution opportunities. Certain foreign service-suppliers that are allowed to distribute books, newspapers and periodicals are not allowed to distribute imported books, newspapers and periodicals. By contrast, domestically produced books, newspapers and periodicals are not restricted in this way. Accordingly, the measures at issue also appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994 and the provisions of paragraph 5.1 of Part I of the Accession Protocol as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol (to the extent that it incorporates commitments in paragraph 22 of the Working Party Report)."

7.142 As noted in paragraph 7.140, in the title of Part II.A of the panel request the United States has delineated which subgroups of products it is concerned with when it makes a reference to "publications". In the second paragraph, the panel request itself refers to "electronic publications" as "(a term that refers to a subset of publications)." In the rest of the discussion on the GATS claims the United States refers to "publications" without referring to any specific subset. In the paragraph describing its claim under the GATT 1994, however, the United States took a different tack. Instead of referring to "publications" the United States refers to "books, newspapers and periodicals" and repeats this list five times.

7.143 The United States was quite specific in its panel request and China has argued that it reasonably believed, therefore, that electronic publications were not of concern to the United States with respect to its claims under Article III:4 of the GATT 1994.

7.144 Panels and the Appellate Body have rejected arguments in the past that a reference to a broad product groups or no specific product group was too vague to give the responding party notice that a particular subset of that group was included.[153] The panel in *US – FSC*, noted that even "in the absence of any specification as to the products at issue" the United States was on notice that the European Communities was asserting an inconsistency with the US measures with respect to all agricultural products.[154]

7.145 In this case we are presented with the opposite situation where the complainant has specified a particular list of products at issue in its panel request and then in its written submissions included additional products within the ambit of its claim. We are not being asked to determine whether a broad term was too vague to put China on notice that the United States was concerned with its treatment of a particular subset of products, but rather, whether the United States use of a limited list of products, i.e. "books, newspapers, and periodicals" was sufficient to put China on notice that the United States was making a claim with respect to China's treatment of electronic publications.

7.146 The United States used the term "publications", which it defined in the parenthetical in the title to that part of the panel request as including newspapers, periodicals, books and electronic publications, in the paragraphs immediately preceding the portion of the narrative where it sets forth its claim under Article III:4 of the GATT 1994. However, in the paragraph covering its Article III:4 claim, the United States did not refer to "publications" but rather spelled out "books, newspapers, and

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[153] Appellate Body Report on *EC – Computer Equipment*, paras. 67-68 and 70; Panel Report on *Korea – Alcoholic Beverages*, paras. 10.14-10.16; Panel Report on *US – FSC*, para. 7.29.

[154] Panel Report on *US – FSC*, para. 7.29.

periodicals." Therefore reading the panel request as a whole and the claims in context, we attach meaning to the fact that the United States, expressly limited the scope of its claim to "books, newspapers, and periodicals" and did not refer to the broader category of "publications", which includes electronic publications.

7.147 Thus, China could reasonably conclude, in good faith, that the United States was not including the treatment of electronic publications in its claim under Article III:4 of the GATT 1994. As such, to the extent that we make any findings with respect to the consistency of the challenged measures with Article III:4 of the GATT 1994 those findings are limited to the application of the measures to newspapers, periodicals, and books.

(c) Subscription requirements

7.148 **China** argues that in its panel request the United States only challenged the fact that: "Imported books, newspapers and periodicals are restricted in their distribution opportunities. Certain foreign service suppliers that are allowed to distribute books, newspapers and periodicals are not allowed to distribute imported books, newspapers and periodicals".[155] According to China, such a claim relates to the prohibition imposed on foreign service suppliers to distribute imported reading materials and its restrictive effect on the distribution opportunities of these reading materials. The subscription regime as such and conditions imposed on subscribers of imported reading materials are clearly a distinct issue.

7.149 Moreover, the United States did not, in its panel request, refer to provisions that would specifically deal with the channelling requirement and the conditions imposed on subscribers of imported reading materials. It only made a general reference to the "*Administrative measures on Subscription of Imported Publications*". However, such a general reference is not sufficient to consider that the measures concerning the conditions imposed on subscribers have been adequately identified within the meaning of Article 6.2 of the DSU.

7.150 The **United States** maintains that the US panel request specifically identifies the measures at issue, and those measures in turn include provisions setting forth the discriminatory aspects raised in China's objection – i.e., (i) China's discriminatory subscription regime is provided for in the *Imported Publications Subscription Rule*; (ii) the conditions imposed on subscribers are also provided for in the *Imported Publications Subscription Rule*. According to the United States, as it 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.

7.151 The **Panel** notes that once again, the issue relates to whether the narrative description provided by the United States in its panel request limits its claim in a way that would exclude from it the subscription requirements contained in the *Imported Publications Subscription Rule*. China's objection is two-fold. It covers the "channelling requirements", i.e. the requirement that all newspapers and periodicals and certain books can only be distributed through the "subscription" channel, and the conditions imposed on subscribers.

7.152 In its panel request, the United States described its complaint with respect to whether China's measures governing the distribution of reading materials was in conformity with its obligations under Article III:4 of the GATT 1994, by identifying several distinct situations.

7.153 First, the United States noted that the measures at issue appeared to establish different distribution opportunities for imported and domestically produced books, newspapers and periodicals.

[155] (*footnote original)* See United States' panel request WT/DS363/5, p.5.

Secondly, the United States asserted that the products are restricted in their distribution opportunities. Thirdly, the United States noted that certain foreign service-suppliers are not allowed to distribute imported books, newspapers and periodicals. Finally, the United States noted that domestically produced books, newspapers and periodicals are not restricted in this way.

7.154 The United States identified the *Imported Publications Subscription Rule* in its panel request as the act of the Chinese Government which contained the restrictions that were the specific measures at issue. Article 1 of the *Imported Publications Subscription Rule* states that the purpose of the rule is to "satisfy the reading needs of domestic units and individuals, foreign organizations in China, foreign nationals of enterprises with foreign investment, and personages from Hong Kong, Macao and Taiwan for imported publications and reinforce the management of imported publications." Article 3 of that measure states that:

> "[T]he state manages the distribution of imported publications by categories. In regard to imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, they shall be distributed under subscription to subscribers, and supplied by categories."[156]

7.155 Article 4 of that measure states that subscriptions for imported newspapers and periodicals and books and electronic publications in the limited category shall be handled by publication import business units designated by the General Administration on Press and Publications ("GAPP").

7.156 We believe that the references to "different distribution opportunities" and restriction on distribution opportunities in the US panel request are broad enough to include the requirement that all newspapers and periodicals and certain books be distributed through the subscription channel. Therefore, and in view of the fact that the *Imported Publications Subscription Rule*, has been specifically identified in the relevant part of the panel request, we find that this requirement, as it is embodied in Articles 3 and 4 of the *Imported Publications Subscription Rule* is within our terms of reference.

7.157 **China** has also objected to the inclusion in the US claim of the restrictions on subscribers embodied in Articles 5-8 of the *Imported Publications Subscription Rule*, because they were not identified in the US panel request.

7.158 The **United States** maintains that these provisions were identified in the narrative description of its claim in the panel request.

7.159 **The Panel** notes that Article 5 requires those wishing to subscribe to publications in the non-limited category to bring a subscription application to the import business unit designated by the GAPP. Article 6 states that the GAPP will decide which domestic unit subscribers may subscribe to imported newspapers, periodicals, books, and electronic publications in the *limited* category, while Article 7 describes the application process for that approval. Finally, Article 8 sets forth the procedures for how foreign organizations in China can obtain subscriptions to imported newspapers and periodicals.

7.160 Unlike the restrictions in Articles 3 and 4 of the *Imported Publications Subscription Rule*, Articles 5-8 do not relate to the manner in, or channel through, which imported newspapers and periodicals as well as books in the limited category are distributed or who may distribute them, but rather deal with the manner in which entities or individuals may purchase those products. We note that, whereas the US panel request refers to the restricted distribution opportunities for the products, it does not refer in any way to requirements or limitations imposed on the purchasers of the products.

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

7.161 Therefore, we cannot read the narrative of the US panel request as being inclusive of Articles 5-8 of the *Imported Publications Subscription Rule*. We thus consider that, because the narrative of the US panel request does not identify the subscription procedures imposed on purchasers of imported books, newspapers, and periodicals by their nature or substance, China did not receive adequate notice, within the meaning of Article 6.2 of the DSU, of any US claim with respect to those requirements. Therefore, those provisions of the *Imported Publications Subscription Rule* are outside our terms of reference.

5. 'Measures' China argues the Panel should not examine

7.162 In the context of its claims, the **United States** has argued that certain provisions of the *Several Opinions* and the *Importation Procedure* are inconsistent with China's trading rights commitments under the Accession Protocol. Additionally, the United States argues that certain provisions of the *Several Opinions* and the *Sub-Distribution Procedure* are inconsistent with China's obligations under Article XVII of the GATS.

7.163 **China** has asked the Panel not to examine the *Several Opinions*, the *Importation Procedure*, and the *Sub-Distribution Procedure* because "the *Several Opinions* and the *Importation Procedure* are not regulatory documents", with the *Several Opinions* merely constituting "internal guidance" and the *Importation Procedure* and *Sub-Distribution Procedure* being summaries "of the procedures and requirements contained in applicable regulations and aimed at facilitating the application process".

7.164 The **United States** argues that China "concedes" that these documents are "measures" and that it does not contest that they were identified in the US panel request and included in the Panel's terms of reference. The United States continues to seek findings on these measures particularly given, in its opinion, the absence of any grounds for China's objections.[157]

7.165 Article 3.3 of the DSU states:

> "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired *by measures taken by another Member* is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." (emphasis added)

7.166 This means that only measures taken by another Member are subject to review under the DSU. The Appellate Body has explained that:

> "[I]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.[158] The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[159]"[160]

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[157] United States' second written submission, para. 220.

[158] (*footnote original*) We need not consider, in this appeal, related issues such as the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.

[159] (*footnote original*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report on *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

[160] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

7.167 Although China has not explicitly asserted that the *Several Opinions*, *Importation Procedure*, and *Sub-Distribution Procedure* are not measures taken by a Member as required by Article 3.3 of the DSU, it has argued that they cannot "serve as the legal basis for any administrative acts." [161]

7.168 **The Panel,** therefore, believes that this is the appropriate standard against which we must measure whether we can and should examine the *Several Opinions*, the *Importation Procedure*, and the *Sub-Distribution Procedure*. We also note that China has not raised any other basis for excluding the *Several Opinions*, the *Importation Procedure*, and the *Sub-Distribution Procedure* from review (such as a lack of consultations, or non-compliance of the United States with Article 6.2 of the DSU), therefore a finding that the *Several Opinions*, the *Importation Procedure*, and the *Sub-Distribution Procedure* are not measures within the meaning of Article 3.3 of the DSU is the only basis upon which the Panel would be able to accede to China's request. We note that a faculty of a panel is not limited to the arguments of the parties when developing its own reasoning so long as a party has raised a claim under that issue.[162] China has raised the issue before us of whether these documents are subject to panel review.

7.169 We note that the Appellate Body, in the context of a discussion of Articles 6.2 and 7.1 of the DSU, has held that "panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed."[163]

7.170 Given that Article 3.3 of the DSU limits the scope of what may be brought before the DSB for adjudication to "measures taken by another Member", we believe that whether a claim brought before a panel relates to a "measure" within the meaning of Article 3.3 likewise goes to the root of our jurisdiction and must be dealt with, even on our own motion, so that we may satisfy ourselves that we have the authority to proceed.

7.171 Because China has raised the issue generally and because it is an issue that is a prerequisite for lawful panel proceedings, we will examine the three documents identified by China as those the panel "should not examine" to determine whether they constitute measures within the meaning of Article 3.3 of the DSU.

7.172 A determination of whether something is a "measure" "must be based on the content and substance of the instrument, and not merely on its form or nomenclature."[164] Acts setting forth rules or norms that are intended to have general and prospective application are measures subject to WTO dispute settlement.[165]

7.173 For example, the panel and the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, determined that a non-binding policy bulletin had normative value because it provided administrative guidance and created expectations among the public and among private actors.[166]

7.174 This guidance from the Appellate Body deals with attempts to challenge "rules or norms" as such. The United States is also challenging the *Several Opinions*, the *Importation Procedure*, and the

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[161] China's response to question No. 39.

[162] Appellate Body Report on *EC – Hormones*, para. 156; Appellate Body Report on *Korea – Dairy*, para. 139; and Panel Report on *Egypt – Steel Rebar*, para. 7.58; Appellate Body Report on *Chile – Price Bands*, paras. 166-168.

[163] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

[164] Appellate Body Report on *US – Corrosion Resistant Sunset Review*, footnote 87.

[165] *Ibid.*, para. 82.

[166] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

Sub-Distribution Procedure "as such".[167] Therefore, the reasoning of the Appellate Body is apposite to the present case.

7.175 Our task, then, is to determine whether the *Several Opinions*, the *Importation Procedure*, and the *Sub-Distribution Procedure* are attributable to China and whether they set forth rules or norms that are intended to have general and prospective application.

(a) The *Several Opinions*

7.176 The **United States** argues that the *Several Opinions* prohibits foreign-invested enterprises from importing the products, from participating in the "master distribution" of reading materials, limit the amount of equity foreign investors can hold in enterprises sub-distributing audiovisual products, that they must satisfy pre-establishment legal compliance requirements[168], and prohibits foreign-invested enterprises from electronically distributing sound recordings.

7.177 Specifically, the United States argues that Article 1 of the *Several Opinions* is inconsistent with China's obligations under the GATS. Article 1 states in part that "[u]nder the condition where the right of our country to examine the content of audiovisual products is not harmed, 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." The United States also argues that Article 4 of the Several Opinions is inconsistent with China's GATS commitments as well as its trading rights commitments in its Protocol of Accession. Article 4 provides that "foreign investors are prohibited from setting up and operating ... businesses dealing with internet culture ..., motion picture import and distribution companies.... Foreign 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."

7.178 The United States also argues that Articles 5 and 6 are inconsistent with China's obligations under the GATS. Article 5 states that:

> "Administrations of culture, press and publication, and radio, film and television are responsible for doing a good job of guarding the door of entry into the relevant industry, carry out pre-examination and approval of applications for setting up wholly foreign owned enterprises and Chinese-foreign equity and contractual joint ventures in accordance with the law, standardize the scope of utilization of foreign capital and the ratio of shares."

7.179 Additionally, Article 6 directs agencies executing the administrative examination and approval to "give priority to cultural enterprises outside China whose *capability is strong*, *management is standardized*, *technology is advanced*, and are *friendly* towards us in conducting *equity and contractual joint ventures*, and ensure that the quality of the foreign investment introduced is *reliable*."

7.180 The United States maintains that these provisions establish restrictions on who may import and distribute the relevant products which are the subject of its claims.

7.181 **China** argues that the *Several Opinions* is merely an internal guideline for the formulation and improvement of implementation procedures by the authorities competent in the cultural sectors

[167] United States' first written submission, paras. 253, 257.
[168] We note that we have found that this particular requirement is outside our terms of reference.

concerned and is consequently not relevant for the purpose of addressing the consistency of China's trading rights system with its commitments under its Accession Protocol.

7.182 In its response to questions from the Panel, China maintains that pursuant to its *Legislation Law*, the hierarchy of Chinese laws and regulations at central government level is composed of three levels: (i) laws enacted by the National People's Congress or its Standing Committee; (ii) administrative regulations enacted by the State Council; (iii) departmental rules enacted by ministries or agencies under the State Council. [169] According to China, the *Several Opinions* does not fit into any of the three categories of laws and regulations within China and as an internal guideline is not applicable in the context of administrative acts.[170]

7.183 The **United States** disputes that the *Several Opinions* is merely internal guidance. The United States relies on Exhibit US-62, which is an opinion from China's Supreme People's Court, which it argues demonstrates that legal instruments such as the *Several Opinions* are legally binding on their issuing agencies, guide the enforcement of law and implementation of administrative measures and serve as a basis for particular administrative acts.[171]

7.184 Additionally, the United States argues that the *Several Opinions* was issued jointly by the five national-level agencies responsible for the products at issue and were approved by the highest organ of the executive branch: the State Council. Therefore, according to the United States, the *Several Opinions* is an "other regulatory document", which is a type of legal instrument that the Supreme People's Court of China has confirmed is binding on the agencies that issue them.

7.185 The United States points to the Notice issued together with the *Several Opinions* which requires these national-level agencies and their regional counterparts to "implement them earnestly" as demonstration that the substance of the measure imposes obligations and prohibitions on private sector actors that must be adhered to under penalty of law.[172]

7.186 **China,** for its part, contends that the exhortation in the Notice issued together with the *Several Opinions* to agencies to "please implement them earnestly" means that the requirements in the *Several Opinions* must be implemented by the promulgation of specific departmental rules by various agencies and its provisions are not directly applicable. [173]

7.187 **The Panel** notes that the *Several Opinions* was issued by the MOC, the State Administration of Radio, Film, and Television, the General Administration of Press and Publication, the National Development and Reform Commission, and the Ministry of Commerce with the "approval of the State Council". It is directed to

> "[A]ll people's governments of provinces, autonomous regions and municipalities directly under the Central Government, all ministries and commissions under the State Council and all agencies directly under the State Council, cultural departments (bureaus), radio, film and television departments (bureaus), press and publication bureaus, commissions of development and reform, and administrative departments of commerce of provinces, autonomous regions, and municipalities directly under the Central Government."

[169] China's response to question No. 37(a).
[170] China's responses to question Nos. 37(a) and (b).
[171] Exhibit US-62.
[172] United States' response to question No. 142.
[173] China's responses to question Nos. 37(a) and (b).

7.188 With respect to China's argument that the *Several Opinions* does not fall within any of the three categories of laws or regulations within China, we recall that although an understanding of China's administrative law system is useful, what is important for purposes of our analysis is not the nomenclature used by the domestic legal system of the Member, but whether the act falls within the meaning of the term "measure" as it is used in Article 3.3 of the DSU.

7.189 We note that the *Several Opinions* was issued jointly, with "the approval of the State Council", by several executive agencies of the Chinese Government. Therefore, it is an act taken by the organs of the state. As such, regardless of whether it fits within one of the categories of Chinese nomenclature for its laws and regulations, it is attributable to China.

7.190 As the *Several Opinions* is attributable to China the next question is whether it sets forth rules or norms that are intended to have general and prospective application.

7.191 In response to a question from the Panel, China explains that the Notice issued together with the *Several Opinions* addressed to a number of Central Government or State Council agencies (and not just those identified in Article 13) is a notification process that communicates the internal guidelines to various government agencies and tells them to "[p]lease implement them earnestly." China contends that the wording of "earnest implementation" does not mean that the various government agencies to which the notice is addressed can implement the *Several Opinions* directly.[174]

7.192 The *Several Opinions* includes a variety of provisions about the types of corporations and investors that may invest in certain cultural sectors of the Chinese economy. Articles 1 to 9 contain explanations of the various areas where foreign capital investment is restricted and the conditions under which foreign investment will be permitted.

7.193 Articles 10 to 12 set forward various requirements for administering agencies. For example, Article 10 states that "[d]epartments everywhere may not expand the scope of bringing in foreign capital on their own; they may not overstep their authority in drawing up policies that open up regions or industry, or examine and approve such programs." Article 11 discusses the strictness of the licensing regime and the punishment for foreign-invested enterprises which have violated regulations. Article 12 states:

> "[C]ulture, radio, film and television, and press and publication administrations at every level shall strengthen macro-control and daily supervision regarding the introduction of foreign capital and seriously implement relevant regulations on the management of bringing in foreign capital. The weak links shall be reinforced, supervision methods improved, and follow-up supervision enhanced. Comprehensive law enforcement shall be vigorously promoted and the crack-down on violations of the law and regulations strengthened."

7.194 Finally, Article 13 of the *Several Opinions* states that "the Ministry of Culture, the State Administration of Radio, Film and Television, and the General Administration of Press and Publication shall, based on these Opinions, draw up and improve concrete implementation measures for their own departments."

7.195 In response to a question from the Panel, China explained that "Article 13 requires MOC, SARFT and GAPP to "formulate and improve" the relevant implementation procedures for their respective sectors according to the *Several Opinions*. This requirement in Article 13 must be

[174] China's response to question No. 37(a).

"implemented earnestly" by various government agencies through the promulgation of relevant departmental rules."[175]

7.196 Even accepting China's arguments that the *Several Opinions* merely provides internal guidance and is not directly applicable would not be enough to exclude it from review by this Panel. It is already well established that internal government documents that provide administrative guidance to agencies in how they carry out their duties can be "measures" within the meaning of Article 3.3 of the DSU.[176] Additionally, accepting that the restrictions described in the *Several Opinions* do not have direct effect, but must be implemented by government agencies promulgating regulations, does not mean that they do not set forth rules or norms that are intended to have general and prospective application.

7.197 We have examined the provisions of the *Several Opinions* which set forth various restrictions on the participation of foreign capital in various cultural sectors, combined with the provisions directed at government agencies. The provisions not only make pronouncements such as prohibiting foreign investors from participating in certain businesses (see Article 4), but they also provide guidance for administrative agencies about how they are to do their jobs (e.g, Article 6 which sets forth the type of businesses that agencies examining applications for licences "shall give priority to"). Finally, Article 13 states that agencies "shall" draw up and improve concrete implementation measures for their own departments based on the *Several Opinions*. We also take note of China's own description of the *Several Opinions* as internal guidelines for the formulation and improvement of implementation procedures by the authorities competent in the cultural sectors concerned.

7.198 China confirms that the *Several Opinions* serves as a guideline for the formulation of implementation procedures by the competent authorities, that "guidance" includes proclamations regarding which sectors will be permitted to have foreign investment and which will not. Additionally, the guidance in the *Several Opinions* relate to how government agencies will perform their application approval functions. This guidance, which the Notice issued together with the *Several Opinions* indicates should be implemented earnestly, creates the expectation that going forward the government agencies addressed therein will conduct themselves in their administration of foreign investment in the cultural sectors in a manner consistent with the provisions set forth in the *Several Opinions*. Therefore, the *Several Opinions* sets forth rules or norms intended to have general and prospective application and, as such, are a "measure" within the meaning of Article 3.3 of the DSU. Accordingly, we will examine this measure, in particular Articles 4 and 6, in the course of this proceeding.

(b) The *Importation Procedure* and the *Sub-Distribution Procedure*

7.199 **China** argues that the *Importation Procedure* and the *Sub-Distribution Procedure* only summarize the legal requirements of other measures to provide guidance to applicants and the texts are not binding.

7.200 The **United States** argues that the *Importation Procedure* and the *Sub-Distribution Procedure* are measures within the meaning of Article 3.3 of the DSU. According to the United States, the two procedures bind the General Administration of Press and Publication (GAPP) and were issued pursuant to its administrative law obligations under the Administrative Licensing Law. The United

[175] China's response to question No. 37(a).

[176] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 187; Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 74 and 82; and Panel Report on *Japan – Film*, paras. 10.43-10.44; and Panel Report on *EC – Approval and Marketing of Biotech Products*, paras. 7.438 - 7.456.

States maintains that these procedures implement the provisions of the *Publications Regulation* and the *Publications (Sub-)Distribution Rule*, respectively.[177]

7.201 The United States argues that under Chinese law these two documents 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. The United States cites an opinion of China's Supreme People's Court to support its contentions that "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. [178]

7.202 According to the United States, the Supreme People's Court has found that 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".

7.203 **China**, in response to a question from the Panel about the relevance of the decision of the Supreme People's Court cited by the United States, reiterates that the *Importation Procedure* and the *Sub-Distribution Procedure* are summaries of the procedures and requirements contained in applicable regulations and aimed at facilitating the application process.[179]

7.204 The **United States** also cites to the *Administrative Licensing Law of the People's Republic of China* ("Administrative Licensing Law")[180] which refers to four categories of legal instruments, including other regulatory documents. Additionally, the United States argues that the *Importation Procedure* and the *Sub-Distribution Procedure* were issued by GAPP pursuant to its administrative law obligations under the Administrative Licensing Law. Specifically, Article 5 which requires that administrative licensing requirements be announced to the public and Articles 30 and 33 of the Law which further require government agencies to display in their offices, and announce on their websites, all requirements related to the administrative licences for which the agency is responsible.[181]

7.205 According to the United States, the *Importation Procedure* and *Sub-Distribution Procedure* therefore fulfil 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 licencees engaged in the importation and sub-distribution of reading materials pursuant to the *Publications Regulation* and the *Publications (Sub-)Distribution Rule*.

(i) Importation Procedure

7.206 **China** argues that the *Importation Procedure* is merely a webpage and that all the requirements contained in this webpage are requirements established by applicable published regulations. According to China, this document is merely a summary of the procedures and requirements contained in such regulations and aims at facilitating the application process. China maintains that it cannot serve as the basis for administrative acts and as such is not relevant for the

[177] United States' response to question No. 142.
[178] Exhibit US-62.
[179] China's response to question No. 147.
[180] *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).
[181] United States' response to question No. 4.

purpose of addressing China's consistency with its trading rights commitments in the Accession Protocol.

7.207 The **United States**, in its first written submission, argues that the *Importation Procedure*, issued by GAPP, implements Article 43 of the *Publications Regulation*. According to the United States, it confirms, and to some extent elaborates upon, the licensing requirements for the importation of reading materials, AVHE products, and sound recordings into China.

7.208 Specifically, the United States contends that the *Importation Procedure* begins with the heading "Licensing Requirements" which, just as in the *Publications Regulation*, sets as the second condition for an enterprise to import these products that it is a wholly state-owned enterprise. Additionally, the United States notes that there is a quantity restriction on licences based on the "state plan regarding the total number, structure and deployment of publication import business units". Therefore, the United States argues that the *Importation Procedure* reconfirms the prohibition on any foreign-invested enterprise or foreign individual, or any privately-owned Chinese enterprise, engaging in the importation of reading materials, AVHE products, and sound recordings.

7.209 **The Panel** must determine whether the *Importation Procedure* is attributable to China and if so, whether it sets forth rules or norms of general and prospective application such that it would constitute a "measure" within the meaning of Article 3.3 of the DSU.

7.210 We note that the *Importation Procedure* is located on the GAPP website and that the text indicates that its "stated basis" is the *Publications Regulation* (State Council Order No. 343) Article 43. We also note that the last line of text of the *Importation Procedure* reads "Laws, regulations, and standardization documents which form the legal basis of this administrative licence: [*Publications Regulation*]." China also confirms that this document was generated internally by the GAPP to facilitate an application process that the GAPP administers. Therefore, we conclude that this document was generated by an organ of the State, i.e., the executive branch, and is attributable to China.

7.211 With respect to whether the *Importation Procedure* sets forth rules or norms of general and prospective application, it seems to us that the references to the *Publications Regulation* as the "basis" of the *Importation Procedure* support China's position that this document merely summarizes legal requirements that actually derive their legal effect from the *Publications Regulation*. The *Law on Licensing*, which the United States cites, further supports China's view. Articles 5, 30 and 33 thereof require government agencies to announce existing rules to the public and display them in their offices. Nothing in these provisions provides the authority to interpret regulations or provide for new obligations. Accepting, as the United States itself claims, that the *Importation Procedure* was promulgated to fulfil this requirement, then the document is merely a publication of existing licensing requirements and not the source of new requirements.

7.212 With respect, to the US reliance on a decision of the Supreme People's Court of China, to support its position that these "ther regulatory documents" are part of the Chinese legal hierarchy, we note that the Supreme People's Court of China stated that

> "[I]n 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."[182]

[182] Exhibit US-62.

7.213 Additionally, the Court went on to explain that "administrative organs often directly take these particular interpretation and other regulatory documents as the basis for their particular administrative acts."[183] However, the United States does not point to anything in the *Importation Procedure* that would indicate that it serves to guide the enforcement of law, implement administrative measures or serve as the basis of administrative acts. Instead, as China indicates, the *Importation Procedure* seems to simply advise the public of the existence of a variety of requirements that originate and derive their legal force from the *Publications Regulation*.[184]

7.214 We therefore determine that the *Importation Procedure* does not itself establish rules or norms that are intended to have general and prospective application. We recall the reasoning of the panel in *US – Export Restraints*, which was examining whether particular measures challenged in that case could individually give rise to a violation of WTO obligations. That panel concluded that:

> "[T]he central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i. e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations."[185] (emphasis original)

We find this reasoning relevant to the situation here, where we are trying to determine whether an instrument by itself establishes rules or norms of general and prospective application such that it can constitute a "measure" subject to WTO dispute settlement adjudication.

7.215 As indicated, the *Importation Procedure* merely notifies the public of the existence of the rules or norms which may have general and prospective application contained in the *Publications Regulation*s. The *Importation Procedure* does not have a functional life of its own and does not do something concrete, independently of any other instruments. Therefore, although the *Importation Procedure* does list various requirements, the rules and norms themselves and any expectations formed as to the conduct of the Chinese Government are based on the *Publications Regulation* which give them their legal force, and not on the basis of the document summarizing them.[186] We thus conclude that the *Importation Procedure* does not constitute a "measure" of a Member within the meaning of Article 3.3 of the DSU. As a result, we do not further examine the *Importation Procedure*, nor do we rule on the US claims relating to the *Importation Procedure*.

(ii) Sub-Distribution Procedure

7.216 **China,** in its first written submission, contends that the United States bases its claim, *inter alia* on a document (the *Sub-Distribution Procedure*) that is not relevant for the purpose of addressing the consistency of China's trading rights system with its commitments under its Accession Protocol. Particularly, China argues that, this text is in fact a webpage from the GAPP's website, which is intended to provide guidance for applicants. As a consequence, China argues that this text, which is not binding, should not be examined by the Panel.

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[183] Exhibit US-62.

[184] Additionally, we note that the Supreme People's Court noted that "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." The Court went on to find that it would "recognize their legal force" in examining particular administrative acts based on such documents if the Courts deemed them to be "legal, effective, reasonable, and appropriate." (Exhibit US-62, p. 3)

[185] Panel Report on *US – Export Restraints*, para. 8.85.

[186] We note in this respect, that the United States has challenged the provisions in the *Publications Regulation* that are summarized in the *Importation Procedure*. This challenge will be addressed further below.

7.217 The **United States** maintains that the *Sub-Distribution Procedure* sets out the requirements and examination and approval procedures for foreign-invested enterprises seeking to engage in the sub-distribution of books, newspapers and periodicals published in China.

7.218 The United States submits that China is incorrect in its characterizations of this measure. The United States argues that although the *Sub-Distribution Procedure* may also be found on GAPP's website, so are many of the other challenged measures. The United States contends that, as with the *Importation Procedure*, this measure is more than mere "guidance for applicants;" it fulfils GAPP's administrative law obligations by implementing and elaborating upon China's legal regime governing the importation and sub-distribution of reading materials.

7.219 The United States argues that, the *Sub-Distribution Procedure* implements State Council Order No. 412 (State Council Decision on Setting Up Administrative Licensing for Administratively Examined and Approved Projects That Truly Need to be Preserved), which is the same decision of the State Council which is the basis for the *Network Music Opinions*. The United States maintains that China's assertion that only one of two measures implementing the identical State Council decision is a legal instrument further undermines China's supposition that the *Sub-Distribution Procedure* is merely internal guidance.

7.220 **China** argues that the United States' argument is based on an erroneous assumption that since the *Sub-Distribution Procedure* and the *Network Music Opinions* share the same State Council decision as their legal basis, the *Sub-Distribution Procedure* must share the same legal effect as the *Network Music Opinions*.[187] According to China, the *Sub-Distribution Procedure* summarizes the procedures and requirements for the approval of foreign-invested enterprises engaged in the distribution of reading materials. This approval can find its legal authorization from that State Council's decision. The summary itself is not a legal instrument based on the State Council's decision.

7.221 **The Panel** examines the *Sub-Distribution Procedure*, just as with the *Importation Procedure*, to determine whether it is attributable to China and whether it sets forth rules and norms that are intended to have general and prospective application.

7.222 We note that the *Sub-Distribution Procedure* is located on the GAPP website and that the text indicates that its "source" is the "Policies, Laws and Regulations Division, General Administration of Press and Publication." Additionally, the text of the procedure lists a State Council decision, several laws, regulations and rules as the "basis" for the document (*see* paragraph 7.223 below). China also confirms that this document was generated internally by government agencies to serve as internal guidance. Therefore, we conclude that this document was generated by an organ of the State, i.e., the executive branch, and is attributable to China.

7.223 Next, we must determine whether the *Sub-Distribution Procedure* establishes rules and norms that are intended to have general and prospective application. The *Sub-Distribution Procedure* does set out various licensing requirements and procedures relating to the distribution of books, newspapers and periodicals. However, at the end of the document it is stated that the "laws, regulations and standardized documents which serve as the legal basis for this administrative licence" are "the P.R.C. Chinese-Foreign Joint Venture Law, the P.R.C. Chinese-Foreign Contractual Venture Law, the P.R.C. Foreign-Capital Enterprise Law, the Regulations on the Management of Publications, Rules for the Management of Foreign-Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals."

7.224 The source of the rules and norms described in the *Sub-Distribution Procedure* is therefore, not the procedure itself, but rather the laws, regulations, and rules listed at the end of the document.

[187] United States' second written submission, para. 218.

The rules and norms that are described in the *Sub-Distribution Procedure* originate in and derive their legal authority from other sources of law. The *Sub-Distribution Procedure* is merely a composite of all the requirements and procedures that relate to the particular topic, i.e. licensing of sub-distributors of books, newspapers and periodicals, set forth in other legal documents including the *Publications (Sub-)Distribution Rule*.

7.225 As is the case with the *Importation Procedure*, the *Sub-Distribution Procedure* merely notifies the public of the existence of the rules or norms which may have general and prospective application contained in the *Publications Regulation*s. The *Sub-Distribution Procedure* does not have a functional life of its own and does not do something concrete, independently of any other instruments. Therefore, although the *Sub-Distribution Procedure* does list various requirements, the rules and norms themselves and any expectations formed as to the conduct of the Chinese Government are based on other legal documents, including the *Publications (Sub-)Distribution Rule*, which give them their legal force, and not on the basis of the document summarizing them.[188] We thus conclude that the *Sub-Distribution Procedure* does not constitute a "measure" of a Member within the meaning of Article 3.3 of the DSU. As a result, we do not further examine the *Sub-Distribution Procedure*, nor do we rule on the US claims relating to the *Sub-Distribution Procedure*.

6. Summary of conclusions

7.226 In sum, in response to China's various objections to the inclusion of various measures and claims of the United States within the Panel's terms of reference, we have concluded the following:

(a) The *Film Distribution and Exhibition Rule* is outside the Panel's terms of reference with respect to the US claim that it is inconsistent with China's trading rights commitments in its Protocol of Accession because China did not receive adequate notice that it was a specific measure at issue, with respect to this claim, as required by Article 6.2 of the DSU.

(b) The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are outside the Panel's terms of reference with respect to the US claim that China's measures are inconsistent with Article III:4 of the GATT 1994 because the panel request did not adequately notify China that these were specific measures at issue, with respect to this claim, as required by Article 6.2 of the DSU.

(c) The so-called "pre-establishment legal compliance" requirement, the approval process to engage in distribution of reading materials and audiovisual products and the "decision making criteria" that the MOC would apply in the approval of Chinese-foreign contractual joint ventures for the distribution of reading materials and audiovisual products are not within the Panel's terms of reference. When read as a whole, including the listing of the specific requirements that are the subject of its complaint, the US panel request did not notify China that these requirements were "specific measures at issue" within the meaning of Article 6.2 of the DSU.

(d) The United States' claims that China's measures on reading materials are inconsistent with Article III:4 of the GATT 1994 is within the Panel's terms of reference, despite the lack of consultations.

[188] We note that the provisions of the *Sub-Distribution Procedure* with which the United States is concerned are identical to those contained in the *Publications (Sub-)Distribution Rule* and/or the *Several Opinions* (United States' first written submission, paras. 100-102) which are still within the Panel's terms of reference. These challenges will be addressed further below.

(i) The United States, through its description of its claim in the panel request, excluded electronic publications from its claim under Article III:4 of the GATT 1994. Therefore, the Panel's findings as to whether China's measures are inconsistent with Article III:4 of the GATT 1994 will relate only to whether books, newspapers, and periodicals are treated no less favourably than like domestic products.

(ii) The requirements, set forth in Articles 3 and 4 of the *Imported Publications Subscription Rule*, that newspapers and periodicals, as well as books in the limited category may only be sold through subscription, are within the Panel's terms of reference as they are adequately identified in the US panel request.

(iii) The requirements on purchasers of imported newspapers and periodicals, as well as books in the limited category, embodied in Articles 5 through 8 of the *Imported Publications Subscription Rule*, are not within the Panel's terms of reference as they were not adequately identified as specific measures at issue within the meaning of Article 6.2 of the DSU.

(e) The *Several Opinions* is attributable to China and establishes rules or norms intended to have general and prospective application. It is therefore a "measure" within the meaning of Article 3.3 of the DSU and is a proper subject of these dispute settlement proceedings.

(f) The *Importation Procedure* and the *Sub-Distribution Procedure* are attributable to China, but they do not establish rules or norms intended to have general and prospective application. Therefore, they are not "measures" within the meaning of Article 3.3 of the DSU. As such, they are not a proper subject of these dispute settlement proceedings.

C. US CLAIMS REGARDING CHINA'S TRADING RIGHTS COMMITMENTS

7.227 The **Panel** now turns to assess the US claims of violation based on China's trading rights commitments. The United States raises claims of violation under the provisions of China's Accession Protocol.[189] These claims are directed at a series of Chinese measures relating to reading materials, audiovisual home entertainment products (hereafter "AVHE products"), sound recordings and films for theatrical release. China considers that none of the US claims has merit. China argues that some of the measures challenged by the United States are not subject to the relevant provisions of the Accession Protocol, and that those which are subject to these provisions are not inconsistent with the Accession Protocol or in any event justified under the provisions of Article XX of the GATT 1994.

7.228 The Panel will first determine whether the United States has established that any of the specific measures at issue is inconsistent with the Accession Protocol. Thereafter, if one or more measures are inconsistent with the Accession Protocol, the Panel will proceed to address China's defence under Article XX of the GATT 1994, to the extent China has asserted an Article XX defence in relation to the relevant measure(s).

1. US claims of violation of China's Accession Protocol

7.229 The **Panel** notes that the United States bases its claims of violation on three paragraphs of the Accession Protocol: (i) paragraph 1.2, to the extent that it incorporates paragraphs 83(d) and 84(a) and

[189] Protocol on the Accession of the People's Republic of China, WT/L/432 (Exhibit US-1).

(b) of the Report of the Working Party on the Accession of China (hereafter the "Working party Report"); (ii) paragraph 5.1; and (iii) paragraph 5.2.

(a) Paragraphs 1.2, 5.1 and 5.2 of the Accession Protocol

7.230 Paragraph 1.2 of the Accession Protocol provides:

> "2. The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

7.231 Paragraph 342 of the Working Party Report provides (underlining added):

> "The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. TheWorking Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs 18-19, 22-23, 35-36, 40, 42, 46-47, 49, 60, 62, 64, 68, 70, 73, 75, 78-79, <u>83-84</u>, 86, 91-93, 96, 100-103, 107, 111, 115-117, 119-120, 122-123, 126-132, 136, 138, 140, 143, 145, 146, 148, 152, 154, 157, 162, 165, 167-168, 170-174, 177-178, 180, 182, 184-185, 187, 190-197, 199-200, 203-207, 210, 212-213, 215, 217, 222-223, 225, 227-228, 231-235, 238, 240-242, 252, 256, 259, 263, 265, 270, 275, 284, 286, 288, 291, 292, 296, 299, 302, 304-305, 307-310, 312-318, 320, 322, 331-334, 336, 339 and 341 of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol."

7.232 Accordingly, the commitments set out in, *inter alia*, paragraphs 83(d) and 84(a) and (b) of the Working Party Report are commitments that are incorporated into paragraph 1.2 of the Accession Protocol.

7.233 Paragraph 83(d) of the Working Party Report provides:

> "The representative of China confirmed that during the three years of transition, China would progressively liberalize the scope and availability of trading rights.
>
> ...
>
> (d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting."
>
> The Working Party took note of these commitments.

7.234 Paragraphs 84(a) and (b) of the Working Party Report provide:

> "(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to

export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China's Schedule of Specific Commitments under the GATS.

(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He 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. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply."

The Working Party took note of these commitments.

7.235 Furthermore, paragraphs 5.1 and 5.2 of the Accession Protocol provide:

"1. Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

2. Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade."

7.236 Before addressing any of the US claims under the above provisions, it is useful to deal with a number of interpretative issues. We will first examine paragraphs 5.1 and 5.2 of the Accession Protocol. Thereafter, we will examine paragraphs 83(d), 84(a) and 84(b), all of which are incorporated into the Accession Protocol through paragraph 1.2 thereof.

(i) Paragraph 5.1 of the Accession Protocol

7.237 Regarding paragraph 5.1 of the Accession Protocol, the **United States** is of the view that pursuant to this paragraph every enterprise throughout the entire customs territory of China, without exception, must have the right to trade. The United States argues that as long as an enterprise is in China, the obligation in paragraph 5.1 contains no additional conditions or restrictions on which enterprises shall have the right to trade. Therefore, the United States maintains, China may not

reserve the right to trade to a subset of enterprises in China that are wholly state-owned or wholly Chinese-owned. The United States further submits that, likewise, any limitations on who may exercise the right to trade, based on criteria such as sources of investment, would be inconsistent with paragraph 5.1.

7.238 As the United States further points out, the right to trade applies to "all goods" except those listed in Annexes 2A and 2B. The United States submits that Annex 2B is not relevant to these proceedings because none of the relevant products is covered by Annex 2B, and because this limitation is no longer applicable to China's trading rights commitments, since it expired in December 2004. As regards Annex 2A, the United States notes that since the US claims concern the right to import, only Annex 2A1 – entitled "Products Subject to State Trading (Import)" – is relevant. The United States notes that Annex 2A1 contains a list of eight product headings excepted from China's obligations – grain, vegetable oil, sugar, tobacco, crude oil, processed oil, chemical fertilizer, and cotton – that are divided into 84 products identified by the eight-digit Harmonized System (HS) product classification code and by the state trading enterprises that import these products.[190] Since none of the relevant products is covered by Annex 2A1, the United States considers that limiting the right to import any of the relevant products would be inconsistent with China's trading rights commitments.

7.239 **China** points out that paragraph 5.1 expressly states that China's commitment to liberalize trading rights is without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement. China therefore does not agree with the United States that the only exception to China's commitment to liberalize the right to trade is Annex 2A. According to China, the United States intentionally ignores the unambiguous first part of paragraph 5.1 that provides for China's right to regulate trade, which constitutes a second exception to China's commitment to liberalize the right to trade. China therefore considers that it is committed to grant the right to import and export goods to all companies and for all goods except those listed in Annex 2A and that this commitment is without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement.

7.240 China submits that, literally, the "right to regulate trade" means the right to take measures for the purpose of regulating trade. China considers that "trade" covers the "right to trade" itself, which is by definition one of its elements. China maintains that the right to regulate trade is the expression of a general exception to Members' obligations, which leaves room for the implementation of public policies and is crucial for the preservation of China's sovereignty.

7.241 China notes that pursuant to paragraph 5.1 the right to regulate trade must be exercised in a manner consistent with the WTO Agreement, and that the term "WTO Agreement" includes the WTO Agreement and all its Annexes. China argues that since China's commitment in paragraph 5.1 concerns the right to import and export goods, China's right to regulate trade must be interpreted in conjunction with WTO agreements applicable to trade in goods, including the GATT 1994.[191] China considers, therefore, that it has the right to take measures pursuing policy objectives in a manner consistent with Article XX of the GATT 1994. More specifically, China considers that it has the right under paragraph 5.1 to impose restrictions and conditions on the grant of trading rights, such as a limitation of the right to import to a number of selected entities, provided that these measures are consistent with Article XX of the GATT 1994.

7.242 The **United States** responds that China's reading of its "right to regulate trade" is inconsistent with the structure and operation of paragraph 5.1, read as a whole. In the United States' view, paragraph 5.1 provides a specific mechanism for excluding products from China's trading rights

[190] The United States refers to the Accession Protocol, WT/L/432, Annex 2A1, p. 20 (Exhibit US-1).

[191] China notes that Annex 1A on "Multilateral Agreements on Trade in Goods" of the WTO Agreement includes the GATT 1994.

commitments – i.e., Annexes 2A and 2B of the Accession Protocol. The United States argues that China's interpretation of the right to regulate trade would make the specific mechanisms in Annexes 2A and 2B superfluous. In particular, the United States considers that the "right to regulate trade" does not permit China to reserve certain products *per se* to state trading. In the United States' view, doing so would amount to eliminating China's trading rights commitments altogether, not simply to regulating trade. The United States submits that to give effect to the entire first sentence of paragraph 5.1, the scope of China's right to regulate trade cannot extend to the domain covered by these Annexes. According to the United States, the language and structure of paragraph 5.1 make clear the intent of WTO Members to agree on a self-contained, complete, and agreed set of excepted products – to be found in Annexes 2A and 2B.[192] The United States maintains that if China wished to deny trading rights for the products at issue, it should have availed itself of the mechanism provided by Annexes 2A and 2B at the time of its accession, which it did not do. The United States considers, therefore, that China is trying to construct a "secret entrance" into the Annexes of paragraph 5.1, contrary to the agreement negotiated by WTO Members.

7.243 The United States further argues that the right to regulate trade in a manner consistent with the WTO Agreement applies to measures addressing the goods being traded rather than the traders of those goods. The United States considers that under the first clause of paragraph 5.1 China may require that goods being imported into China satisfy other requirements allowed under the WTO Agreement, such as import licensing, TBT and SPS requirements.[193] The United States notes that China could, e.g., prevent imports of wholly prohibited goods by all importers, or apply tariffs and health and safety requirements to imported goods without infringing its trading rights commitments. In the United States' view, the first clause of paragraph 5.1 thus does not detract from China's commitments to allow the three enumerated categories of importers – i.e., all foreign enterprises, all foreign individuals and all enterprises in China – to trade in the goods being regulated.

7.244 **China** responds that its right to regulate trade is distinct from the derogations negotiated and agreed upon with respect to state trading, and that the Panel should dismiss the United States' attempt to blur the distinction. China argues in this respect that Annexes 2A and 2B reflect the negotiated right of China to preserve state trading for a certain number of products and sectors. China submits that these products are outside the scope of China's trading rights commitments and can (or could, in the case of Annex 2B), therefore, be regulated and made subject to restrictions by China without any further justification than their inclusion in these Annexes. China argues that the right to regulate trade, on the other hand, does not create a right to exclude products from the scope of China's trading rights commitments, but rather to adopt or maintain measures that are consistent with the WTO Agreement. In China's view, the right to regulate trade is the expression of a general right of WTO Members to maintain certain measures and to pursue legitimate policy objectives. In particular, China argues, the "without prejudice" clause affirms China's right to adopt or maintain measures with the potential consequence of imposing certain limitations on the right to trade, e.g., on the type of enterprise that may trade in goods. China submits that to interpret the "without prejudice" clause differently would fail to give meaning to all words in paragraph 5.1.

7.245 Thus, China is of the view that the situation pertaining to the "without prejudice" clause is very different from that pertaining to the products listed in Annexes 2A and 2B. According to China, while the products listed in Annexes 2A and 2B can (or could) be made subject to state trading and other restrictions on the right to trade without any justification other than their presence in these Annexes, other restrictions implemented under the "without prejudice" clause may only result from measures which are justified by another provision of the WTO Agreement and fully consistent with

[192] The United States notes that according to paragraphs 80 and 84(a) of the Working Party Report China's trading rights commitments are to give "all enterprises ... the right to import and export all goods (except for the share of products listed in Annex 2A ...)".

[193] The United States refers to paragraph 84(b) of the Working Party Report.

such provision. China submits that the "without prejudice" clause thus aims at providing the basis for a coherent reading of China's commitments, on the one hand, and China's right to implement certain policy objectives through the adoption of WTO-consistent measures, on the other hand. In China's view, the "without prejudice" clause is the recognition on the part of WTO Members of the need to maintain a balance between China's right to regulate trade on the basis of other provisions of the WTO Agreement and China's commitments with regard to the granting of the right to trade.

7.246 The **Panel** notes that paragraph 5.1, first sentence, imposes on China the obligation to ensure that, within three years after accession, "all enterprises in China … have the right to trade in all goods throughout the customs territory of China", except for those goods listed in Annex 2A to the Accession Protocol.[194] Paragraph 5.1, second sentence, defines the "right to trade" as including the "right to import … goods". Paragraph 5.1, fourth sentence, further stipulates that for those goods listed in Annex 2B, any limitations on the grant of trading rights were to be phased out pursuant to the schedule in that Annex. Annex 2B indicates that for all goods listed therein, liberalization was, likewise, to be completed "within 3 years after accession".

7.247 China acceded to the WTO on 11 December 2001.[195] As a result, the three-year transition period referred to in paragraph 5.1 expired on 11 December 2004, which is well before the date of establishment of this Panel.

7.248 Regarding whether the products at issue are subject to the obligation in question, as noted above, the United States raises claims in respect of the following products:[196] reading materials (e.g., books, newspapers, periodicals and electronic publications), finished physical AVHE products (including video cassettes, VCDs and DVDs) and physical AVHE products intended for publication (e.g., master copies), finished physical sound recordings (including tapes, records and CDs) and physical sound recordings intended for publication (e.g., master recording discs), and physical films for theatrical release.[197] None of these products is part of the eight categories of goods listed in Annex 2A1[198] or the six categories of goods listed in Annex 2B. It is not in dispute, and we agree, that the relevant reading materials, finished AVHE products and finished sound recordings are "goods" within the meaning of paragraph 5.1.[199] However, China appears to dispute the United States' view that

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[194] To recall, paragraph 5.1 reads:

"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period."

[195] WT/INF/43/Rev.8 (Exhibit US-41).

[196] In response to a question from the Panel, the United States stated that "all of the products at issue in the US trading rights claims are physical goods" (United States' response to question No. 22).

[197] By AVHE products and sound recordings intended for publication – the United States refers to unfinished AVHE products and sound recordings – the United States means master copies to be used to publish and manufacture copies for sale in China (United States' response to question No. 18).

[198] Annex 2A2 is not relevant to this dispute, in that it relates to goods to be exported.

[199] The United States has stated that sound recordings include songs, ringtones and ringback tones. We understand the United States to mean that the recorded audio content can be a song, a ringtone or a ringback tone. We recall in this respect that the United States has made clear that all of the products at issue in the US trading rights claims consist of a carrier medium carrying content (United States' response to question No. 22).

physical AVHE products and physical sound recordings intended for publication as well as films for theatrical release are, likewise, "goods". For reasons we explain below when addressing the consistency of the relevant measures with the Accession Protocol, we consider that the products which are the subject of US claims under the Accession Protocol are all goods.[200]

7.249 Paragraph 5.1 provides that "all enterprises in China" must have the right to trade in all goods. In view of the absence of further textual qualification, we consider that the phrase "all enterprises in China" encompasses both Chinese enterprises registered in China and foreign enterprises invested and registered in China.[201] In other words, we think that paragraph 5.1 requires China to grant the right to trade even to enterprises that are wholly Chinese-invested.[202] The absence of further textual qualification also suggests to us that the phrase "all enterprises in China" encompasses both state-owned and privately owned enterprises in China.

7.250 Regarding the category of foreign enterprises invested and registered in China, we find support for our view in paragraph 83(d) of the Working Party Report, which sets out a commitment incorporated into the Accession Protocol through paragraph 1.2 of the Accession Protocol. Paragraph 1.2 is part of the context of paragraph 5.1. Like paragraph 5.1, the first sentence of paragraph 83(d) commits China to grant the right to trade to "all enterprises in China". The second sentence then goes on to state that "[f]oreign-invested enterprises" would not be required, e.g., to establish in a particular form or as a separate entity to engage in importing and exporting. It is clear that the second sentence is about foreign-invested enterprises wishing to engage in importing into China or exporting from China, i.e., about foreign-invested enterprises in China. In the light of this, and since paragraph 83(d) only has two sentences, it is also clear that the second sentence of paragraph 83(d) explains and clarifies, with specific reference to foreign-invested enterprises in China, the commitment given in the first sentence. In other words, we consider that the second sentence of paragraph 83(d) indicates that the phrase "all enterprises in China" in the first sentence is meant to include foreign-invested enterprises in China.

7.251 In view of the parallelism between the first sentence of paragraph 83(d) and paragraph 5.1, we think the phrase "all enterprises in China" in paragraph 5.1 should, likewise, be interpreted to include foreign-invested enterprises in China.[203] We note in this respect that both parties agree that the phrase "all enterprises in China" in paragraph 5.1 includes foreign-invested enterprises registered in China.[204] It is useful to note, as well, that according to China there are only three types of "foreign-invested enterprises" in China: wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures.[205] With specific regard to Chinese-foreign equity or contractual joint ventures, in view of the absence of indications to the contrary in paragraph 5.1 of the Accession Protocol or paragraphs 83-84 of the Working Party Report, we consider that such

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[200] See *infra*, paras. 7.526 and 7.642.

[201] Both parties appear to agree that the phrase in question covers enterprises which are registered in China, and that it does not include foreign enterprises which are not registered in China (parties' responses to question No. 50(c)(i) and (ii)). China has indicated that "registration" includes, but is not limited to, the incorporation of an enterprise (China's response to question No. 23(a)).

[202] This would appear to be confirmed by paragraph 83(b) of the Working Party Report, which sets out a commitment incorporated into the Accession Protocol through paragraph 1.2 of the Accession Protocol. Paragraph 83(b) commits China to eliminate, in respect of "wholly Chinese-invested enterprises", its examination and approval system at the end of the phase-in period for trading rights.

[203] Since paragraph 83(d) indicates that China is to grant trading rights also to foreign-invested enterprises in China, it is unnecessary to examine, in the context of an analysis of paragraph 5.1, whether there exists a plausible rationale for other WTO Members to seek trading rights for such enterprises, or for China to grant trading rights to such enterprises.

[204] Parties' responses to question No. 50(c).

[205] China's response to question No. 50(c)(iii).

enterprises would qualify as "foreign-invested enterprises" regardless of whether they are owned or controlled by foreign investors or by Chinese investors.

7.252 It follows from the above that as of the date of establishment of this Panel, China was under an obligation to ensure that "all enterprises in China", including foreign-invested enterprises registered in China (wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures), have the right to import all goods into China.[206]

7.253 We now turn to examine the introductory clause of paragraph 5.1, that is to say, the phrase "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". That phrase (hereafter the "'without prejudice' clause") makes clear that China's obligation to ensure that all enterprises in China have the right to trade in all goods is "without prejudice to" China's right to regulate trade in a manner consistent with the WTO Agreement. The phrase "without prejudice to" is defined in dictionaries as meaning "without detriment to any existing claim or right; *spec*. in law, without damage to one's own rights or claims"[207], or "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party"[208].

7.254 In the light of this, we consider that the phrase "without prejudice to" is intended to indicate that China's obligation to ensure that all enterprises in China have the right to trade must not, and does not, detrimentally affect China's right to regulate trade in a WTO-consistent manner. In our view, this implies that if China regulates trade in a WTO-consistent manner, and this results, contrary to the obligation set forth in paragraph 5.1, in "enterprises in China" not "hav[ing] the right to trade in all goods", China's right to regulate trade in a WTO-consistent manner takes precedence over China's obligation to ensure that all enterprises in China have the right to trade. Consequently, in the aforementioned hypothetical situation, the end result would be that China could introduce, or maintain, the relevant measure even though it is in breach of paragraph 5.1.

7.255 China appears to argue, however, that when a measure regulates trade in a WTO-consistent manner, China would not actually breach its obligation under paragraph 5.1, even if as a result of this measure not all enterprises in China have the right to trade.[209] We do not agree. Nothing in paragraph 5.1 suggests that the obligation to grant trading rights would not arise, or would cease to be applicable, in situations where China has regulated trade in a WTO-consistent manner. To the contrary, we think that the phrase "without prejudice to" supports the view that China is subject to the obligation to grant trading rights irrespective of whether China has regulated trade in a WTO-consistent manner.[210] Accordingly, we consider that by failing to comply with its obligation to ensure that all enterprises in China have the right to trade, China would be acting inconsistently with paragraph 5.1, first sentence. Hence, to establish an inconsistency with paragraph 5.1, first sentence, a complaining party in our view need only establish that China has acted inconsistently with the

[206] We note that paragraph 5.1 states that "all enterprises in China" must "have" the right to trade within three years after China's accession to the WTO. It does not state that all enterprises meeting certain qualifications must have the right to trade within three years. Nonetheless, as we explain below, at para. 7.408, it appears that the right to trade may be made subject to compliance with customs and fiscal requirements that do not constitute a barrier to trade.

[207] *Shorter Oxford English Dictionary*, 5th ed. (Clarendon Press 2002), Vol II, p. 2324.

[208] *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group 1999), p. 1596.

[209] China's first written submission, para. 234.

[210] Indeed, the view that the obligation in question is applicable also in situations where China has regulated trade in a WTO-consistent manner helps explain the existence of the "without prejudice" clause. Absent such a clause, the obligation in question could potentially prejudice China's right to regulate trade in a WTO-consistent manner. The "without prejudice" clause clarifies that no such effect is intended.

aforementioned obligation.[211] As we have indicated in the preceding paragraph, however, if a measure which does not ensure that all enterprises in China have the right to trade, and which is therefore inconsistent with paragraph 5.1, at the same time regulates trade in a WTO-consistent manner, the end result would be that China could nevertheless maintain that measure because in such cases China's right to regulate trade takes precedence over China's obligation to ensure that all enterprises in China have the right to trade.

7.256 The next issue for us to consider is the meaning of the phrase "China's right to regulate trade". The verb "regulate" is defined in relevant part as "[c]ontrol, govern, or direct by rule or regulations; subject to guidance or restrictions …".[212] In the context of paragraph 5.1, the regulator is China, i.e., a government. Thus, China's right to "regulate" trade can be understood as meaning China's right to subject trade to governmental control, guidance, direction or restrictions, by rule or regulations.

7.257 The noun "trade" is defined in relevant part as "[b]uying and selling or exchange of commodities for profit, *spec*. between nations …".[213] It is clear to us that in the specific context of paragraph 5.1, the concept of "trade" is intended to refer to international, or cross-border, trade in goods.[214] Accordingly, the phrase "right to regulate trade" in paragraph 5.1 could be understood as meaning the right to regulate the exchange of goods across international borders. We find significant, however, the fact that the second sentence of paragraph 5.1 defines the "right to trade" as the "right to import and export goods". Given this, we consider it appropriate, in the specific context of paragraph 5.1, to interpret the phrase "right to regulate trade" in the light of, and consistently with, the language used in the second sentence. This leads us to the view that the "right to regulate trade" can be understood as the "right to regulate imports and exports". Needless to say, in the context of paragraph 5.1, we use the terms "imports" and "exports" to mean goods that are imported and exported, respectively.[215]

7.258 Our analysis thus far suggests that China's "right to regulate trade" is China's right to subject imports or exports – i.e., the goods that are imported into China or exported from China – to governmental control, guidance, direction or restrictions, by promulgating appropriate rules or regulations.

7.259 We next look to the wider context of paragraph 5.1, which includes paragraph 1.2 of the Accession Protocol. Paragraph 1.2 incorporates, *inter alia*, paragraphs 86 and 84(b) of the Working Party Report. We consider that our interpretation of the phrase "right to regulate trade" fits with the text of paragraphs 86 and 84(b). Paragraph 86, which concerns the grant of trading rights for goods specified in Annex 2B, actually uses the terms "imports" and "exports".[216] Specifically, it sets out a

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[211] It is important to recall in this connection that, as explained previously, a finding of inconsistency with paragraph 5.1, first sentence, would not necessarily mean that the measure at issue cannot be introduced or maintained.

[212] *Shorter Oxford English Dictionary*, 5th ed. (Clarendon Press 2002), Vol II, p. 2516.

[213] *Ibid*., p. 3316.

[214] Paragraph 5.1 defines the right to trade as the right to import or export goods.

[215] The term "import" is defined as "something imported or brought in ..." (*Shorter Oxford English Dictionary*, 5th ed. (Clarendon Press 2002), Vol I, p. 1331). In the context of paragraph 5.1, it is goods that are imported or exported.

[216] Paragraph 86 reads in relevant part:

> "Members of the Working Party noted China's commitment that it would phase out the limitation on the grant of trading rights for goods specified in Annex 2B of its Draft Protocol within three years after accession. … The representative of China added that China would eliminate import and export volume as a criterion for obtaining the right to trade these products, reduce minimum captalization requirements and extend the right to register as designated importing and exporting enterprises to enterprises that used such goods in the production of finished goods and enterprises that distributed such goods in China. At the end

commitment by China that "none of the criteria [for obtaining the right to trade] applicable under the designated trading regime would constitute a quantitative restriction on imports or exports".

7.260 Paragraph 84(b), which the United States is invoking in this dispute, is not about the grant of trading rights to "enterprises in China", but about the grant of trading rights to "foreign enterprises and individuals". Nonetheless, we find the provisions of paragraph 84(b) instructive.[217] The second sentence of paragraph 84(b) confirms that "any requirements for obtaining trading rights … would not constitute a barrier to trade". We think that the second sentence of paragraph 5.1 and the afore-mentioned commitment set out in paragraph 86 support understanding the term "barrier to trade" as meaning "barrier to imports or exports".

7.261 In addition, we also find relevant to the interpretation of paragraph 5.1 the final sentence of paragraph 84(b), according to which "[t]he representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply".

7.262 In analysing the final sentence, we note, first of all, the phrase "foreign enterprises and individuals with trading rights". We consider that this phrase refers to foreign enterprises and individuals who have trading rights in accordance with the Accession Protocol. Or to put it more clearly, we consider that it refers to foreign enterprises and individuals in respect of whom China has an obligation, under the Accession Protocol, to grant the right to trade.[218] In our view, the final sentence makes clear that even though they are foreign enterprises and individuals "with trading rights" (in that the Accession Protocol prescribes that they must be granted such rights), such enterprises and individuals must still comply with "all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS". Thus interpreted, the final sentence is plainly very similar in function to the "without prejudice" clause of paragraph 5.1.

7.263 China suggests that "foreign enterprises and individuals with trading rights" are enterprises and individuals who actually enjoy trading rights, that is to say, who have actually been granted trading rights without restriction.[219] China appears to infer from this argument that the final sentence

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of three years, all enterprises in China and all foreign enterprises and individuals would be permitted to import and export such goods throughout the customs territory of China. During the transition period , none of the criteria applicable under the designated trading regime would constitute a quantitative restriction on imports or exports. The Working Party took note of these commitments."

[217] We recall that paragraph 84(b) reads:

"With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He 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. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply."

[218] The phrase "with trading rights" may have been added to reflect the fact that there was a three-year transition period during which the availability and scope of the right to trade was progressively liberalized, and that foreign enterprises and individuals wishing to import or export goods listed in Annex 2A would not have the right to trade.

[219] China's response to question No. 169; China's comments on the United States' response to question No. 159.

of paragraph 84(b) only addresses situations where trading rights have actually been granted and says nothing about situations where trading rights are being restricted.[220]

7.264 The United States, in response to a question from the Panel, suggests that the phrase "with trading rights" is intended to recognize the fact that in those cases where China has imposed fiscal or customs requirements for obtaining trading rights, as contemplated in the second sentence of paragraph 84(b), some foreign enterprises or individuals may not yet have trading rights.[221]

7.265 We are not persuaded by the parties' interpretations of the phrase "with trading rights". We first note the last part of the sentence in question, which confirms that "requirements relating to minimum capital and prior experience would not apply". In our view, certainly a requirement relating to prior experience in importing and exporting is a requirement which would be imposed as a condition for obtaining the right to trade, not for maintaining it.[222] Furthermore, there is no indication in the final sentence of paragraph 84(b) that, unlike the first part of that sentence, the last part is not about foreign enterprises and individuals "with trading rights". To the contrary, the conjunction "but" indicates that a contrast is being drawn between requirements with which foreign enterprises and individuals "with trading rights" must comply and requirements with which they can expect not to have to comply.[223]

7.266 If, then, the last part of the sentence in question also concerns foreign enterprises and individuals "with trading rights", under China's suggested interpretation of the phrase "with trading rights" the last part would "confirm" that enterprises and individuals who have already been granted trading rights will not need to comply with, *inter alia*, a requirement relating to prior experience. Such an interpretation does not seem appropriate, in that a prior experience requirement could not logically be imposed on enterprises or individuals who have already been granted trading rights. We think the interpretation suggested by the United States is, likewise, difficult to reconcile with the last part of the second sentence of paragraph 84(b). In contrast, our interpretation comports well with the last part of the sentence in question. Under our interpretation, the last part "confirms" that China will not apply "requirements relating to minimum capital and prior experience" to foreign enterprises and individuals in respect of whom China has an obligation, under the Accession Protocol, to grant the right to trade.[224]

7.267 Another element of the final sentence is the phrase "all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS". We find it relevant because it is substantively similar to the reference in paragraph 5.1 to WTO-consistent regulation of trade. In our view, the phrase "requirements related to importing and exporting" covers

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[220] China's comments on the United States' response to question No. 159. At the same time, China maintains that the phrase "with trading rights" does not mean that WTO-consistent requirements related to importing and exporting may not restrict trading rights (China's response to Panel question No. 197(d).

[221] United States' response to question No. 197(d).

[222] It is relevant to note in this context that paragraph 83(a) of the Working Party Report commits China to eliminate, for Chinese and foreign-invested enterprises, "any export performance, trade balancing, foreign exchange balancing and *prior experience requirements, such as in importing and exporting*, as criteria for obtaining or maintaining the right to import or export" (emphasis added). We also note that paragraph 83(b) indicates that China in the past applied minimum capital requirements to wholly Chinese-invested enterprises as a condition for obtaining trading rights.

[223] If no connection was intended between the first part and the last part of the final sentence, it would have been more natural for the last part to be a new sentence beginning, like the second sentence of paragraph 84(b), with the words "He further confirmed that…".

[224] Understanding the last part in this way is also consistent with the second sentence of paragraph 84(b) which makes clear that China may apply customs or fiscal requirements to foreign enterprises and individuals in respect of whom it has an obligation to grant the right to trade, provided they do not constitute barriers to trade.

requirements concerning whether particular *goods* may be imported or exported. This view draws support from the three examples that are provided. All of them can be interpreted as examples of requirements relating to goods that are imported or exported.[225] Thus, for certain goods, it may be necessary to obtain an import or export licence. For other goods, there may be TBT- or SPS-type requirements governing their importation. For instance, China might have a requirement that only cars meeting certain technical safety standards may be imported, or that certain agricultural products may not be imported because they present risks to human, animal or plant health.[226]

7.268 We find further confirmation for our view in the text of the phrase "requirements related to importing and exporting". The phrase uses the terms "importing" and "exporting", which indicate that it is about requirements related to the activity, or process, of importing and exporting.[227] Also, the phrase uses the term "related to", which means "[h]aving relation; having mutual relation; connected".[228] In contrast, the last part of the same final sentence of paragraph 84(b) refers to requirements "relating to" minimum capital and prior experience, i.e., requirements that concern the activity of importing or exporting. Thus, "requirements related to importing and exporting" are requirements that have a connection to the activity of importing and exporting, not requirements "relating to", or concerning, the activity of importing or exporting.[229] The above-noted hypothetical requirement that only cars meeting certain technical safety standards may be imported would seem to be a requirement that has a connection to the activity of importing, via the good it regulates. It does not appear to be a requirement that concerns the activity of importing, as it does not determine who may engage in the activity, etc.

7.269 We think that in view of its functional and substantive similarity to the "without prejudice" clause of paragraph 5.1, the final sentence of paragraph 84(b) is relevant to the interpretation of the phrase "right to regulate trade" in paragraph 5.1. More specifically, we think the final sentence of paragraph 84(b) is consistent with our view that the phrase "right to regulate trade" in paragraph 5.1 should be understood as meaning the right to regulate imports and exports. It is clear to us that the phrase "requirements related to importing and exporting" covers requirements regulating imports and exports. We also consider that the examples provided in the final sentence can be viewed as requirements regulating imports and exports. We observe in this respect that, in our view, regulation of imports and exports comprises both regulation directed explicitly at imports or exports (such as "requirements concerning import licensing") and regulation which is directed at particular goods but affects also imports or exports of such goods (such as "requirements concerning TBT").

7.270 While the final sentence of paragraph 84(b) in our view supports our understanding of the phrase "right to regulate trade", the reference in that sentence to "import licensing" also indicates that we need to undertake further analysis of what is included in the "right to regulate trade". The explicit reference to "import licensing" in the final sentence of paragraph 84(b) makes clear that China could impose a WTO-consistent requirement under which a licence is needed to import a particular good. This leads logically to the further and separate question of whether China could impose, in addition, a

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[225] We understand both parties to agree (China's response to question No. 169; US comments on China's response to question No. 169).

[226] We take no position on whether such requirements would be WTO-consistent, which is a separate issue.

[227] We note that paragraph 83(d) of the Working Party Report uses the phrase "to engage in importing and exporting". We think that the final sentence of paragraph 84(b) refers to requirements related to "importing" and "exporting" because the final sentence is about foreign enterprises and individuals "with trading rights", i.e., about enterprises and individuals in respect of whom China must grant the right to engage in importing or exporting.

[228] *Shorter Oxford English Dictionary*, 5th ed. (Clarendon Press 2002), Vol II, p. 2520.

[229] The fact that the final sentence is about foreign enterprises and individuals "with trading rights" is a further indicator that the requirements in question are those that have a connection to importing and exporting as opposed to those that are about importing and exporting.

WTO-consistent requirement under which only importers meeting specified criteria could obtain a licence to import the good at issue. Neither paragraph 84(b) nor paragraphs 5.1 or 5.2 explicitly answer that question. Since we are concerned in this case with measures that are alleged to restrict the right to trade, we will attempt to answer this question. We do not mean to suggest that different types of additional requirements could not give rise to similar questions. For instance, the question could arise in respect of additional requirements concerning the process of importation *stricto sensu*, such as requirements relating to the operating practices to be followed by importers.

7.271 Having regard to the question we are concerned with – whether China could impose an additional, WTO-consistent requirement under which only importers meeting specified criteria could obtain a licence – it would, in our view, be problematic to argue, based on paragraph 84(b), that all foreign enterprises and individuals in respect of whom China has an obligation to grant the right to trade would have to be given an import licence if they wish to import the good in question. Indeed, we would be concerned about such an interpretation of the aforementioned provisions, as it could lead to unreasonable results. A hypothetical example serves to illustrate this point.

7.272 Suppose that China maintained a general prohibition on the importation of narcotic drugs, but that it had the authority under its laws exceptionally to grant licences for the import of such drugs, e.g., for purposes of pharmaceutical research (e.g., on a possible cure for drug addiction) or for medico-therapeutic purposes (e.g., to provide palliative care to certain cancer patients). Considering the well-known societal problems associated with illegal trade in, and consumption of, narcotic drugs, China might conceivably see fit to stipulate that import licences could be granted only to entities authorized to use narcotic drugs (e.g., appropriate research institutes or hospitals). If, however, China were required to allow foreign enterprises not registered in China, and foreign individuals not in China, to import into China narcotic drugs which they are not authorized to use, China might be significantly impaired in its ability, or unable, to ensure that the narcotic drugs imported into China are in fact used exclusively for the purpose for which their importation has been authorized.

7.273 We are not suggesting that limiting imports of narcotic drugs to authorized users thereof would always and necessarily be WTO-consistent. However, we think the above example demonstrates that if China imposes a WTO-consistent requirement under which a licence is needed to import a particular good, it may in certain cases be appropriate for China to impose, in addition, a WTO-consistent requirement under which only importers meeting specified criteria could obtain a licence to import the good in question.

7.274 Arguably, import or export licensing requirements are the most obvious cases in which it could be appropriate to impose additional requirements to prescribe who may import or export the relevant good(s). We see no reason to assume, however, that they would necessarily be the only requirements concerning goods which it would be appropriate to complement by requirements regulating who may import or export such goods. Having said this, it is clear that not every WTO-consistent requirement concerning a good that is imported or exported entails a need for an additional requirement concerning who may import or export that good.

7.275 In the light of the foregoing, we consider that China's "right to regulate trade" in a WTO-consistent manner includes, by implication, a consequent right to regulate importers or exporters of the relevant good(s) in a WTO-consistent manner.[230] To interpret the phrase "right to regulate trade" as not including a consequent right to regulate importers or exporters of regulated goods could either

[230] An example of such incidental regulation of importers would be the above-mentioned hypothetical requirement that only entities authorized to use narcotic drugs, such as research institutes or hospitals, may be granted licences for the import of narcotic drugs.

render illusory China's "right to regulate trade" or significantly undermine that right.[231] We do not mean to suggest that the "right to regulate trade" could not include, by implication, the right to impose other types of related requirements, e.g., concerning operating practices to be followed by importers. Since the issue is not presented in this case, we take no position in this respect.

7.276 With regard to regulation of who may import or export a regulated good, consistent with the foregoing considerations it would, in our view, depend notably on two elements whether China's "right to regulate trade" would in a particular case permit China to regulate not only the goods that are imported or exported, but also who can be importers or exporters of these goods: (i) whether the regulation of importers or exporters of these goods has a reasonable link to the regulation of the goods at issue (notably to the rationale underpinning the regulation of the goods), i.e., whether it is incidental (or necessary) to the regulation of the relevant goods, and (ii) whether the regulation of importers or exporters is WTO-consistent.

7.277 We should recall at this point that "regulation" may mean restriction.[232] Therefore, in keeping with our view that the "right to regulate trade" implies a consequent right to regulate, in a WTO-consistent manner, importers or exporters of a regulated good, we consider that the "right to regulate trade" would, in appropriate cases, permit China to restrict or limit, in a WTO-consistent manner, the class of entities or individuals who may engage in importing or exporting the good in question.

7.278 It is worth noting in this regard that at a late stage in the proceedings even the United States appeared to accept that China could permissibly introduce or maintain certain WTO-consistent limitations on the right to trade that are the consequence of regulating the goods being traded. In response to a question from the Panel the United States stated that it did not argue that paragraphs 5.1 and 5.2 of the Accession Protocol or paragraph 84(b) of the Working Party Report would prevent China from ever restricting the right to trade.[233] The United States notably stated that it recognizes that "the regulation of traded goods may have incidental effects on individual traders' trading rights".[234] The United States appears to accept, for instance, that China could impose restrictions on individual importers based on their capability to import or export particular goods that entail risks inherent to the importation process.[235]

7.279 The United States argues, correctly, that interpretation of the phrase "right to regulate trade" in paragraph 5.1 must not render superfluous the mechanisms in Annex 2A and Annex 2B for excluding certain goods from disciplines which would otherwise be applicable. We do not consider that the references in paragraph 5.1 to Annex 2A and Annex 2B cast doubt on our interpretation of the phrase "right to regulate trade". In particular, we do not think our interpretation makes those Annexes redundant. The goods listed in Annex 2A are goods in respect of which China is not required to fulfil its obligation to ensure that all enterprises in China have the right to trade in all goods. For these goods, China may limit the right to trade to state-trading enterprises.[236] The only applicable condition

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[231] As regards the final sentence of paragraph 84(b), we similarly consider that China's right to impose "WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS" implies a right to impose incidental WTO-consistent requirements relating to importing and exporting.

[232] As noted above, the dictionary meaning of the verb "regulate" includes "subject to guidance or restrictions".

[233] United States' response to question No. 160(a).

[234] *Ibid*. (stating also that "[i]mporters must comply with … WTO-consistent requirements on goods, including incidental requirements regarding the good being imported") and United States' response to question No. 160(b) (referring to "incidental effects of the legitimate regulation of trade").

[235] United States' response to question No. 160(b).

[236] We note, however, the provisions of paragraph 213 of the Working Party Report, which have been incorporated into the Accession Protocol. In paragraph 213, China confirmed that notwithstanding

is that the good be included in the list. In contrast, under our interpretation of the "right to regulate trade", for goods not included in the Annex 2A list, any incidental restriction of the right to trade would only be permissible if it is WTO-consistent. Therefore, if as a consequence of regulating a particular good not included in Annex 2A, China wanted to limit the right to trade in that good to state-owned enterprises, it could only do so if denying other enterprises in China the right to trade would not breach any of China's obligations under the WTO Agreement. Given this restrictive condition, we see no basis for an argument that such an interpretation of the "right to regulate trade" would, in effect, permit China to add new goods to the Annex 2A list.

7.280 Essentially the same considerations apply regarding Annex 2B. Under Annex 2B, limitations on the grant of the right to trade in listed goods needed to be phased out in accordance with the schedule in Annex 2B. Subject to that condition being met, the limitations could be maintained. As indicated, under our interpretation of the "right to regulate trade", any incidental limitations would need to be WTO-consistent. Therefore, even if after the phase-out period China were to introduce an incidental WTO-consistent restriction of the right to trade in a good listed in Annex B, we think this could not reasonably be considered to amount to an effective extension of the phase-out period. Rather, it would be a legitimate exercise of China's "right to regulate trade" in a WTO-consistent manner.

7.281 Having considered the text of the phrase "right to regulate trade" in its context, we turn, finally, to consider that phrase in light of the object and purpose of the Accession Protocol. We discern no inconsistency between our interpretation of the phrase "right to regulate trade" and the object and purpose of the Accession Protocol. We observe that the Accession Protocol sets forth the terms of China's accession to the WTO. The preamble to the Accession Protocol refers to the fact that these terms are the result of negotiations between the WTO and China. This being so, we must be mindful of the possibility that the Accession Protocol may impose obligations on China that are not imposed on other Members under the WTO Agreement, or are stricter than those that are applicable to other Members. However, this element does not logically lead to the conclusion that the obligation to grant trading rights stipulated in paragraph 5.1 was intended to prejudice China's ability to regulate imports and exports and, incidentally, importers or exporters of the regulated goods. As explained above, other elements and considerations lead us to a different conclusion. We therefore do not consider that our interpretation of the phrase "right to regulate trade" is in any way at variance with the object and purpose of allowing the WTO and China to establish, by mutual agreement, the terms under which China could accede to the WTO.

(ii) Paragraph 5.2 of the Accession Protocol

7.282 Regarding paragraph 5.2 of the Accession Protocol[237], the **United States** considers that it commits China to extend to all foreign enterprises and all foreign individuals, including sole proprietorships of other WTO Members, the same right to import all goods into China as is accorded to all enterprises in China. Thus, the United States submits, any measure that disadvantages foreign enterprises and foreign individuals relative to enterprises in China with respect to the right to import the relevant products is inconsistent with paragraph 5.2.

7.283 **China** submits that paragraph 5.2 is directly related to paragraph 5.1 and is a complement to China's main commitment to liberalize the right to trade. China therefore argues that paragraph 5.2

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paragraph 5.1, non-state-trading enterprises would still be permitted to import goods listed in Annex 2A for production purposes. We note that neither party has referred to paragraph 213.

[237] To recall, paragraph 5.2 reads:

"Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade."

also applies "without prejudice" to China's right to regulate trade in a manner consistent with the WTO Agreement. China notes that in paragraph 5.2, China agreed to accord treatment no less favourable to foreign individuals and enterprises, "except as otherwise provided for in this Protocol". In China's view, this exception includes China's right to regulate trade in a manner consistent with the WTO Agreement.

7.284 The **Panel** notes that pursuant to paragraph 5.2 "all foreign individuals and enterprises, including those not invested or registered in China" must be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade, which, as paragraph 5.1 confirms, includes the right to import.

7.285 We begin our analysis with the phrase "all foreign individuals". In response to the Panel's question whether the phrase "all foreign individuals" in paragraph 5.2 covers non-Chinese individuals in China, non-Chinese individuals outside China, or both, the United States replied that the phrase includes both. China replied that the phrase refers to individuals whose nationality is not Chinese.[238] The parties also indicated their view that the phrase would cover both individuals who are commercial traders and individuals importing goods for their own use.[239] Thus, both parties consider that the phrase "all foreign individuals" covers all individuals whose nationality is not Chinese. We certainly agree that the phrase covers non-Chinese individuals in China, notably individuals living or residing in China. Regarding non-Chinese individuals outside China, we note that the phrase in question does not specify any limitations in this regard. Notably, it does not qualify the phrase with the words "in China". Furthermore, paragraph 84(b) of the Working Party Report, which is part of the context of paragraph 5.2[240], confirms that the term "foreign individuals" includes sole proprietorships "of other WTO members". We therefore agree that the phrase "all foreign individuals" can also cover non-Chinese individuals outside China.

7.286 The next element we need to address is the phrase "all foreign … enterprises, including those not invested or registered in China". It is clear to us from the phrase "including those not invested or registered in China" that paragraph 5.2 applies to enterprises registered in a country other than China.[241] It is less clear whether the term "foreign enterprise" as it appears in paragraph 5.2 applies to: (i) foreign-registered enterprises which wish to engage in importing into China or exporting from China, but have no commercial presence in China; (ii) foreign-registered enterprises which maintain a commercial presence in China (other than in the form of an enterprise registered in China, e.g., a Chinese branch) and which wish to engage in importing or exporting through the entity present in China; or (iii) both. The parties in their submissions to the Panel have not addressed this issue. Since the United States' claims concern, *inter alia*, "foreign enterprises"[242], it is appropriate, however, to examine the issue.

7.287 We begin this task by considering the first interpretative issue, that is, whether foreign-registered enterprises without a commercial presence in China are "foreign enterprises" for the purposes of paragraph 5.2. The first point to be made is that the phrase "all foreign enterprises" is not qualified with the words "in China". Thus, the text of paragraph 5.2 does not suggest that the phrase "all foreign enterprises" is intended to exclude foreign enterprises which do not maintain a commercial presence in China. Although it is likely that, typically, goods would be imported into China, or exported from China, by entities established in China, we perceive no basis for assuming

[238] Parties' responses to question No. 50(e)(i).
[239] Parties' responses to question No. 50(e)(ii).
[240] Paragraph 84(b) sets out commitments incorporated into the Accession Protocol through paragraph 1.2 of the Accession Protocol.
[241] China refers to enterprises incorporated outside the Chinese territory in accordance with foreign laws (China's responses to question Nos. 50(d) and 23(b)).
[242] United States' response to question No. 151.

that there would be, or could be, no foreign-registered enterprises without a commercial presence in China that would wish to engage in importing and exporting. While it may be necessary to satisfy certain customs- or fiscal-related requirements to engage in importing and exporting, this would not be the same as establishing an enterprise in China. We also have not been made aware of any legal or technical reasons that would suggest that only enterprises registered in China could reasonably be permitted to import or export goods.[243] Based on these considerations and the information on the record, we are of the view that the term "foreign enterprises" in paragraph 5.2 covers foreign-registered enterprises without a commercial presence in China.

7.288 The other interpretative issue is whether the phrase "all foreign enterprises" covers foreign-registered enterprises with a commercial presence in China (other than in the form of an enterprise registered in China) and engaging in importing or exporting through the entity present in China. We have asked the parties whether the phrase "all foreign enterprises" in paragraph 5.2 covers "foreign incorporated enterprises operating in China". The United States gave no direct reply. It merely stated that the meaning of "operating" in the Panel's question was not entirely clear to it.[244] China likewise did not give a specific reply, saying that the phrase "all foreign enterprises" covers enterprises incorporated outside the Chinese territory in accordance with foreign laws.[245] It appears to us that, in principle, foreign incorporated enterprises could operate in China by setting up one or more Chinese branches. In other words, we think that a branch in China could be the type of entity present in China through which a foreign-registered enterprise could engage in importing or exporting.

7.289 It appears that, generally speaking, foreign-registered enterprises can set up branches in China. China's Schedule of GATS Commitments stipulates in the "horizontal commitments" section that "[t]he establishment of branches by foreign enterprises is unbound, unless otherwise indicated in specific sub-sectors, as the laws and regulations on branches of foreign enterprises are under formulation".[246] Article 196 of China's 2005 Company Law provides that "[t]he branch of a foreign company established within the territory of China does not have the status of a juridical person"[247] and that "[t]he foreign company shall bear civil liabilities for the business operation of its branches undertaken within the territory of China". In addition, Article 193 of the 2005 Company Law provides that foreign enterprises wishing to establish a branch in China need to apply with the competent Chinese authority for approval. It also appears that Chinese branches of foreign-registered enterprises would need to be registered as such in the same way as branches of Chinese enterprises.[248]

7.290 As we see it, if a Chinese branch of a foreign-registered enterprise were to engage in importing or exporting, its imports or exports would be attributable, for the purposes of China's trading rights commitments, to the foreign parent, that is to say, to the relevant foreign enterprise not registered in China, and not an "enterprise in China". Or to put it another way, we consider that if China were to restrict the right of a Chinese branch of a foreign-registered enterprise to import or export goods from within China, it would, in terms of the provisions of paragraph 5.2, restrict the right to trade of a "foreign enterprise", specifically one that is "not invested or registered in China". We recall in this respect that in accordance with Article 14 of the 2005 Company Law branches in China do not have the status of "enterprise legal persons" and that it appears that branches must be registered as branches, not as enterprises.

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[243] We note in this connection that the evidence on the record does not include China's laws and regulations on foreign trade.

[244] United States' response to question No. 50(d).

[245] China's response to question No. 50(d).

[246] For the relevant horizontal commitments, see *infra*, para. 7.952.

[247] The 1993 Company Law, which was provided by China, referred to the status of "enterprise legal persons".

[248] Article 193 of the 2005 Company Law appears to indicate that Chinese branches of foreign companies must be registered as such in China. Article 48 of the Company Registration Regulation provides that Chinese companies wishing to establish branches in China must apply for registration of the latter.

7.291 In light of the foregoing, we are of the view that the term "foreign enterprises" in paragraph 5.2 covers foreign-registered enterprises with a commercial presence in China (other than in the form of an enterprise registered in China) and wishing to engage in importing or exporting through the entity (e.g., a branch) present in China.

7.292 In sum, we consider that the phrase "all foreign …enterprises, including those not invested or registered in China" applies both to foreign-registered enterprises which wish to engage in importing or exporting, but have no commercial presence in China, and foreign-registered enterprises maintaining a commercial presence in China and wishing to engage in importing or exporting through the entity present in China.

7.293 There is a further interpretative issue arising from the phrase "all foreign …enterprises, including those not invested or registered in China" which we need to resolve. The issue is whether that phrase covers only foreign enterprises not registered in China. In response to a question from the Panel, China argues that this is the case. In other words, China contends that the phrase in question does not cover foreign-invested enterprises registered in China.[249] The United States, in contrast, argues that foreign-invested enterprises registered in China are covered.[250] Neither party has offered specific reasons in support of its contention.

7.294 The phrase in question refers to "all" foreign enterprises, which would appear to include foreign-invested enterprises in China. Also, foreign-invested enterprises in China might conceivably be treated less favourably than "enterprises in China", such as wholly Chinese-invested enterprises or Chinese wholly state-owned enterprises. We further note that the phrase in question uses the term "including", and not terms like "comprising" or "consisting of". Unlike the latter terms, the term "including" in ordinary usage indicates that what follows is not an exhaustive, but a partial, list of all covered items.[251] Thus construed, the phrase in question would indicate that the relevant foreign enterprises "include", but are not limited to, enterprises not invested or registered in China. We recognize that the verb "include" could in certain exceptional cases be intended to provide an exhaustive listing of relevant items.[252] In the particular case of paragraph 5.2, however, such an interpretation seems implausible, in that the phrase in question lists only a single item. Indeed, if a limitation to foreign enterprises not in China had been intended, it would have been more natural for the drafters to express such an intention by referring directly to "all foreign … enterprises not invested or registered in China".

7.295 The interpretation suggested by China would be problematic for another reason. If paragraph 5.2 did not apply to foreign-invested enterprises in China, it would seem logical to infer that it would not apply to foreign individuals in China either. If it is assumed for the sake of argument that foreign individuals in China are not covered by paragraph 5.2, this would have as a consequence that they would not have the right to trade under paragraph 5, since paragraph 5.1 only applies to enterprises in China. It seems to us to be incongruous, however, to assume that foreign individuals in China were not intended to have the right to trade when foreign individuals outside China would have that right in accordance with paragraph 5.2. We also recall our view that the phrase "all foreign individuals" in paragraph 5.2 covers foreign individuals in China.

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[249] China's response to question No. 50(d).

[250] United States' response to question No. 50(d).

[251] *American Heritage Dictionary*, 4th ed. (Houghton Mifflin 2000), available at http://www.bartleby.com/61/.

[252] For instance, if one says that the price to be paid should "include" applicable taxes, this would ordinarily be understood to mean that all, and not just some, of the applicable taxes should be added to the seller's pre-tax price. See also *American Heritage Dictionary*, 4th ed. (Houghton Mifflin 2000), available at http://www.bartleby.com/61/.

7.296 We also find relevant paragraph 84(b) of the Working Party Report. As previously noted, paragraph 84(b) is part of the context of paragraph 5.2. Similarly to paragraph 5.2, the first sentence of paragraph 84(b) commits China to grant the right to trade to "foreign enterprises and individuals, including sole proprietorships of other WTO members" in a non-discriminatory and non-discretionary way. The final sentence of paragraph 84(b) commits China not to apply "requirements relating to minimum capital and prior experience". In our view, if the references in paragraph 84(b) to "foreign enterprises" are interpreted as including foreign-invested enterprises in China, it makes sense that the final sentence would commit China not to apply "requirements relating to minimum capital". Conversely, if the references in question were interpreted as covering only foreign enterprises not in China, it is not apparent to us why the final sentence commits China not to apply such requirements. Minimum capital requirements would be imposed by China on enterprises registered in China, not on enterprises which are not registered in China.[253]

7.297 To recall, according to China, the references in paragraph 84(b) to "foreign enterprises" should be interpreted as covering only foreign enterprises not registered in China. China considers that, for the purposes of its trading rights commitments, foreign-invested enterprises are "enterprises in China", and not "foreign enterprises".[254] We accept that under our interpretation, paragraph 84(a), which sets out a commitment applicable to "all enterprises in China and foreign enterprises and individuals", could cover foreign-invested enterprises either as "enterprises in China" or as "foreign enterprises".[255] In our view, this does not adversely affect the rights of either China or other Members.[256] Besides, both terms – "enterprises in China" and "foreign enterprises" – cover also enterprises other than foreign-invested enterprises. In other words, under our interpretation, both terms still have independent meaning. Moreover, as we have explained in the preceding paragraph, we think that such an interpretation is more easily reconcilable with the text of the final sentence of paragraph 84(b).

7.298 We consider that paragraph 84(b) is relevant to the interpretation of paragraph 5.2 because of its close substantive similarity to paragraph 5.2: the former provides that foreign enterprises are to be granted trading rights in a non-discriminatory way, the latter that foreign enterprises are to be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade. In this regard, we see no reason to disagree with the statement by the United States that paragraph 5.2 is intended "to address aspects of China's trading rights regime that *discriminated* against foreign-invested enterprises (as well as foreign individuals)".[257]

7.299 Accordingly, the text of paragraph 5.2, considered together with paragraph 84(b), which is part of its context, leads us to the view that foreign-invested enterprises in China qualify as "foreign enterprises" within the meaning of paragraph 5.2.[258]

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[253] This would appear to be confirmed, e.g., by paragraph 83(b) of the Working Party Report, which refers to minimum capital requirements for wholly Chinese-invested enterprises.

[254] China's response to question No. 197(a).

[255] We recall that paragraph 84(a) provides in relevant part:

> "The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China."

[256] The United States in response to question No. 197(a) appears to express the same view.

[257] United States' response to question No. 50(d) (emphasis added). As discussed above, paragraph 5.2 is also intended to address discrimination against foreign enterprises not registered in China.

[258] Consistent with what we have said about paragraphs 84(b) and (a), we see no contradiction between our view that foreign-invested enterprises in China are "foreign enterprises" within the meaning of

7.300 Finally, we need to address whether the obligation set out in paragraph 5.2 would prejudice China's ability to regulate trade in a WTO-consistent manner. The first point to be made in this respect is that China's obligation to provide no less favourable treatment to foreign enterprises and individuals applies "[e]xcept as otherwise provided for" in the Accession Protocol. We agree with the United States that the Accession Protocol could be considered to contain a relevant provision in the first sentence of paragraph 5.1, where an exception is set out for goods listed in Annex 2A.[259] We consider that it can be inferred from the existence of this provision that, with respect to goods listed in Annex 2A, China has no obligation to treat foreign enterprises and individuals no less favourably than Chinese state-trading enterprises which have the right to import or export the goods listed in Annex 2A.

7.301 In contrast, we think the "without prejudice" clause of paragraph 5.1, which refers to China's "right to regulate trade" in a WTO-consistent manner, is not a clause that "provides otherwise" within the meaning of paragraph 5.2. As we have explained earlier, the "without prejudice" clause in paragraph 5.1 does not provide for an exception in the same way as Annex 2A. The obligation contained in paragraph 5.1, first sentence, continues to apply even in cases where China regulates trade in a WTO-consistent manner.[260] Thus, the "without prejudice" clause does not, in our view, constitute a provision from which it can be inferred that the obligation set out in paragraph 5.2 is not applicable in cases where China regulates trade in a WTO-consistent manner.

7.302 Nevertheless, and notwithstanding the fact that paragraph 5.2 does not itself contain a "without prejudice" clause, the "without prejudice" clause of paragraph 5.1 is still relevant context for the interpretation of paragraph 5.2. Paragraph 5.1 refers to "China's right to regulate trade in a manner consistent with the WTO Agreement". We note that this "right" is not qualified with respect to its applicability. In other words, there is no indication in paragraph 5.1 that the "right to regulate trade" is meant to exist in relation to enterprises in China that wish to import or export, but not in relation to foreign enterprises or individuals that wish to import or export.

7.303 We also recall our view that the "right to regulate trade" implies a consequent right to regulate importers or exporters of the relevant good(s) in a WTO-consistent manner. As we see it, just like there could be legitimate reasons to impose incidental limitations on the trading rights solely of enterprises in China, so also there could be legitimate reasons to impose such limitations only in respect of foreign enterprises not registered in China and/or foreign individuals.

7.304 We further recall the final sentence of paragraph 84(b), which states in relevant part that foreign enterprises and individuals with trading rights must comply with all WTO-consistent requirements related to importing and exporting. As previously explained, we interpret this part of the final sentence to imply that China could impose incidental limitations on the trading rights of foreign enterprises and individuals. Considering the close substantive similarity between the first sentence of paragraph 84(b) and paragraph 5.2, it would seem incongruous if China could not likewise impose such limitations on the trading rights of foreign enterprises and individuals in cases where an inconsistency is claimed with paragraph 5.2.

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paragraph 5.2 and also "enterprises in China" for the purposes of paragraph 5.1. In fact, we consider that even for the purposes of paragraph 5.2, foreign-invested enterprises in China would, in principle, qualify as "enterprises in China". In our view, it is not unreasonable to interpret paragraph 5.2 as requiring that China accord, e.g., to foreign individuals, or foreign enterprises not invested or registered in China, treatment no less favourable with respect to the right to trade than the treatment accorded to foreign-invested enterprises registered in China, which are "enterprises in China".

[259] United States' responses to question Nos. 50(f) and 161.

[260] As also explained earlier, the right to regulate trade would, however, take precedence over the obligation.

7.305 For all these reasons, we consider that the provisions of paragraph 5.2 should be read harmoniously with those of paragraph 5.1 and paragraph 84(b), and we therefore conclude that the obligation stipulated in paragraph 5.2 should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner. Thus, although the obligation in paragraph 5.2 would be applicable in cases where China regulates trade, China's right to regulate trade, if exercised in a WTO-consistent manner, would take precedence over the obligation in paragraph 5.2.

7.306 We have addressed the object and purpose of the Accession Protocol in the context of our analysis of the "without prejudice" clause of paragraph 5.1. *Mutatis mutandis*, the observations we have offered in that context also lead us to consider that our understanding of paragraph 5.2 is not at odds with the object and purpose of the Accession Protocol.

(iii) Paragraph 83(d) of the Working Party Report

7.307 Regarding paragraph 83(d)[261], the **United States** considers that it confirms the obligation contained in paragraph 5.1 of the Accession Protocol – i.e., that China committed to provide trading rights to all enterprises in China by 11 December 2004. The United States notes, in addition, that China also specifically committed in paragraph 83(d) not to impose requirements with respect to the form and scope of operation of foreign-invested enterprises engaging in importation and exportation in China.

7.308 **China** considers that paragraph 83 of the Working Party Report also applies "without prejudice" to China's right to regulate trade. According to China, paragraph 83 – which is incorporated into China's Accession Protocol by its paragraph 1.2 – is a complement to, and a repetition of, China's main commitment to liberalize the right to trade. China argues that paragraph 83 should be read in conjunction with paragraph 5.1. China submits that this leads to the view that paragraph 83 is subject to the reservation expressed in the "without prejudice" clause. In China's view, any other reading would deprive the "without prejudice" clause of useful effect.

7.309 The **Panel** has already addressed certain aspects of this paragraph in the context of its analysis of paragraph 5.1.

7.310 Additionally, we note that, unlike paragraph 5.1, paragraph 83(d) does not explicitly state that the obligation to grant the right to trade to all enterprises in China is without prejudice to China's right to regulate trade in a WTO-consistent manner. We do not consider that one can logically infer from this that the commitment set out in paragraph 83(d) is intended to deprive China of the right to regulate trade. We think the purpose of paragraph 83(d) is to "confirm" the obligation to grant the right to trade to enterprises in China. If that is the case, it was not essential to provide specific clarification whether this obligation detrimentally affects China's right to regulate trade. Furthermore, we recall that paragraph 5.1 is part of the context of paragraph 83(d). In view of the close substantive similarity between the first sentence of paragraph 5.1 and paragraph 83(d), we believe the provisions of paragraph 83(d) should be interpreted so as to be consistent with those of paragraph 5.1. For these reasons, we conclude that the obligation stipulated in paragraph 83(d) should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner. We do not think that

[261] To recall, paragraph 83(d) provides:
"The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting."

understanding paragraph 83(d) in this way is at odds with the object and purpose of the Accession Protocol.[262]

(iv) Paragraph 84(a) of the Working Party Report

7.311 Regarding paragraph 84(a) of the Working Party Report[263], the **United States** considers that it confirms China's obligations set forth in paragraph 5.1 of the Accession Protocol, in that it provides that China's trading rights obligations apply to all enterprises in China, as of 11 December 2004, with regard to all products not listed in Annex 2A. The United States further considers that paragraph 84(a) confirms and elaborates on paragraph 5.2 of the Accession Protocol, inasmuch as it provides that China must permit all foreign enterprises and all foreign individuals, including sole proprietorships, to import goods, including the relevant products, into China. The United States argues that, as a result, measures that only permit selected Chinese entities to engage in the importation of the relevant products, thereby depriving foreign enterprises and individuals of the right to import the relevant products, are inconsistent with paragraph 84(a). In the United States' view, this inconsistency arises whether or not the foreign enterprises or foreign individuals are inside or outside of China.

7.312 **China** considers that paragraph 84 of the Working Party Report also applies "without prejudice" to China's right to regulate trade. According to China, paragraph 84 – which is incorporated into China's Accession Protocol by its paragraph 1.2 – is a complement to, and a repetition of, China's main commitment to liberalize the right to trade. China argues that paragraph 84 should be read in conjunction with paragraph 5.1. China submits that this leads to the view that paragraph 84 is subject to the reservation expressed in the "without prejudice" clause. In China's view, any other reading would deprive the "without prejudice" clause of useful effect.

7.313 The **Panel** considers that paragraph 84(a) commits China, on expiry of the three-year transition period: (i) to permit all enterprises in China to export and import all goods and (ii) to permit all foreign enterprises and individuals to do the same. We note that under this interpretation, paragraph 84(a) in one respect would differ from paragraph 5.2, in that it would establish an obligation to permit, as from the end of the transition period, all foreign enterprises and individuals to import and export all goods, regardless of whether enterprises in China may import and export all goods. In contrast, under paragraph 5.2 the treatment to be accorded to foreign individuals and enterprises depends on the treatment accorded to enterprises in China with respect to the right to trade. As the text of paragraph 84(a) is unqualified, however, we see no reason to interpret paragraph 84(a) differently.[264]

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[262] We recall that paragraph 1.2 of the Accession Protocol incorporates paragraph 83(d) into the Accession Protocol. We also recall that in the context of our analysis of the "without prejudice" clause of paragraph 5.1 we have considered the issue of the consistency of our understanding of that clause with the object and purpose of the Accession Protocol. The same considerations apply, *mutatis mutandis*, to our understanding of paragraph 83(d).

[263] It is useful to recall once more that paragraph 84(a) provides in relevant part:

> "The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China."

[264] We note that paragraph 84(a) does not say, e.g., "all enterprises in China and, consequently, all foreign enterprises and individuals". We also observe that neither party appears to argue for a different interpretation (parties' responses to question No. 198(a)).

7.314 Furthermore, with regard to the reference in paragraph 84(a) to "foreign enterprises", we consider that like the same term in paragraph 5.2, it covers foreign enterprises not registered in China. As we have explained above in our analysis of paragraph 5.2, we consider that this category of enterprises includes both foreign-registered enterprises without a commercial presence in China and foreign-registered enterprises with a commercial presence and wishing to engage in importing or exporting through the entity present in China.

7.315 Additionally, we note that, unlike paragraph 5.1, paragraph 84(a) does not explicitly state that the obligation to grant the right to trade to all enterprises in China, and all foreign enterprises and individuals, is without prejudice to China's right to regulate trade in a WTO-consistent manner. We do not consider that it can be logically inferred from this that the commitment set out in paragraph 84(a) is intended to deprive China of the right to regulate trade. In our view, the purpose of paragraph 84(a) is to "reconfirm" the obligation to grant the right to trade, and so we think it is not altogether surprising that no clarification is provided whether this obligation detrimentally affects China's right to regulate trade. Furthermore, we recall that paragraph 5.1 and paragraph 84(b) are part of the context of paragraph 84(a). In view of the close substantive similarity between the first sentence of paragraph 5.1 and the first sentence of paragraph 84(a), and in view of the final sentence of paragraph 84(b), which we have analysed above, we believe the provisions of paragraph 84(a) should be read harmoniously with those of paragraph 5.1 and paragraph 84(b). For these reasons, we conclude that the obligation stipulated in paragraph 84(a), first sentence, should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner. We do not think that this understanding of paragraph 84(a) is inconsistent with the object and purpose of the Accession Protocol.[265]

(v) Paragraph 84(b) of the Working Party Report

7.316 Regarding paragraph 84(b) of the Working Party Report[266], the **United States** submits that it confirms and elaborates on paragraph 5.2 of the Accession Protocol. According to the United States, paragraph 84(b) explains that not only are trading rights to be granted to foreign individuals and enterprises, but that these rights shall be granted in a "non-discriminatory and non-discretionary" way. The United States contends that, as a result, measures that make the right to import the relevant products available only to selected Chinese enterprises, or that subject the availability of the right to import the relevant products to the Chinese Government's discretion, are inconsistent with paragraph 84(b).

7.317 **China** considers that paragraph 84 of the Working Party Report also applies "without prejudice" to China's right to regulate trade. According to China, paragraph 84 – which is incorporated into China's Accession Protocol by its paragraph 1.2 – is a complement to, and a repetition of, China's main commitment to liberalize the right to trade. China argues that

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[265] We recall that paragraph 1.2 of the Accession Protocol incorporates paragraph 84(a) into the Accession Protocol. We also recall that we have previously considered the issue of the consistency of our understanding of the "without prejudice" clause of paragraph 5.1 with the object and purpose of the Accession Protocol. The same considerations apply, *mutatis mutandis*, to our understanding of paragraph 84(a).

[266] It is well to recall once again that paragraph 84(b) provides:

> "With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He 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. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply."

paragraph 84 should be read in conjunction with paragraph 5.1. China submits that this leads to the view that paragraph 84 is subject to the reservation expressed in the "without prejudice" clause. In China's view, any other reading would deprive the "without prejudice" clause of useful effect.

7.318 The **Panel** has already indicated, in the context of its analysis of paragraph 5.2, its view that the phrase "foreign enterprises" as used in paragraph 84(b) covers also foreign-invested enterprises in China. The Panel also recalls in this connection its view that the phrase "foreign enterprises" as used in paragraph 84(a) covers foreign enterprises not registered in China, and that this includes foreign-registered enterprises without a commercial presence in China and foreign-registered enterprises with a commercial presence and wishing to engage in importing or exporting through the entity present in China. We consider that the phrase "foreign enterprises" in paragraph 84(b) has the same meaning and scope as in paragraph 84(a).

7.319 Moreover, we have addressed the final sentence of paragraph 84(b) in the context of our analysis of paragraph 5.1. To recall, the final sentence refers to "WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS". As we have indicated in that context, we consider that China's right to impose "WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS" contains, by implication, a right to impose incidental WTO-consistent requirements relating to importing and exporting. We see no reason to think that this interpretation of paragraph 84(b) is at variance with the object and purpose of the Accession Protocol.[267]

7.320 Regarding the commitment undertaken in paragraph 84(b) to grant trading rights to foreign enterprises and individuals in a "non-discriminatory" way, we agree with the United States that this commitment would be breached, for example, in the event of relevant discrimination between foreign enterprises and individuals, on the one hand, and Chinese-owned enterprises in China, on the other hand. This view is consistent with paragraph 5.2. It requires China to treat foreign individuals and enterprises no less favourably with respect to the right to trade than "enterprises in China", a phrase which covers Chinese-owned enterprises. The fact that paragraph 84(b) might then catch situations that are also caught by paragraph 5.2 does not rule out our interpretation, as paragraph 83(d), for instance, also catches situations that are caught by paragraph 5.1.

7.321 In response to a question from the Panel, China expressed the view that paragraph 84(b) does not apply to cases involving discrimination between foreign enterprises and individuals, on the one hand, and enterprises in China, on the other hand. Instead, China maintains, paragraph 84(b) only covers discrimination between "different" foreign enterprises and individuals, i.e., between, say, US enterprises and Australian enterprises.[268] China considers that its view is supported by the introductory phrase of paragraph 84(b), i.e., the phrase "[w]ith respect to the grant of trading rights to foreign enterprises and individuals".

7.322 As we see it, the phrase referred to by China serves to identify the class of importers in respect of whom China undertook a commitment in paragraph 84(b).[269] Thus, we think that

[267] We recall that paragraph 1.2 of the Accession Protocol incorporates paragraph 84(b) into the Accession Protocol. We also recall that we have previously considered the issue of the consistency of our understanding of the "without prejudice" clause of paragraph 5.1 with the object and purpose of the Accession Protocol. The same considerations apply, *mutatis mutandis*, to our understanding of paragraph 84(b).

[268] China's response to question No. 52(a).

[269] Indeed, paragraph 84(b) states that "[w]ith respect to the grant of trading rights to foreign enterprises and individuals … the representative of China confirmed that …". Thus, China's representative in paragraph 84(b) provides a confirmation that concerns foreign enterprises and individuals. We also note that the introductory phrase of paragraph 84(b) parallels the introductory phrase of paragraph 83(b), which provides that "[w]ith respect to wholly Chinese-invested enterprises, the representative of China stated that…". Thus, paragraph 83(b) sets out a commitment that concerns wholly Chinese-invested enterprises.

paragraph 84(b) commits China to grant foreign enterprises and individuals trading rights in a non-discriminatory way. We also note that, by its terms, the phrase in question does not refer to the grant of trading rights to "different" foreign enterprises and individuals.

7.323 In our view, it can be inferred from paragraph 5.2 that one way in which China could grant foreign enterprises and individuals trading rights in a discriminatory way is by treating them less favourably than enterprises in China with respect to the right to trade. Therefore, we see no basis to exclude from the scope of paragraph 84(b) discrimination between foreign enterprises and individuals, on the one hand, and enterprises in China, on the other hand. We also observe that, for the purposes of this dispute, it is not necessary to determine whether other situations of discrimination, such as discrimination between foreign enterprises of different Members, would, likewise, be caught by paragraph 84(b).

7.324 Regarding the commitment to grant trading rights to foreign enterprises and individuals in a "non-discretionary" way, we note that the adjective "discretionary" is defined as "involving an exercise of judgment and choice, not an implementation of a hard-and-fast rule".[270] Based on this definition, we think this commitment means that any Chinese authority charged with granting trading rights cannot have the freedom to choose, based essentially on its own preference, whether or not such rights are granted.[271] In this regard, we consider that imposition of requirements, or conditions, for obtaining trading rights would not necessarily constitute a breach of this particular commitment. Many requirements, or conditions, cannot be considered to confer, on the authority charged with applying them, the freedom to choose, based on its own preference, whether or not the condition is satisfied such that the right to trade can be granted. An example of this would be a requirement that importers have a tax number in China. As we see it, this particular requirement would not leave it to the pleasure of the competent authority to decide whether or not an entity is approved as an import entity. Rather, the requirement involves implementation of a "hard-and-fast" rule: when the applicant has a tax number, it must be granted the right to trade, whether or not it pleases the competent authority.

(b) Consistency of the challenged Chinese measures with the cited paragraphs of the Accession Protocol

7.325 The **Panel** now turns to assess the consistency of the challenged Chinese measures with paragraphs 5.1 and 5.2 of the Accession Protocol and with paragraph 1.2 of the Accession Protocol, to the extent that paragraph 1.2 incorporates paragraphs 83(d) and 84(a) and (b) of the Working Party Report.

7.326 The **United States** asserts that through a variety of measures, China greatly constrains the right to import into China reading materials (i.e., books, newspapers, periodicals and electronic publications), AVHE products (e.g., videocassettes, VCDs and DVDs), sound recordings, and films for theatrical release (hereafter the "relevant products"). First, the United States contends that the measures in question prohibit foreign-invested enterprises in China, privately invested enterprises in China, foreign enterprises and foreign individuals from engaging in the importation of reading materials, AVHE products, sound recordings and films for theatrical release into China.

7.327 Secondly, the United States contends that with regard to reading materials, AVHE products and sound recordings, the relevant measures provide that only Chinese wholly state-owned enterprises can import those products. Thirdly, the United States contends that with regard to films for theatrical

[270] *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group 1999), p. 479.

[271] We note that authorities must always exercise discretion in accordance with the law. However, the fact that they normally do not have completely unfettered freedom to choose between several courses of action does not mean that they do not have discretion with respect to the substantive decision to be taken.

release, the relevant measures "designate" only a single Chinese wholly state-owned enterprise to engage in their importation.

7.328 Based on these contentions, the United States claims that enterprises in China (other than certain Chinese wholly state-owned enterprises), foreign enterprises and foreign individuals are denied the right to import reading materials, AVHE products, sound recordings and films for theatrical release. The United States submits that the relevant measures are, therefore, inconsistent with China's obligations contained in paragraphs 5.1 and 5.2 of the Accession Protocol as well as paragraph 1.2 of the Accession Protocol, to the extent that paragraph 1.2 incorporates paragraphs 83 and 84 of the Working Party Report.

7.329 The specific measures which the United States claims to be inconsistent with paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol are the following: the *Catalogue*; the *Foreign Investment Regulation*; the *Several Opinions*; the *Publications Regulation*; the *Importation Procedure*; the *Electronic Publications Regulation*; the *2001 Audiovisual Products Regulation*; the *Audiovisual Products Importation Rule*; the *Audiovisual (Sub-) Distribution Rule*; the *Film Regulation*; the *Film Enterprise Rule*; and the *Film Distribution and Exhibition Rule*.[272]

7.330 **China** argues that the measures regulating who may engage in the activity of importing motion pictures for theatrical release[273] as well as audiovisual products used for publication[274] do not fall under the rules applicable to trade in goods. China submits that the United States wrongly assumes that motion pictures for theatrical release and audiovisual products used for publication are goods and that paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol are applicable to Chinese measures governing the importation of such products. China considers that the relevant measures fall exclusively under the GATS. Consequently, in China's view, the US claims concerning trading rights for motion pictures for theatrical release as well as audiovisual products used for publication lack any legal basis and should be rejected.

7.331 In respect of the other products at issue (i.e., reading materials and finished audiovisual products, including finished sound recordings), China submits that the United States is overlooking the fact that China has a right to regulate trade which limits, under certain circumstances, the right to trade. China argues that what the United States is targeting is in fact the result of a selection process which limits the number of importation entities, but which is justified in order to implement an effective and efficient content review. According to China, its regime for the importation of cultural goods is designed to guarantee an effective and efficient application of the content review that China has chosen to implement. China considers that its measures governing the importation of the other products (reading materials and finished audiovisual products, including finished sound recordings) are justified under Article XX of the GATT 1994 and paragraph 5.1 of the Accession Protocol. China therefore contends that the relevant measures challenged by the United States do not breach China's obligations under paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol.

7.332 The **Panel** notes that in response to a question from the Panel, the United States indicated that it is challenging the measures at issue both separately and together.[275] As a result, the Panel will address the various measures challenged by the United States one by one. References below to

[272] The full names of the relevant Chinese rules, procedures and regulations are summarized in the table entitled "Short Title of Measures" and included at the beginning of this Report. Furthermore, the specific claims put forward by the United States in respect of the challenged measures are identified and addressed below, starting at para. 7.333.

[273] China uses the phrase "motion pictures for theatrical release" instead of the phrase "films for theatrical release".

[274] China uses the phrase "audiovisual products used for publication" instead of the US phrase "unfinished AVHE products". China considers the latter reference to be incorrect.

[275] United States' response to question No. 1.

paragraphs 5.1 or 5.2 are to the corresponding paragraphs of the Accession Protocol. References to paragraphs 83(d), 84(a) or 84(b) are to the corresponding paragraphs of the Working Party Report. For the sake of brevity, in the Panel's analyses below, we omit separate references to paragraph 1.2 of the Accession Protocol. As explained above, any inconsistency with paragraphs 83(d), 84(a) or 84(b) leads to a consequential inconsistency with paragraph 1.2. A summary of the Panel's main conclusions is provided at the end of this subsection. The summary makes reference to paragraph 1.2, as appropriate.[276]

(i) Catalogue

7.333 The **United States** alleges that the *Catalogue* forbids foreign-invested enterprises from engaging in the importation of any of the relevant products into China. The United States notes that under the heading "*Catalogue* of Prohibited Foreign Investment Industries", Article X.2 provides, *inter alia*, that foreign investment is prohibited in the business of importing of books, newspapers and periodicals into China. The United States notes that immediately thereafter, Article X.3 states that foreign investment in the business of importing audiovisual products and electronic publications is likewise not allowed. The United States considers that China's audiovisual regulatory regime covers sound recordings. In the United States' view, the prohibition on foreign investment in the business of importation of audiovisual products contained in this provision, therefore, extends to sound recordings.

7.334 The United States points out that films for theatrical release are not explicitly singled out as a separate category. However, in the United States' view, they are included within the term "audiovisual products" as that term is used in the *Catalogue*. According to the United States, this reading of the *Catalogue* finds support from a comparison of Article VI.3 under the heading "*Catalogue* of Industries with Restricted Foreign Investment" with Article X.3 under the heading "*Catalogue* of Prohibited Foreign Investment Industries". The United States notes that Article VI.3 provides, in relevant part, that foreign investment is restricted in enterprises engaging in the "[s]ub-distribution of audiovisual products (excluding motion pictures)". In contrast, the United States points out, Article X.3 provides that foreign investment is prohibited in enterprises engaging in the importation of "audiovisual products", without any exclusion for motion pictures. The United States submits that the exclusion of motion pictures in Article VI.3, but not in Article X.3, indicates that the term "audiovisual products" as used in the *Catalogue* includes motion pictures. Accordingly, the United States maintains, unlike in Article VI.3 where motion pictures are explicitly excluded in the distribution context, the Article X.3 prohibition on foreign investment in the importation of audiovisual products includes motion pictures. In the United States' view, the *Catalogue*, therefore, prohibits foreign investment in the importation of all of the relevant products.[277]

7.335 The United States claims that the *Catalogue* is inconsistent with China's trading rights commitments in two ways. First, the *Catalogue* deprives foreign-invested enterprises in China, as well as foreign enterprises and individuals, of the right to import the relevant products and thereby limits the trading rights of these entities, which China's trading rights commitments do not permit.

[276] It should also be noted that the three-year transition period applicable to relevant provisions invoked by the United States has ended, and so we make no further mention of the fact that certain obligations or commitments were not fully applicable from the effective date of China's accession.

[277] The United States references two additional provisions in this connection: (i) Article 4 of the *Imported Cultural Products Rule* (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, SARFT, and the General Administration of Press and Publication".) (emphasis added by the United States) (Exhibit US-10); and (ii) Article 9 of the *Decisions on Non-Public-Owned Capital* (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).

Secondly, the United States argues that the *Catalogue* also restricts trading rights in a discriminatory manner, as it insulates certain wholly Chinese-owned enterprises from any competition from foreign sources. The United States submits that this is likewise inconsistent with China's trading rights commitments.

7.336 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles X.2 and X.3 of the *Catalogue* of Prohibited Foreign Investment Industries, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, and foreign individuals.[278]

7.337 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.338 In relation to the *Catalogue*, China further contends that motion pictures for theatrical release are excluded from the term "audiovisual products" in Article X.3. China notes in this respect that according to Article 2 of the *2001 Audiovisual Products Regulation* "audiovisual products include recorded contents such as audio tapes, video tapes, gramophone records, compact discs and laser discs, etc.". In China's view, it is, therefore, obvious that China does not include motion pictures for theatrical release in the audiovisual products category.

7.339 Regarding coverage of films for theatrical release, the **United States** reponds that Article 2 of the *2001 Audiovisual Products Regulation* does not attempt to provide an exhaustive list. The United States notes in this regard that Article 2 uses the term "etc.", denoting that it is only providing illustrative examples.

7.340 The **Panel** first addresses the issue whether the reference in Article X.3 of the *Catalogue* of Prohibited Foreign Investment Industries to "audiovisual products" covers physical sound recordings and films for theatrical release.[279] We note that, as a general matter, the term "audiovisual products" can be understood to refer to products using sound or sight, or both, to present information.[280] Therefore, we think that, in principle, both sound recordings and films for theatrical release could be viewed as "audiovisual products". We understand that China does not dispute that physical sound recordings are covered by Article X.3. In fact, China itself refers the Panel to Article 2 of the *2001 Audiovisual Products Regulation*, which includes audio tapes, gramophone records and compact discs among the products covered by the Regulation. Since we have no reason to disagree, we consider that physical sound recordings are covered.

7.341 Regarding films for theatrical release consisting of a carrying medium carrying film content, we note that according to Article X.6 of the *Catalogue* "[m]otion picture producing studios, distribution companies, and theater chains" are also prohibited foreign investment industries. No reference is made in Article X.6 to "motion picture import companies". We are not convinced that the reference to "motion picture distribution companies" covers import operations as part of motion

[278] United States' response to question No. 1.

[279] We recall that we are concerned only with physical products, and so we do not address whether Articles X.2 and X.3 of the *Catalogue* also covers non-physical products.

[280] The term "audiovisual" is defined as "pertaining to both hearing and vision" (*Oxford English Dictionary Online* available at http://dictionary.oed.com/entrance.dtl).

picture distribution operations. China has confirmed that not all film distribution companies in China are authorized to import films.[281] Thus, the reference to "motion picture distribution companies" does not necessarily imply motion picture import companies and has independent meaning. Furthermore, we note that the *Several Opinions* in its Article 4 refers to "motion picture import and distribution companies". It thus draws a distinction between importation and distribution. In contrast, as noted, the *Catalogue*, which post-dates the *Several Opinions*[282], merely refers, in Article X.6, to "motion picture distribution companies". This reference raises the question whether import operations were deliberately excluded, or whether they were not included in Article X.6 because they were already included in Article X.3. Considering that it is uncontested that import operations involving video tapes – i.e., films on tapes – are covered by Article X.3, and that Article 4 of the *Several Opinions* prohibits foreign-invested "motion picture import … companies", it seems to us that the latter hypothesis is more plausible. However, we do not find Article X.6 to be conclusive, in the sense that it neither confirms nor contradicts the view that films for theatrical release are "audiovisual products" for the purposes of Article X.3.

7.342 A further contextual element we find relevant is Article VI.3 of the *Catalogue* of Industries with Restricted Foreign Investment. As noted by the United States, Article VI.3 refers, in relevant part, to "[s]ub-distribution of audiovisual products (excluding motion pictures)".[283] The fact that it was considered appropriate to clarify that the term "audiovisual products" in Article VI.3 should not be understood to include motion pictures, when no such clarification was deemed appropriate in Article X.3, where the exact same term appears, strongly suggests that the term "audiovisual products" in the *Catalogue* can be properly understood as covering also motion pictures, which term in our view can cover films for theatrical release. Considering that Article VI.3 is as much a part of the *Catalogue* as Article X.3, we think that we are entitled to assume that the omission in Article X.3 of the clarification "excluding motion pictures" was deliberate and has meaning.

7.343 China argues that no such inference may be drawn in view of the above-mentioned Article 2 of the *2001 Audiovisual Products Regulation*, which includes no reference to films for theatrical release. It seems to us that, absent indications to the contrary, it can be reasonably assumed that the *Catalogue* uses a term like "audiovisual products" to have the same meaning throughout. In contrast, we do not think that the same is necessarily true for identical terms appearing in separate legal instruments. China has not argued, for example, that the *Catalogue* implements the *2001 Audiovisual Products Regulation*, or that it would not be legally possible for the *Catalogue* to reflect a broader concept of "audiovisual products" than the *2001 Audiovisual Products Regulation*. Therefore, we see no reason to exclude the possibility that the *2001 Audiovisual Products Regulation* is intended to regulate only a subset of all audiovisual products, and that this subset does not include films for theatrical release. It is pertinent to note in this respect that there are several specific legal instruments governing films for theatrical release, such as the *Film Regulation*, the *Film Distribution and Exhibition Rule* and the *Film Enterprise Rule*. In the light of these elements, we are not persuaded that it would be appropriate to infer from Article 2 of the *2001 Audiovisual Products Regulation* that the term "audiovisual products" in Article X.3 of the *Catalogue* does not include films for theatrical release.

7.344 Finally, we note that it is undisputed that there currently is only one entity importing films for theatrical release into China, the China Film Import and Export Corporation. It is likewise uncontested that this corporation is not foreign-invested, but wholly state-owned. This is consistent with the United States' view that "audiovisual products" in Article X.3, which is about prohibited foreign investment industries, includes films for theatrical release into China.

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[281] China's response to question No. 190.

[282] The *Catalogue* is from 2007, the *Several Opinions* is from 2005.

[283] United States' response to question No. 17. We also note that Article 1 of the *Several Opinions* similarly refers to "sub-distribution of audiovisual products, with the exception of motion pictures".

7.345 Considering the above elements together – i.e., the ordinary meaning of the term "audiovisual products", Articles VI.3 and X.6 of the *Catalogue*, Article 4 of the *Several Opinions*, Article 2 of the *2001 Audiovisual Products Regulation* and the existence of a single state-owned importer of films for theatrical release – we are not convinced by China's argument that the term "audiovisual products" in Article X.3 of the *Catalogue* does not cover films for theatrical release.

7.346 We next turn to consider the United States' assertion that Articles X.2 and X.3 of the *Catalogue* forbid, or ban, foreign-invested enterprises from engaging in the importation of the relevant products into China.[284] The United States has provided no specific analysis in support of this assertion.. We note that Articles X.2 and X.3 are part of a "Catalogue of Prohibited Foreign Investment Industries". Article X.2 reads: "Publication, master distribution [*Zong Fa Xing*], and import operations of books, newspapers and periodicals". Article X.3 reads: "Publication, production, import operations of audiovisual products and electronic publications". Thus, Articles X.2 and X.3 are items in a catalogue, i.e., in a list. As such, they are unlike the other provisions which we are called on to analyse in this case.[285]

7.347 It appears to us that the legal significance of the items listed in the *Catalogue* is established by a separate legal instrument, the *Foreign Investment Regulation*. Article 2 of the *Foreign Investment Regulation* makes clear that the *Regulation* applies to investment projects in China which establish foreign-invested enterprises and other forms of foreign-invested projects. Article 3 of the *Foreign Investment Regulation* provides that the *Catalogue* is one "basis for the examination and approval of foreign-invested projects and FIE [foreign-invested enterprise] applicable policies". Article 4 of the *Foreign Investment Regulation* indicates that the *Catalogue* lists "encouraged, restricted and prohibited categories of foreign-invested projects" and that projects not included in any of those categories fall into the permitted category of foreign-invested projects. Read together, Articles 3 and 4 thus appear to imply that foreign-invested projects need to be examined on the basis of the *Catalogue*, and that if a foreign-invested project falls within the prohibited category, it may not be approved. A project concerning import operations of books, newspapers, periodicals, audiovisual products or electronic publications (Articles X.2 and X.3) would fall within the prohibited category.

7.348 Thus, one practical legal effect of Articles Articles X.2 and X,3, read together with Articles 3 and 4 of the *Foreign Investment Regulation*, is that no foreign-invested enterprise in China could lawfully import books, newspapers, periodicals, audiovisual products (including sound recordings and films for theatrical release) or electronic publications.

7.349 Consistent with the foregoing considerations, we are not persuaded, however, by the United States' assertion that Articles X.2 and X.3 produce, by themselves, the legal effect of forbidding, or banning, foreign-invested enterprises from engaging in the importation of the relevant products into China. Equally, it is clear that Articles 3 and 4 of the *Foreign Investment Regulation* do not, by themselves, have that effect. As a result, we will examine below whether (i) Article X.2, in conjunction with Articles 3 and 4, and/or (ii) Article X.3, in conjunction with Articles 3 and 4, cause one or more of the inconsistencies alleged by the United States.

Paragraphs 5.1, 83(d) and 84(a)

7.350 We now turn to examine the US claims under paragraphs 5.1, 83(d) and 84(a). According to the United States, the measures at issue deprive foreign-invested enterprises in China, as well as

[284] United States' first written submission, paras. 25 and 253.

[285] See, e.g., Article 21 of the *Audiovisual (Sub-) Distribution Rule*, which states that "[a] Chinese-foreign contractual joint venture for sub-distribution of audiovisual products may not engage in the import of audiovisual products". For the most part, the items listed in Article X of the *Catalogue* consist of nouns only (e.g., Article X.1, which reads: "News agencies").

foreign enterprises and individuals, of the right to import the relevant products, contrary to the aforementioned provisions.

7.351 We begin our examination with the claim in respect of foreign-invested enterprises. We recall our view that the phrase "all enterprises in China" in paragraph 5.1 of the Accession Protocol includes foreign-invested enterprises in China. As explained above, we consider that the legal effect of: (i) Article X.2, in conjunction with Articles 3 and 4, and (ii) Article X.3, in conjunction with Articles 3 and 4, is to prevent foreign-invested enterprises in China from lawfully importing the relevant products. As a result, foreign-invested enterprises in China do not have the right to import those products. This is contrary to paragraph 5.1, first sentence.[286] We thus conclude that (i) Article X.2, in conjunction with Articles 3 and 4 (with respect to books, newspapers and periodicals), and (ii) Article X.3, in conjunction with Articles 3 and 4 (with respect to physical audiovisual products, sound recordings, electronic publications and films for theatrical release), are inconsistent with paragraph 5.1.

7.352 Paragraph 83(d), first sentence, commits China to grant the right to trade to "all enterprises in China". Similarly, paragraph 84(a), second sentence, commits China to permit "all enterprises in China" to import all goods. The phrases "all enterprises in China" in paragraphs 83(d) and 84(a) include foreign-invested enterprises in China. As a consequence, for the reasons mentioned in the previous paragraph, we conclude that: (i) Article X.2, in conjunction with Articles 3 and 4, and (ii) Article X.3, in conjunction with Articles 3 and 4, also give rise to a breach of paragraph 83(d), first sentence, and paragraph 84(a), second sentence.

7.353 So far as concerns the US claims in respect of foreign individuals and foreign enterprises not invested or registered in China, the United States has not adequately explained why and how the measures could be said to affect such individuals and enterprises and give rise to the alleged inconsistencies.[287] The *Catalogue* is entitled "*Catalogue of Industries for Guiding Foreign Investment*", and Article X is part of a category entitled "*Catalogue of Prohibited Foreign Investment Industries*". Indeed, Article X refers to agencies, companies, industries, stations and channels as possible recipients of foreign investment, but not to individuals. Thus, we think that the *Catalogue* concerns industries, not individuals, and that it concerns industries in China which receive foreign investment, not industries abroad. To recall, Article 2 of the *Foreign Investment Regulation* provides that the *Regulation* applies to "investment projects in China" which establish foreign-invested enterprises, i.e., enterprises registered in China. This, too, indicates that the projects at issue are projects in China that China would be called on to approve, and that the enterprises to be established are enterprises registered in China. There is no suggestion that individuals in China, or Chinese branches of foreign enterprises not registered in China, are contemplated as possible recipients of foreign investment.

7.354 In the light of this, we are not persuaded that: (i) Article X.2, in conjunction with Articles 3 and 4, or (ii) Article X.3, in conjunction with Articles 3 and 4, deprive foreign individuals or foreign enterprises not invested or registered in China of the right to import the products concerned. We therefore conclude that the United States has not established its claims under paragraphs 5.1, 83(d) and 84(a) in respect of these individuals and enterprises.

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[286] We recall that the United States challenges all of the relevant products as goods, i.e., as tangible, physical items (United States' response to question No. 22).

[287] In response to question No. 6, the United States merely suggests that foreign enterprises and individuals might be affected as investors in the listed industries, e.g., by translating relevant Chinese titles as meaning "*Catalogue of Industries for Guiding the Investment of Foreign Investors*" and "*Catalogue of the Industries in which Investment of Foreign Investors is Prohibited*".

Paragraphs 5.2 and 84(b)

7.355 The United States further claims that the *Catalogue* restricts trading rights in a discriminatory manner, by "insulat[ing] certain wholly Chinese-owned enterprises from any competition from foreign sources". We begin with the US claims in respect of foreign-invested enterprises. It is useful to recall in this regard our view that paragraphs 5.2 and 84(b) cover foreign-invested enterprises in China as "foreign enterprises".

7.356 We note that the issue under paragraphs 5.2 and 84(b) is not whether the treatment accorded to foreign-invested enterprises in China "insulates" wholly Chinese-owned enterprises (i.e., enterprises in China) from competition. The issue is whether foreign-invested enterprises in China are treated less favourably than, or in a discriminatory way compared to, wholly Chinese-owned enterprises with respect to the right to trade.

7.357 The US claim is based on the practical legal effect of the *Foreign Investment Regulation* and the *Catalogue*, which is to prevent foreign-invested enterprises in China from lawfully importing the relevant products. We have already determined that as a consequence of this legal effect China has acted inconsistently with its obligations under, *inter alia*, paragraph 5.1 in respect of foreign-invested enterprises in China. As a consequence, we see no need to offer additional findings regarding whether, as a result of the same legal effect, China has also acted inconsistently with its obligations under paragraphs 5.2 and 84(b) in respect of the same enterprises. Accordingly, we exercise judicial economy in relation to the US claim under paragraphs 5.2 and 84(b).

7.358 Turning now to the US claims in respect of foreign individuals and foreign enterprises not invested or registered in China, these claims also appear to be based on the legal effect of the *Foreign Investment Regulation* and the *Catalogue*. However, for reasons we have explained above, we do not agree with the United States that these measures deprive foreign individuals or foreign enterprises not invested or registered in China of the right to import the products concerned. We therefore conclude that the United States has not established its claims under paragraphs 5.2 and 84(b) in respect of foreign enterprises and individuals.

(ii) Foreign Investment Regulation

7.359 The **United States** notes that Article 4 of the *Foreign Investment Regulation* requires "encouraged, restricted and prohibited" foreign-invested projects to be listed in the *Catalogue*. The United States also notes that Article 3 of the *Foreign Investment Regulation* further defines the function of the *Catalogue*, stating that it is "the basis for the examination and approval of foreign-invested projects and FIE [foreign-invested enterprise] applicable policies".

7.360 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 3 and 4 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, and foreign individuals.[288]

7.361 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the

[288] United States' response to question No. 1.

importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.362 The **Panel** recalls its view that Articles 3 and 4 of the *Foreign Investment Regulation* do not, by themselves, produce the legal effect of precluding foreign-invested enterprise in China from lawfully importing books, newspapers, periodicals, audiovisual products (including sound recordings and films for theatrical release) or electronic publications. The Panel has, therefore, examined, in the previous subsection, whether the *Catalogue* considered in conjunction with the *Foreign Investment Regulation* cause any of the alleged inconsistencies. The results of this examination are also set out above. We therefore see no need for further analysis of the US claims under Articles 3 and 4 of the *Foreign Investment Regulation*.

(iii) Several Opinions

7.363 The **United States** argues that the *Several Opinions* forbids foreign-invested enterprises, whether or not they are in China, from engaging in the importation of any of the relevant products. The United States notes in this respect that the first sentence of Article 4 of the *Several Opinions* states in relevant part that "[f]oreign investors are prohibited from setting up and operating ... motion picture import ... companies". This provision, the United States argues, covers imported films for theatrical release. The United States further notes that the second sentence of Article 4 provides, in relevant part, that "[f]oreign investors are prohibited from engaging in the ... import of books, newspapers and periodicals, and ... import of audiovisual products and electronic publications". In the United States' view, this provision prohibits foreign-invested enterprises from engaging in the importation of reading materials, AVHE products, and sound recordings.

7.364 The United States claims that the *Several Opinions* is inconsistent with China's trading rights commitments in two ways. First, in the United States' view, the *Several Opinions* deprives foreign-invested enterprises in China, as well as foreign enterprises and individuals, of the right to import the relevant products and thereby limits the trading rights of these entities, which China's trading rights commitments do not permit. Secondly, the United States argues that the *Several Opinions* also restricts trading rights in a discriminatory manner, as they insulate certain wholly Chinese-owned enterprises from any competition from foreign sources. The United States submits that this is likewise inconsistent with China's trading rights commitments.

7.365 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Article 4 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, and foreign individuals.[289]

7.366 As already noted in the discussion in Section VII.B.5(a) above, **China** argues that the *Several Opinions*, including Article 4, should not be examined by the Panel because, in its view, it merely provides internal guidance for the formulation and improvement of implementation procedures by the authorities competent in the cultural sectors concerned, i.e., the MOC, the SARFT and the GAPP.

7.367 The **Panel** recalls, first of all, its decision at paragraph 7.198 above that, notwithstanding China's arguments to the contrary, the *Several Opinions* is a "measure" within the meaning of Article 3.3 of the DSU, and is properly before the Panel. Therefore, it needs to be examined by the Panel for its consistency with China's trading rights commitments under the Accession Protocol.

[289] United States' response to question No. 1.

Accordingly, we proceed to examine whether the provision at issue – Article 4 of the *Several Opinions* – is inconsistent with the Accession Protocol, as alleged by the United States.

7.368 We note at the outset that in response to a question from the Panel, China indicated disagreement with how the United States translated Article 4.[290] Specifically, China disagrees with the US translation of the Chinese term "*Wai Shang Tou Zi*". China submits that the term should be translated as "foreign investment (or foreign-invested enterprises)", and not as "foreign investors", as the United States suggests. The expert advice received by the Panel from its independent translator indicates that, in the specific context of Article 4, the term "*Wai Shang Tou Zi*" should be translated as "foreign investors", as suggested by the United States.

7.369 We note that the Panel's independent translator has indicated that the relevant Chinese term on its own could in other contexts be translated as "foreign investment". However, in the specific context of Article 4, and given the specific workings of Chinese grammar, the independent translator does not consider "foreign investment" an appropriate translation. China comments that account should be taken of the context of the measures, and in particular the fact that the *Several Opinions* guides the investment by foreign investors into the cultural sector. More specifically, China submits that the *Several Opinions* regulates where foreign investors can or cannot invest their capital in the cultural sector and does not cover the issue whether foreign investors can directly engage in a cultural business. We note, however, that the independent translator's suggested translation takes account of the context within which the relevant Chinese term appears. Also, we do not see how the translation suggested by China avoids the issue referred to by China.[291] The Panel will, therefore, follow the advice of its independent translator and will proceed on the basis that the correct translation is "foreign investors" rather than "foreign investment".

7.370 Article 4, first sentence, provides in relevant part that foreign investors "are prohibited from setting up and operating … motion picture import … companies". Article 4, second sentence, provides in relevant part that foreign investors "are prohibited from engaging in the … import of books, newspapers and periodicals … and import of audiovisual products and electronic publications". We note that there is a slight difference in wording between the first and second sentence. We consider, however, that the two sentences should be read harmoniously. Thus, we do not consider that the second sentence is intended to address situations where foreign investors themselves import the relevant products into China, i.e., where foreign investors act as importers.[292] Rather, we consider that the second sentence is intended to make clear that foreign investors may not set up and operate foreign-invested enterprises in China that would import the relevant products.[293] The context of Article 4 lends support to our understanding of the second sentence. The full title of the *Several Opinions* is "*Several Opinions* on the Introduction of Foreign Capital into the Cultural Sector". This suggests that the *Several Opinions* is concerned with foreign investors as providers of foreign capital, not as importers of products. Furthermore, Article 5 refers to "entry into the relevant industry" and "applications for setting up wholly foreign owned enterprises and Chinese-foreign equity and contractual joint ventures". Finally, Article 6 refers to the "investing parties" who apply to set up a foreign-invested enterprise in China.

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[290] China's response to question No. 176.

[291] Specifically, it is not clear, under China's translation, how "foreign investment" could be said to "set up and operate" motion picture import companies.

[292] The United States notes that investors act through investment (United States' response to question No. 5). Thus, it would appear that investors would be engaging in the import of relevant products through investment.

[293] China appears to confirm this understanding in its comments on the independent translator's suggested translation of Article 4. Specifically, China states that in the *Several Opinions*, "it is foreign-invested enterprises rather than foreign investors themselves that are prohibited from operating in certain cultural businesses in China".

7.371 We recall that the US claims are concerned only with physical products. We note in this regard that Article 4, second sentence, refers to the import of books, newspapers, periodicals, electronic publications and audiovisual products. It is clear to us from these references that they cover physical products. In relation to the reference to "motion picture import companies" in the first sentence of Article 4, it appears to us that the term can be understood to cover companies that would import films for theatrical release consisting of a medium carrying film content. But even if it were considered that the term is intended to refer only to companies importing film content, Article 4, first sentence, would, in our view, still be subject to China's trading rights commitments.[294] While Article 4, first sentence, would not, on this view, directly regulate who may (or rather may not) engage in the import of the relevant good (hard-copy cinematographic film), it would nonetheless necessarily affect the import of the relevant good if and when a foreign-invested company in China would wish to engage in the business of importing film contents on physical carriers (cinematographic film), which we understand remains a common commercial practice.[295]

7.372 In response to a question from the Panel, China stated that Article 4 is not directly applicable.[296] China also stated that in accordance with Article 13 of the *Several Opinions*, the requirements in the *Several Opinions* must be implemented by the government agencies to which they are addressed through promulgation of specific departmental rules.[297] Thus, as we understand it, Article 4 directs relevant agencies to ensure, through promulgation of appropriate rules, that no foreign-invested enterprise in China can lawfully import books, newspapers, periodicals, films for theatrical release, other audiovisual products (including sound recordings), or electronic publications.

Paragraphs 5.1, 83(d) and 84(a)

7.373 The United States claims that Article 4 deprives foreign-invested enterprises in China, as well as foreign enterprises and individuals, of the right to import the relevant products and thereby limits the trading rights of these entities, contrary to paragraphs 5.1, 83(d) and 84(a). We begin our examination with the claims in respect of foreign-invested enterprises.

7.374 In relation to paragraph 5.1, we recall our view that the phrase "all enterprises in China" includes foreign-invested enterprises in China. As explained above, Article 4 is addressed to Chinese government agencies and directs them to prohibit foreign-invested enterprises in China from importing the relevant products. As a result, by virtue of Article 4, foreign-invested enterprises in China must not have the right to import those goods. This requirement is contrary to paragraph 5.1, first sentence. We thus conclude that Article 4 is inconsistent with paragraph 5.1 insofar as it affects foreign-invested enterprises. For the same reason, we conclude that Article 4 is inconsistent with paragraph 83(d), first sentence, and paragraph 84(a), second sentence. Paragraphs 83(d) and 84(a) also cover foreign-invested enterprises in China as "foreign enterprises".

7.375 So far as concerns the US claims in respect of foreign individuals and foreign enterprises not invested or registered in China, the United States has not adequately explained why and how Article 4 could be said to affect such individuals and enterprises and to give rise to the alleged

[294] We note that China has offered no substantive response to the US trading rights claims concerning the *Several Opinions*. China has, however, made an argument based on a reference to "motion pictures" in the context of, *inter alia*, the US trading rights claims concerning the *Film Regulation*.

[295] We address the issue of the applicability of China's trading rights commitments to a measure concerning "motion picture import" more fully below, as part of a discussion of a related argument which China has advanced in connection with the US claims concerning the *Film Regulation*. See *infra*, paras. 7.528 *et seq*.

[296] China's response to question No. 37(b).

[297] China's response to question No. 37(a). Article 13 provides that the MOC, the SARFT and the GAPP "shall, based upon these Opinions, draw up and improve concrete implementation measures for their own departments".

inconsistencies.[298] As we have indicated, we do not consider that the second sentence of Article 4 is about imports by foreign investors themselves. We have also noted that the *Several Opinions* is about foreign investment in China. More specifically, it is about investment of foreign capital in wholly foreign-owned enterprises, Chinese-foreign equity joint ventures or Chinese-foreign contractual joint ventures. There is no indication that individuals in China, or Chinese branches of foreign enterprises not registered in China, are contemplated as possible recipients of foreign investment. In the light of this, we are unable to accept that Article 4 deprives foreign individuals or foreign enterprises not invested or registered in China of the right to import the relevant products. We therefore conclude that the United States has not established its claims under paragraphs 5.1, 83(d) and 84(a) in respect of such individuals and enterprises.

Paragraphs 5.2 and 84(b)

7.376 The United States also claims that Article 4 restricts trading rights in a discriminatory manner, by insulating certain wholly Chinese-owned enterprises from any competition from foreign sources.

7.377 In examining this claim, we again begin with the US claim in respect of foreign-invested enterprises. We recall that, in our view, paragraphs 5.2 and 84(b) cover foreign-invested enterprises in China as "foreign enterprises". We further note that the issue under paragraphs 5.2 and 84(b) is not whether the treatment accorded to foreign-invested enterprises in China "insulates" wholly Chinese-owned enterprises (i.e., enterprises in China) from competition. The issue is whether foreign-invested enterprises in China are treated less favourably than, or in a discriminatory way compared to, wholly Chinese-owned enterprises with respect to the right to trade.

7.378 The US claim is based on the legal effect of Article 4, which is to direct government agencies to prohibit foreign-invested enterprises in China from importing the relevant products. We have already determined that as a result of this China has acted inconsistently with its obligations under, *inter alia*, paragraph 5.1 in respect of foreign-invested enterprises in China. As a consequence, we see no need to offer additional findings regarding whether, as a result of the same legal effect, China has also acted inconsistently with its obligations under paragraphs 5.2 and 84(b) in respect of the same enterprises. Accordingly, we exercise judicial economy in relation to the claim under paragraphs 5.2 and 84(b).

7.379 Regarding the US claims in respect of foreign individuals and foreign enterprises not invested or registered in China, we note that these US claims also appear to be based on the legal effect of Article 4. However, for reasons we have explained above, we are unable to accept that Article 4 deprives foreign individuals or foreign enterprises not invested or registered in China of the right to import the products concerned. We therefore conclude that the United States has not established its claims under paragraphs 5.2 and 84(b) in respect of foreign enterprises and foreign individuals.

(iv) Publications Regulation

7.380 The **United States** submits that the *Publications Regulation* covers all of the relevant products except films for theatrical release and that it is the principal Chinese legal instrument governing explicitly, *inter alia*, the importation of reading materials, AVHE products and sound recordings in China. The United States points out in this respect that according to Article 2 this measure applies to "publishing activities", which include the importation into China of "publications". As the United States points out, Article 2 defines the term "[p]ublications" broadly to encompass newspapers, periodicals, books, electronic publications, and AVHE products, and sound recordings.

[298] In response to question Nos. 5 and 10, the United States merely explains the basis for its view that "foreign investors" include foreign individuals and enterprises.

7.381 The United States further points out that according to Article 41 no individual or entity may import any reading materials, AVHE products, or sound recordings without approval. Moreover, the United States notes that Article 42 sets forth the required conditions that applicants must satisfy in order to import reading materials, AVHE products, and sound recordings into China. The United States points out that among the seven conditions enumerated, Article 42 mandates that applicants seeking approval to import reading materials, AVHE products, and sound recordings "shall" be wholly state-owned enterprises. Accordingly, the United States submits that the *Publications Regulation* permits only wholly state-owned enterprises to be approved to import reading materials, AVHE products, and sound recordings into China.

7.382 Furthermore, the United States indicates that Article 42 circumscribes which wholly state-owned enterprises may import publications, providing that "[a]pproval to establish a publication import entity shall not only be in compliance with the conditions listed in the preceding paragraphs, but also conform to the State plan for the total number, structure, and distribution of publication import entities".

7.383 In addition, the United States notes that Article 43 establishes application procedures for Chinese wholly state-owned enterprises seeking to import reading materials, AVHE products, and sound recordings into China. The United States points out that applications for permits to import these products are to be submitted to the GAPP for examination and approval. If the application is approved and the permit granted, the Chinese wholly state-owned enterprise must then secure a business licence in order to engage in importing.

7.384 Separately, the United States points out that with regard to newspapers and periodicals, Article 41 of the *Publications Regulation* creates special additional conditions. The United States notes in this respect that only Chinese wholly state-owned enterprises "designated" by the GAPP may import these products, and no entity or individual may import them without such a designation. Thus, the United States maintains, pursuant to the authority granted by the *Publications Regulation*, the GAPP selects, at its own discretion, the Chinese wholly state-owned enterprises that can engage in the importation of newspapers and periodicals.

7.385 The United States claims that the *Publications Regulation* is inconsistent with China's trading rights commitments in the following ways. First, the United States recalls that Article 42 of the *Publications Regulation* mandates that only wholly state-owned enterprises satisfying specified criteria, including the "State plan for the total number, structure, and distribution" of these enterprises, may import reading materials, AVHE products, and sound recordings into China. According to the United States, this gives rise to three inconsistencies with China's trading rights commitments: (i) by depriving foreign-invested enterprises in China, as well as foreign enterprises and foreign individuals, of the right to import reading materials, AVHE products and sound recordings, Article 42 limits the trading rights of these types of importers, which China's trading rights commitments do not permit; (ii) Article 42 restricts trading rights in a discriminatory manner, as it insulates certain wholly Chinese-owned enterprises from any competition from foreign sources; and (iii) Article 42 is also inconsistent with China's trading rights commitments because it injects qualifying criteria and government discretion into a process that China committed to be "non-discretionary".

7.386 Secondly, the United States argues that pursuant to Article 41 the importation of certain reading materials, i.e., newspapers and periodicals, is further restricted to wholly state-owned enterprises specially designated by the Chinese Government. The United States submits that this designation process injects further qualifying criteria and government discretion into a process that China committed to be "non-discretionary" and is therefore inconsistent with China's trading rights commitments.

7.387 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 41-43 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[299]

7.388 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.389 In relation to the *Publications Regulation*, China argues, in addition, that it does not apply to the importation of audiovisual products, including sound recordings. China notes that Article 67 of the *Publications Regulation* provides that "[i]n the event that provisions on the publication, reproduction, importation and *Fa Xing* of audiovisual products are otherwise specified in administrative regulations, the provisions in such administrative regulations shall apply". China contends that since the *2001 Audiovisual Products Regulation* governs the mentioned activities with regard to audiovisual products, the *Publications Regulation* does not apply to the importation of audiovisual products.

7.390 The **Panel** first addresses whether the *Publications Regulation* applies to audiovisual products, including sound recordings. Article 2 of the *Publications Regulation* indicates that audiovisual products are among the "publications" which fall within the scope of the Regulation.[300] As pointed out by China, however, Article 67 stipulates that where an administrative regulation "specifies otherwise" in respect of the import of audiovisual products, the provisions of that regulation are to be applied. It is clear to us from Article 2 that the *Publications Regulation* is applicable to the import of audiovisual products. Indeed, the *Publications Regulation* regulates "publications" generally. Article 67 in our view merely makes clear that it is nonetheless possible to maintain or introduce special and different rules governing, *inter alia*, the import of audiovisual products. Therefore, we do not agree that the *Publications Regulation* is not applicable to the import of audiovisual products. We do agree, however, that the *Publications Regulation* may not set forth the rule(s) that would ultimately be applied by China to the import of audiovisual products. China argues in this respect that the *2001 Audiovisual Products Regulation* contains relevant special rules. Accordingly, for each of the provisions of the *Publications Regulation* which the United States is challenging, we will consider whether the *2001 Audiovisual Products Regulation* "specifies otherwise" within the meaning of Article 67.

Article 43

7.391 Turning now to the specific claims by the United States, we note that in response to a question from the Panel, the United States has identified Articles 41, 42 and 43 of the *Publications Regulation* as the provisions directly giving rise to an inconsistency with the Accession Protocol.[301] However, it is not clear to us that the United States intended to put forward a claim in respect of Article 43. Indeed, the US submissions to the Panel do not state any claim in respect of Article 43. Even assuming that the United States intended to put forward a claim, the United States in any event

[299] United States' response to question No. 1.

[300] China confirmed that the term "audiovisual products" in Article 2 includes audiovisual proudcts intended for publication (China's response to question No. 31(a)).

[301] United States' response to question No. 1.

has not met its burden of establishing any inconsistency with China's trading rights commitments in respect of Article 43, as it has not provided any explanation as to why and how Article 43 is inconsistent with the trading rights commitments under China's Accession Protocol. We also note that the United States has not explained how Article 43 could give rise to an inconsistency when considered together with other challenged measures.

Article 42

7.392 We consider, next, the US claims in respect of Article 42. We begin this task by noting the provisions of Article 41. Article 41 states that no "entity or individual" may engage in the business of importing publications without approval. Article 41 also states, however, that the business of importing publications must be operated by approved "publication import entities". The term "publication import entities" suggests that entities, but not individuals, may be approved. Article 42 appears to support this understanding. It provides that publication import entities may only be approved if they satisfy the conditions listed in Article 42 and also conform to the State plan for the total number, structure and distribution of publication import entities. Looking at the conditions listed, we note that they refer to the need to be a "wholly state-owned enterprise" or to have a suitable organization and specialized personnel. These elements do not appear to fit the situation of individuals as opposed to entities. Thus, it is our understanding that only entities can be approved as "publication import entities".

7.393 We further note that Articles 41 and 42 do not explicitly state whether "publication import entities" need to be registered in China. We recognize that the term "publication import entity" is unqualified. In our view, this does not necessarily mean, however, that the term could cover also foreign enterprises not registered in China. In considering this issue, we note at the outset that we have not been given, or made aware of, any other trade-related Chinese laws or regulations that could indicate whether an "import entity" needs to be registered in China.[302] We realize that Article 42 requires that only Chinese "wholly state-owned enterprises" may be approved as publication import entities, and that such enterprises are registered in China. But this condition does not seem to be inherent to the concept of "publication import entity". Indeed, China could repeal this particular condition and still use the concept of "publication import entity". On the other hand, Article 43 of the *Publications Regulation* states that after obtaining a licence to import publications, an entity needs to obtain, in addition, a business licence from China's administrative department for industry and commerce. It seems unlikely that entities not registered in China could obtain such a business licence. In view of these elements, and the lack of US arguments and evidence on this issue, we consider that the United States has not demonstrated that the term "publication import entities" as it appears in Articles 41 and 42 could cover foreign enterprises not registered in China. We accept, however, that this term could cover enterprises registered in China.

7.394 As to whether the term "publication import entities" could cover Chinese branches of foreign-registered enterprises[303], it is sufficient to note that the United States has not asserted that Article 42, or Article 41, affects such branches in China and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine this issue further.[304]

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[302] The last paragraph of Article 43 of the *Publications Regulation* indicates that publication import entities must also comply with China's "laws and administrative regulations on foreign trade".

[303] We recall that China requires registration of branches.

[304] Also, it is in any event not clear to us from the information on the record whether Chinese laws or regulations on branches of foreign enterprises allow foreign-registered enterprises to set up Chinese branches in the sector at issue.

7.395 In sum, we note that "entities" in China do not automatically have the right to import the relevant products. Instead, they must obtain that right, by applying for approval as a publication import entity. Article 42 sets out the criteria for obtaining the right to import.

Paragraphs 5.1, 83(d) and 84(a)

7.396 We do not understand the United States to challenge the approval requirement as such. Rather, the United States' claim is based on the effect of the approval criteria. Indeed, the United States claims that the condition that publication import entities must be Chinese wholly state-owned enterprises as well as the other applicable conditions contained in Article 42 deprive "foreign importers and privately-held enterprises in China" of the right to import the relevant products, contrary to paragraphs 5.1, 83(d) and 84(a).[305] The other applicable conditions are that the applicant must: (i) have a name and articles of association, (ii) have a well-defined scope of business, (iii) have adequate funding, (iv) have a fixed business site, (v) meet conditions set out in laws or other regulations, and (vi) have a suitable organization and qualified personnel. In addition, approval may only be granted in case of conformity with the State plan for the number, structure and distribution of publication import entities. In response to a question from the Panel, China has stated that the State plan concerns the number, geographical and product coverage of publication import entities. China also pointed out that the State plan is not available in written form.[306]

7.397 We commence our analysis with the condition that a publication import entity must be a wholly state-owned enterprise. Since only wholly state-owned enterprises can be approved as publication import entities, and since pursuant to Article 41 only approved publication import entities can engage in the business of importing publications, "enterprises in China" other than wholly state-owned enterprises (i.e., foreign-invested enterprises in China and privately owned enterprises in China) cannot obtain the right to import the relevant products.

7.398 As "enterprises in China" other than wholly state-owned enterprises cannot obtain the right to import the relevant products, it follows that there cannot be any such enterprises that have the right to import these products. We consider, therefore, that China has failed to ensure that "all enterprises in China" have the right to import the publications concerned. This is contrary to China's obligations under paragraphs 5.1, 83(d) and 84(a) (in respect of enterprises in China other than wholly state-owned enterprises).

7.399 Regarding foreign enterprises not registered in China, we recall that the United States has not established that the term "publication import entities" as it appears in Article 42 could cover entities not registered in China. Therefore, it has not been demonstrated that it is because of the condition that publication import entities must be wholly state-owned enterprises that foreign enterprises not registered in China cannot obtain the right to import the relevant products. As pointed out above, even if the condition were repealed, foreign enterprises not registered in China could still not be approved if the term "publication import entities" does not cover such entities. We also recall that the United States has not asserted that Article 42 affects Chinese branches of foreign enterprises not registered in China.

7.400 Furthermore, regarding foreign individuals, the United States has not demonstrated that it is because of the condition that publication import entities must be wholly state-owned enterprises that foreign individuals cannot obtain the right to import the relevant products. We note that Article 42 is about establishment of publication import "entities". The fact that only wholly state-owned enterprises can be approved as publication import "entities" does not imply that foreign "individuals"

[305] United States' response to question No. 152.

[306] China's response to question No. 44. We note that China has not explained its reference to "product coverage".

could not be approved to engage in the business of importing publications. Whether they may be approved is in our view determined, not by Article 42, but by Article 41, which states, in effect, that only publication import entities may be approved and that "no individual" may engage in the business of importing publications without approval.[307]

7.401 Thus, on the basis of the foregoing considerations we conclude that Article 42, by imposing the condition that publication import entities need to be wholly state-owned, results, in combination with Article 41, in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a) in respect of enterprises in China other than wholly state-owned ones. The United States has not established that the relevant condition in Article 42 results in an inconsistency with the aforementioned paragraphs in respect of foreign enterprises not registered in China and foreign individuals. Nor has the United States established that the condition results in an inconsistency in respect of such enterprises and individuals when considered together with other challenged measures.

7.402 Regarding whether our conclusion extends also to enterprises wishing to import audiovisual products (which, to recall, include sound recordings), we note that China has indicated that with regard to importation entities for *finished* audiovisual products there is no approval process. China points out that Article 27 of the *2001 Audiovisual Products Regulation* provides for a designation process for entities wishing to import such products.[308] China argues that Article 42 is, therefore, not applied to these products.[309] We note that the United States has referred to the *Imported Cultural Products Rule* and the *Decisions on Non-Public-Owned Capital*, both of which post-date the *2001 Audiovisual Products Regulation*.[310] The former provides, in Article 4, that the "business of importing cultural products such as … audiovisual products … shall be carried out by state-owned cultural units designated or licensed by the [MOC]".[311] The latter provides in relevant part that "non-public capital … may not engage in the import business of cultural products such as … finished audiovisual products".[312] In fact, China itself stated that only wholly state-owned enterprises are permitted to import audiovisual products.[313]

7.403 In our view, the two measures identified by the United States do not demonstrate that Article 42 is applied to finished audiovisual products. The state ownership requirement is contained in those two measures, but those two measures do not depart from the designation requirement established by Article 27. In other words, in those two measures state ownership is not a condition applied as part of an approval process like the one established by Article 42 whereby applications may be submitted.[314] Therefore, we consider that the provisions on importing of finished audiovisual products which China applies are contained, not in Article 42, but, by virtue of Article 67 of the *Publications Regulation*, in Article 27 of the *2001 Audiovisual Products Regulation* and the *Imported Cultural Products Rule* and the *Decisions on Non-Public-Owned Capital*. The effect of these provisions is that importers must be designated, and that only state-owned entities may be designated. This is different, however, from Article 42 which says that only state-owned enterprises may be approved.

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[307] As indicated, we do not think that Article 41 determines whether foreign individuals may import publications for their personal consumption or use.

[308] China's response to question No. 25(b). We discuss Article 27 further below, in the Sub-section dealing with the *2001 Audiovisual Products Regulation*.

[309] China's comments on the United States' response to question No. 157.

[310] United States' responses to question Nos. 8 and 157.

[311] Exhibit US-10.

[312] Exhibit US-11.

[313] China's response to question No. 46(a).

[314] We recall that Article 4 of the *Imported Cultural Products Rule* refers to state-owned cultural units "designated or licensed" by the MOC.

7.404 In the light of the foregoing, we conclude that the state ownership requirement in Article 42 does not result in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a) in respect of enterprises in China that wish to import finished audiovisual products.

7.405 For audiovisual products imported *for publication*, China likewise argues that the *2001 Audiovisual Products Regulation* applies, not the *Publications Regulation*.[315] Article 5 of the *2001 Audiovisual Products Regulation* provides for a licensing process for importation entities wishing to import audiovisual products for publication. A permit is necessary to engage in importing.[316] There does not appear to be any process for submitting applications and obtaining a permit. Article 5 also contains no criteria to be followed by the MOC in deciding whom to approve as an importer of audiovisual products imported for publication. Indeed, the United States itself claims that the approval requirement in Article 5 introduces discretion.[317] Also, Article 5 talks about the State instituting a system of licensing; it does not indicate that existing approval processes, such as the one provided for in Article 42, would apply. We therefore consider that Article 5 specifies otherwise than Article 42. The *Imported Cultural Products Rule* appears to apply also to audiovisual products imported for publication. However, as we have explained above, we do not think this demonstrates that Article 42 is applied to such products, particularly since the *Imported Cultural Products Rule* does not depart from the licensing requirement established by Article 5.

7.406 Therefore, we consider that the provisions on the import of audiovisual products for publication which China applies are contained, not in Article 42, but in Article 5 of the *2001 Audiovisual Products Regulation* and the *Imported Cultural Products Rule*.[318] In the light of this, we conclude that the state ownership requirement in Article 42 does not result in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a) in respect of enterprises in China that wish to import audiovisual products for publication.

7.407 We now proceed to examine the next US claim in respect of Article 42. The United States claims that the other conditions in Article 42 which must be satisfied in order to obtain approval as a publication import entity – i.e., the conditions other than state ownership – also result in depriving "foreign importers and privately-held enterprises in China" of the right to import the relevant products. The United States argues that by imposing these other conditions, Article 42 reserves the right to import to a subset of wholly state-owned enterprises which satisfy these conditions.

7.408 We agree that the existence of the other conditions[319] implies that enterprises in China that do not satisfy these conditions cannot be approved as publication import entities and, hence, cannot obtain the right to import the relevant products. We recall in this respect that the second sentence of paragraph 84(b) of the Working Party Report sets forth a confirmation by China that "any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade". We are mindful of the fact that the US claims are not based on paragraph 84(b), but paragraphs 5.1, 83(d) and 84(a). However, we see no convincing reason to find that China may impose requirements for obtaining trading rights of the described type on foreign enterprises and foreign individuals (as confirmed by paragraph 84(b)), but not on enterprises in China.[320] Accordingly, we consider that China may impose on enterprises in China, and on foreign enterprises and foreign individuals, requirements for obtaining trading rights that serve customs and

[315] China's response to question No. 31(c) and China's comments on the United States' response to question No. 157.

[316] We discuss Article 5 further below, in the Sub-Section dealing with the *2001 Audiovisual Products Regulation.*

[317] United States' first written submission, para. 262.

[318] *The Decisions on Non-Public-Owned Capital* refer only to finished audiovisual products.

[319] For the other conditions, see *supra*, para. 7.396.

[320] We recall our view that the term "foreign enterprises" in paragraph 84(b) includes foreign-invested enterprises.

fiscal purposes, provided such requirements do not constitute a barrier to trade. We also note in this connection that the United States in response to a question from the Panel on paragraph 84(b) has referred to what it terms "normal background business regulation".[321] We observe in this respect that in this case we have no need to take a position on whether, under the rubric of "normal business regulation", China could impose, on enterprises in China, other requirements for obtaining trading rights. As we indicate below, even if China could do so, we would not reach any different conclusion in respect of the US claims at issue.

7.409 We note that the United States has not provided any elaboration as to why each of the conditions at issue is impermissible. In relation to five of these conditions: (i) name and articles of association, (ii) well-defined scope of business, (iii) adequate funding, (iv) fixed business site and (v) conditions set out in laws or other regulations – the United States has not advanced arguments or evidence sufficient to raise a presumption that they are maintained for purposes other than fiscal or customs purposes, or for purposes other than "normal business regulation". We note that in response to a question from the Panel, the United States has merely suggested, without explanation, that conditions like scope of business and business site "seem difficult to justify".[322] In the light of this, we conclude that the United States has not met its burden of establishing that, contrary to paragraphs 5.1, 83(d) or 84(a), these five conditions result in an impermissible denial of the right of enterprises in China to import the relevant publications. Also, we note that the United States has not established that the five conditions result in an inconsistency when considered together with other challenged measures.

7.410 In relation to the remaining two approval conditions – (i) suitable organization and qualified personnel and (ii) conformity with the State plan for the number, structure and distribution of publication import entities – we think it is readily apparent that they are not maintained for fiscal or customs purposes, or as "normal business regulation". We also note that this has been confirmed by China. China stated that these conditions are imposed to ensure a proper selection of those entities that participate in the review of the content of imported publications. China argues that an effective and efficient content review makes it necessary to approve only entities that have an appropriate organization, competent personnel and that ensure an appropriate geographical coverage.[323] China further argues that for content review to be efficient and smooth, it is necessary that only a limited number of entities be approved.[324]

7.411 Accordingly, since enterprises in China (including enterprises other than state-owned ones such as foreign-invested enterprises) that do not satisfy these two conditions cannot obtain the right to import the relevant products, it follows that there cannot be any such enterprises that have the right to import these products. We thus consider that by maintaining these conditions, China has failed to ensure that "all enterprises in China" have the right to import the publications concerned. This is contrary to China's obligations under paragraphs 5.1, 83(d) and 84(a) (in respect of enterprises in China other than wholly state-owned enterprises). We therefore conclude that Article 42, by imposing the conditions that publication import entities need to have a suitable organization and qualified personnel, and that approval may only be granted subject to conformity with the State plan for the number, structure and distribution of such entities, results, in combination with Article 41, in China acting inconsistently with its obligations under the aforementioned paragraphs in respect of enterprises in China.

7.412 Regarding whether our conclusion with respect to enterprises in China extends also to such enterprises wishing to import audiovisual products, we recall China's argument that in accordance

[321] United States' response to question No. 198(b).
[322] United States' response to question No. 52(b).
[323] China's first written submission, para. 156.
[324] *Ibid*., paras. 215-216.

with Article 67 of the *Publications Regulation* it would apply the *2001 Audiovisual Products Regulation*, not the *Publications Regulation*, to such enterprises.[325] The relevant provisions of the *2001 Audiovisual Products Regulation* – Article 5 (licensing system) and Article 27 (designation system) – do not indicate that interested enterprises could submit applications and obtain approval under Article 42 subject to satisfaction of the relevant conditions. Article 4 of the *Imported Cultural Products Rule* refers to the State plan for the number, structure and distribution of import entities. In our view, this does not demonstrate, however, that Article 42 is applied to audiovisual products, since the *Imported Cultural Products Rule* does not depart from the licensing and designation systems established by Articles 5 and 27.

7.413 Therefore, we consider that Articles 5 and 27 specify otherwise than Article 42 in respect of who may engage in importing of audiovisual products, and that, by virtue of Article 67, China would therefore apply these provisions, not Article 42, to enterprises wishing to import audiovisual products. In the light of this, we conclude that the relevant two conditions contained in Article 42 do not result in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a) in respect of enterprises in China wishing to import audiovisual products.

7.414 We note that the US claims with respect to the conditions other than state ownership also concern foreign enterprises not registered in China and foreign individuals. Regarding foreign individuals, we note that the United States has not demonstrated that it is because of these conditions set out in Article 42 that foreign individuals cannot obtain the right to import the relevant products. We recall in this regard our considerations above concerning the state ownership condition where we addressed the same issue.[326] We think they are relevant and applicable to the other conditions as well. We therefore conclude that the United States has not established that the relevant conditions in Article 42 result in an inconsistency with paragraphs 5.1, 83(d) and 84(a) in respect of foreign individuals. Also, we note that the United States has not established that the conditions result in an inconsistency when considered together with other challenged measures.

7.415 Regarding foreign enterprises not registered in China, we recall that the United States has not established that the term "publication import entities" as it appears in Article 42 could cover entities not registered in China. Therefore, it has not been demonstrated that it is because of the conditions in question that foreign enterprises not registered in China cannot obtain the right to import the relevant products. Even if the conditions were repealed, foreign enterprises not registered in China could still not be approved if the term "publication import entities" does not cover such entities. We also recall that the United States has not asserted that Article 42 affects Chinese branches of foreign enterprises not registered in China. We therefore conclude that the United States has not established that the relevant conditions in Article 42 result in an inconsistency with paragraphs 5.1, 83(d) and 84(a) in respect of foreign enterprises not registered in China. Also, we note that the United States has not established that the conditions result in an inconsistency when considered together with other challenged measures.

Paragraphs 5.2 and 84(b)

7.416 The United States makes further claims in respect of Article 42, based on paragraphs 5.2 and 84(b). According to the United States, Article 42 discriminates against foreign enterprises and individuals by according them less favourable treatment relative to wholly state-owned enterprises with regard to the right to import the relevant publications. The United States submits that foreign

[325] China's response to question No. 31(c) and China's comments on the United States' response to question No. 157.

[326] See *supra*, para. 7.400.

enterprises and individuals are discriminated against because they are not wholly state-owned enterprises.[327]

7.417 We first recall our view that the phrase "foreign enterprises" in paragraphs 5.2 and 84(b) covers foreign enterprises not registered in China and also foreign-invested enterprises in China. In this regard, we refer to our earlier finding that Article 42, by imposing the condition that publication import entities need to be wholly state-owned, results, in combination with Article 41, in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a) in respect of enterprises in China other than wholly state-owned ones, including foreign-invested enterprises. We therefore see no need to offer additional findings regarding whether, as a result of Article 42, China has also acted inconsistently with its obligations under paragraphs 5.2 and 84(b) in respect of the same enterprises. We thus exercise judicial economy.

7.418 So far as concerns foreign individuals, we recall that pursuant to Article 42 only wholly state-owned enterprises can be approved as publication import entities, and that pursuant to Article 41 approved publication import entities can engage in the business of importing publications. Thus, we agree that as a result of Article 42 wholly state-owned enterprises can obtain the right to import publications. However, as previously pointed out, the United States in our view has not demonstrated that it is because of the state ownership condition in Article 42 that foreign individuals cannot obtain the right to import the relevant products. Whether they may be approved as importers is in our view determined, not by Article 42, but by Article 41. Indeed, even if China were to repeal the state ownership condition in Article 42, wholly state-owned enterprises could still obtain the right to import publications while foreign individuals would still be unable to obtain that right. We therefore conclude that the United States has not established that the state ownership condition in Article 42 results in China acting inconsistently with its obligations under paragraphs 5.2 and 84(b) in respect of foreign individuals. Also, we note that the United States has not established that the condition results in an inconsistency when considered together with other challenged measures.

7.419 Regarding foreign enterprises not registered in China, we recall our view that the United States has not demonstrated that it is because of the state ownership condition that foreign enterprises not registered in China cannot obtain the right to import the relevant products. As pointed out above, even if the condition were repealed, foreign enterprises not registered in China could still not be approved if the term "publication import entities" does not cover such entities, while wholly state-owned enterprises could continue to be approved. We also recall that the United States has not asserted that Article 42 affects Chinese branches of foreign enterprises not registered in China. We therefore conclude that the United States has not established that the state ownership condition in Article 42 results in China acting inconsistently with its obligations under paragraphs 5.2 and 84(b) in respect of foreign enterprises not registered in China. Also, we note that the United States has not established that the condition results in an inconsistency when considered together with other challenged measures.

7.420 The United States claims, in addition, that foreign enterprises are subject to further discrimination. In support of this claim, the United States refers to a reply from China to a Panel question. In that reply, China states, in part, that the "criteria [set out in Article 42] cannot be met by enterprises other than wholly state-owned enterprises".[328] The United States infers from this that China has made a "determination" that foreign enterprises can never fulfil the criteria contained in Article 42.[329] The United States considers this to be inconsistent with paragraphs 5.2 and 84(b).

[327] United States' response to question No. 152.
[328] China's response to question No. 46(b).
[329] United States' response to question No. 152.

7.421 In view of China's reply, it appears to us that this claim of the United States concerns the conditions set out in Article 42, other than the condition concerning state ownership.[330] The United States appears to assert that, unlike wholly state-owned enterprises, foreign enterprises could never satisfy these conditions and that they therefore could not be approved as publication import entities. As a consequence, unlike wholly state-owned enterprises, they could not obtain the right to import the relevant products.

7.422 We recall at the outset that the measure at issue is the *Publications Regulation*, and specifically Article 42 thereof, and not an alleged separate "determination" by China. We see nothing in the text or nature of the conditions at issue which would indicate that foreign-invested enterprises registered in China could never satisfy these conditions.[331] Moreover, regarding foreign enterprises not registered in China, we note that it is not clear that China's reply was intended to address such enterprises. The United States, for its part, has not offered any explanation as to why the relevant conditions could not be satisfied by such enterprises. Finally, we recall that the United States has not established that Article 42 contemplates foreign enterprises not registered in China as possible "publication import entities". Thus, the United States has also not demonstrated that it is because such enterprises are unable to satisfy the relevant conditions that they cannot obtain the right to import the products in question. In addition, we recall that the United States has not asserted that Article 42 affects Chinese branches of foreign enterprises not registered in China.

7.423 We further note that if China in its reply intended to assert that it would be costly for enterprises other than wholly state-owned ones to meet the conditions at issue, particularly the one relating to the need for a suitable organization and competent personnel, and that this would dissuade enterprises that are not wholly state-owned from seeking approval as publication import entities, we note that China has provided no support for such an assertion.[332] In the absence of indications to the contrary, we are not persuaded that the cost of meeting the relevant conditions would effectively allow only wholly state-owned enterprises to meet these conditions.

7.424 In the light of the foregoing, we conclude that the United States has not established that the relevant conditions contained in Article 42 "can never [be] fulfil[led]" by foreign enterprises and that they, therefore, result in China discriminating against foreign enterprises contrary to its obligations under paragraphs 5.2 and 84(b). Moreover, we note that the United States has not established that an inconsistency would arise if Article 42 is considered together with other challenged measures.

Paragraph 84(b)

7.425 There is one more US claim concerning Article 42 which we need to address. The United States claims that Article 42 is inconsistent with paragraph 84(b) because it grants trading rights in a discretionary way. The United States argues that applicants must satisfy the "State plan for the total number, structure and distribution of publication import entities". According to the United States, China has complete discretion in formulating this plan and in determining whether particular applicants satisfy this plan.[333] The United States submits that the discretionary nature of Article 42 is

[330] We recall that we have at any rate already offered findings under paragraphs 5.1, 83(d) and 84(a) in relation to the condition concerning state ownership.

[331] China's response to question No. 46(b) in our view does not make a statement regarding how the conditions are to be interpreted as a matter of Chinese law.

[332] China's response to question No. 46(b) should be read together with its reply to question No. 46(a). There, China states that the cost incurred by enterprises in the course of content review is substantial. In reply to question No. 185, China has, however, provided no estimate of the cost involved, stating instead that the relevant costs consist of human resource costs and the cost of equipment, facilities and premises used for content review.

[333] United States' response to question No. 152.

illustrated by China's statement, made in response to a question from the Panel, that State plans are not available in written form.

7.426 We note at the outset China's reply to a question from the Panel to the effect that foreign individuals and foreign enterprises are not subject to the State plan because publication import entities must be wholly state-owned enterprises.[334] We are not convinced by this argument. The condition that publication import entities be state-owned is a separate and independent condition, and there is no apparent connection with the requirement that applications must be in conformity with the State plan.[335] Accordingly, we must, and do, review the State plan requirement separately.

7.427 We also recall that Article 42 deals with the establishment of "publication import entities" and that the State plan concerns the number, structure and distribution of such entities. As a result, we do not see how the State plan requirement in Article 42 demonstrates that China does not grant foreign "individuals" the right to import in a non-discretionary way. Regarding foreign enterprises, we recall our view that the phrase "foreign enterprises" in paragraph 84(b) covers both foreign-invested enterprises in China and foreign enterprises not registered in China. We further recall our view that the term "publication import entities" as it appears in Article 42 can cover foreign-invested enterprises, but that it has not been demonstrated that it can also cover foreign enterprises not registered in China. Thus, even if as a result of the State plan requirement China enjoyed discretion in the granting of trading rights to publication import entities, the United States has not established that the publication import entities subject to the State plan requirement could include foreign enterprises not registered in China. We recall, finally, that the United States has not asserted that Article 42 affects Chinese branches of foreign enterprises not registered in China. On the other hand, with regard to foreign-invested enterprises, we need to examine whether the State plan requirement means that China does not grant such enterprises the right to import in a non-discretionary way.

7.428 In undertaking this task, we note that, pursuant to Article 42, applications for the establishment of publication import entities may be approved only if they conform to the State plan for the total number, structure and distribution of publication import entities. Thus, Article 42 specifies all additional criteria which are to be, and may be, taken into account. Under Article 42, the GAPP[336] does not have the discretion to apply other criteria.

7.429 We agree that Article 42 allows China to elaborate a plan for the total number, structure and distribution of publication import entities. We are not persuaded, however, that the GAPP would enjoy discretion in determining whether particular applicants satisfy that plan.[337] For instance, the State plan might envisage that there should, in total, be no more than, say, 60 approved publication import entities, and that each approved entity must be able to ensure coverage of a specified number of customs areas.[338] In our view, a determination of whether a particular application is consistent with a State plan of the aforementioned kind would not require the exercise of discretion. In the absence of evidence demonstrating otherwise, we see no basis for assuming that under the relevant State plan the GAPP would have discretion in granting trading rights to foreign-invested enterprises in China.

7.430 China has told the Panel that the State plan is not available in written form. As we understand it, however, if China wishes to apply criteria like the total number, structure and distribution of publication import entities, it can only do so pursuant to a State plan. Moreover, the fact that the State

[334] China's response to question No. 174.

[335] See also Article 51 of the *1997 Electronic Publications Regulation*.

[336] Pursuant to Article 43, the GAPP is charged with examining and approving applications.

[337] In reply to question No. 7, the United States asserts that the GAPP would have discretion in applying the State plan. However, no evidence or argument is provided in support of this assertion.

[338] China's first written submission, paras. 214-216.

plan may not need to be made available in written form does not demonstrate that none exists, or that the plan changes with every application.

7.431 Based on the foregoing considerations, we are not convinced that, as a result of the requirement in Article 42 concerning conformity with the State plan, China does not approve applications in a non-discretionary way, and that it therefore does not grant foreign-invested enterprises in China the right to import in a non-discretionary way.[339]

7.432 In sum, in the light of the above, we conclude that the United States has not established that Article 42 results in China acting inconsistently with its commitment in paragraph 84(b) to grant foreign-invested enterprises in China, foreign enterprises and foreign individuals trading rights in a non-discretionary way. We also note that the United States has not established that the relevant requirement in Article 42 results in an inconsistency when considered together with other challenged measures.

Article 41

7.433 Having disposed of the US claims in respect of Article 42, we turn, finally, to address the US claim in respect of Article 41. The United States argues that pursuant to Article 41 the importation of newspapers and periodicals is further restricted to wholly state-owned enterprises specially "designated" by the Chinese Government. The United States considers that this designation process injects further qualifying criteria and government discretion into a process that China committed to be "non-discretionary" and claims that it is therefore inconsistent with China's trading rights commitments. According to the United States, there are no independent criteria governing how the GAPP designates importers of newspapers and periodicals, and so the GAPP is authorized to designate based on its own discretion the entities of its own choosing.[340] The United States points out that interested entities are not even afforded the opportunity to submit applications for approval.[341]

7.434 Article 41 provides in relevant part that "no entity or individual shall engage in the business of importing newspapers or periodicals without being designated". It also provides that the business of importing publications is to be operated by publication import entities. Thus, it would appear that China can designate only publication import entities. China has confirmed that the GAPP can only designate as importers of newspapers or periodicals, publication import entities that have been approved by the GAPP under Article 42.[342] China has further confirmed that the GAPP designates publication import entities at its own initiative and that there is no application process.[343]

7.435 We note that the United States does not explicitly identify the legal basis for its claim. The United States has, however, referred to China's commitment to grant trading rights in a "non-discretionary" way. We therefore proceed on the assumption that the United States' claim is based upon paragraph 84(b).

7.436 In examining this claim, we observe that designation under Article 41 is not automatic. Rather, it is up to the GAPP to initiate the designation process. Moreover, pursuant to Article 41, the GAPP may only designate as importers of newspapers or periodicals publication import entities that are GAPP-approved. Furthermore, in response to a question from the Panel, China has indicated that

[339] We recall, though, that we have found earlier that the requirement gives rise to an inconsistency with paragraphs paragraphs 5.1, 83(d) and 84(a).
[340] United States' response to question No. 7.
[341] United States' response to question No. 9.
[342] China's responses to question Nos. 25(b) and 26.
[343] China's response to question No. 25(a).

the designation requirement in Article 41 "result[s] in [a] limited number of importers".[344] While keeping the number of designated importers limited, the GAPP is free to decide whom it wishes to designate from among the GAPP-approved publication import entities. Accordingly, under Article 41, China needs to exercise discretion in order to grant the right to import newspapers or periodicals. We therefore conclude that, as a result of Article 41, China in respect of newspapers or periodicals does not grant trading rights to publication import entities in a non-discretionary way.

7.437 In view of the fact that the discretion relates to the designation of publication import entities, we conclude that Article 41 does not result in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. Furthermore, we recall our view that the term "publication import entities" as it appears in Article 41 can cover enterprises registered in China, but that the United States has not established that it can also cover enterprises not registered in China. We also recall that the United States has not asserted that Article 41 affects Chinese branches of foreign enterprises not registered in China. We therefore conclude that, as a result of Article 41, China in respect of newspapers and periodicals does not grant trading rights to foreign-invested enterprises in China in a non-discretionary way and that, for that reason, China is acting inconsistently with its obligation under paragraph 84(b). We also find, however, that the United States has not established that as a result of Article 41 China does not grant trading rights to foreign enterprises not registered in China in a non-discretionary way. We thus conclude that the United States has not established an inconsistency with paragraph 84(b) in respect of such enterprises.

7.438 Regarding the US argument that the designation requirement "injects qualifying criteria" into the process of granting trading rights, we observe that we do not see how it does. The United States has itself stated in response to a question from the Panel that the designation of import entities is discretionary and that there are no independent criteria governing how the competent agency – the GAPP in this case – designates importers.[345]

(v) Importation Procedure

7.439 The **United States** contends that the *Importation Procedure* implements Article 43 of the *Publications Regulation*.[346] In the United States' view, it confirms, and to some extent elaborates upon, the licensing requirements for the importation of reading materials, AVHE products, and sound recordings into China. The United States notes in this regard that the *Importation Procedure* begins with the heading "Licensing Requirements". The United States further notes that pursuant to paragraph 2 under this heading of the *Importation Procedure*, as in the *Publications Regulation*, the second condition for an enterprise to import these products is that it is a wholly state-owned enterprise. Likewise, the United States points out, in accordance with paragraph 8 under the same heading of the *Importation Procedure* licenses are limited based on the "State plan regarding the total number, structure and deployment of publication import business units".[347] Accordingly, the United States submits, the *Importation Procedure* reconfirms the prohibition on any foreign-invested

[344] China's response to question No. 172. In its reply, China suggests that the purpose of its various designation requirements is not to limit the number of importers, but to select entities allowed to import cultural goods. At the same time, as indicated, China specifically noted that "the designation system would result in a limited number of importers".

[345] United States' response to question No. 9.

[346] The United States submits that since the *Importation Procedure* was established pursuant to Article 43 of the *Publications Regulation*, the full scope of the definition of "publication" – including reading materials, AVHE products, and sound recordings – contained in the *Publications Regulation* is thereby incorporated into the *Importation Procedure*.

[347] According to the United States, the finite supply of licenses for the importation of reading materials, AVHE products, and sound recordings, is underscored by the heading "Quantity Restrictions", which immediately follows the "Licensing Requirements" heading in the *Importation Procedure*, and which contains the entry – "Yes".

enterprise or foreign individual, or any privately-owned Chinese enterprise, engaging in the importation of reading materials, AVHE products, and sound recordings.

7.440 The United States claims that since the *Importation Procedure* not only states that only wholly state-owned enterprises are allowed to import reading materials, AVHE products, and sound recordings into China, but also reinforces that such enterprises are subject to the same State "number, structure and deployment" requirements set forth in Article 42 of the *Publications Regulation*, it restricts trading rights and is, therefore, inconsistent with China's trading rights commitments.

7.441 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of paragraphs 2 and 8 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[348]

7.442 **China** argues that the Panel should not examine the *Importation Procedure*, because the document submitted by the United States is a webpage from the GAPP's website which is intended to provide guidance for applicants. China is of the view that it would not be necessary for the Panel to make a ruling on the *Importation Procedure* because it cannot serve as the legal basis for any administrative acts.

7.443 The **United States** responds that the *Importation Procedure* is specifically identified in its panel request and is therefore within the Panel's terms of reference. Additionally, the United States argues that the *Importation Procedure* is legally binding on the GAPP and sets out the requirements and examination and approval procedures for applicants seeking to import reading materials into China.

7.444 The **Panel** recalls its decision at paragraph 7.215 above that, notwithstanding the United States' arguments to the contrary, the *Importation Procedure* does not in and of itself set forth rules or norms of general and prospective application and as such does not qualify as a "measure" within the meaning of Article 3.3 of the DSU. Therefore, the Panel cannot, and does not, make a ruling on the US claims in respect of the *Importation Procedure*.

(vi) 1997 Electronic Publications Regulation

7.445 The **United States** notes that Article 2 of the *1997 Electronic Publications Regulation* defines "electronic publications" as follows:

> "Electronic publications as stated in these Regulations is a form of popular propagation medium which refer to the saving of edited photo, text, audio and video information in the form of digital codes on magnetic, optical and electronic media. They can be accessed for reading and usage through computers or equipment with similar functions so that they can express ideas, disseminate knowledge and accumulate culture, and they can be reproduced and distributed. The media forms include soft floppy disk (FD), read-only CD (CD-ROM), interactive CD (CD-I),

[348] United States' response to question No. 1.

photo-CD, DVD-ROM, IC cards and other forms as recognized by the General Administration of Press and Publication."[349]

7.446 The United States further notes that Article 8 of the *1997 Electronic Publications Regulation* imposes a licensing system on the importation of electronic publications, providing that no entity or individual may import electronic publications into China without a permit.

7.447 Furthermore, the United States notes that according to Article 50 the GAPP must consult with the relevant authorities to determine the total number, structure and deployment of enterprises importing electronic publications. Article 51 further conditions approval to engage in the importation of electronic publications on whether the applicant enterprise satisfies the government's plans for total number, structure and deployment.

7.448 In the United States' view, the *1997 Electronic Publications Regulation* thus implements the restrictive approval and licensing requirements contained in the *Publications Regulation* and the *Importation Procedure*. In so doing, the United States maintains, it reconfirms the prohibition on any foreign-invested enterprise or foreign individual, or any privately owned Chinese enterprise, engaging in the importation of electronic publications.

7.449 The United States claims that the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments by imposing limits on which enterprises may import electronic publications into China. The United States recalls that Articles 50 and 51 limit which enterprises may engage in the importation of electronic publications according to Chinese Government plans for the "total number, structure and deployment" of such enterprises. In addition, the United States submits that Articles 52-55 of the *1997 Electronic Publications Regulation* further require approval by multiple layers of Chinese Government decision-makers before an enterprise may import electronic publications. The United States considers that by conditioning trading rights on Chinese Government plans for structuring these activities and on successfully obtaining Chinese Government approvals, the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments. According to the United States, it injects qualifying criteria and government discretion into a process that China committed to be "non-discretionary". In response to a question from the Panel, the United States further claimed that Article 8 is also inconsistent with China's trading rights commitments, by not allowing all enterprises in China and all foreign enterprises and individuals to import electronic publications and by granting trading rights in a discriminatory and discretionary way.[350]

7.450 Also, in response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 8 and 50-55 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[351]

7.451 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the

[349] The United States adds that despite the broad scope of this definition, it understands that electronic publications include only books, periodicals, newspapers, and audio books saved as digital codes on the media forms set out above, but do not include AVHE products and sound recordings.

[350] United States' response to question No. 153.

[351] United States' response to question No. 1.

WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.452 The **Panel** recalls that China responded to the Panel's questions with respect to the content of the *1997 Electronic Publications Regulation* by saying that it has been repealed and replaced by the *2008 Electronic Publications Regulation*. China contends that the *1997 Electronic Publications Regulation* has ceased to have any legal effect.[352] According to China, the *1997 Electronic Publications Regulation* was replaced in April 2008, when the *2008 Electronic Publications Regulation* came into force.[353] This was well after 27 November 2007, the date of establishment of the Panel. In this respect, the Appellate Body explained, in *EC – Bananas III* (*Ecuador Second Recourse to Article 21.5)*, that:

> "[O]nce a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference. We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue."[354]

7.453 We note that the United States has indicated that, notwithstanding China's contention that the measure has been repealed, it requests a finding from the Panel on the consistency of the *1997 Electronic Publications Regulation* with China's trading rights commitments under the Accession Protocol.[355] Moreover, China has never conceded that the *1997 Electronic Publications Regulation* is WTO-inconsistent. Being administrative regulations promulgated by the GAPP, the relevant provisions could also be easily re-imposed. In the light of these elements, we think that despite China's position that the *1997 Electronic Publications Regulation* no longer has legal effect, a ruling by us on the US claims could assist in securing a positive solution to the dispute.[356] We thus find it appropriate in this case to address the merits of the US claims that the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments under the Accession Protocol.[357]

7.454 Before examining the US claims, we note that the parties appear to agree that "electronic publications" within the meaning of the *1997 Electronic Publications Regulation* include books, periodicals, newspapers and audio books saved as digital codes on the media forms set out in Article 2 of the Regulation, but do not include audiovisual products.[358] We see no reason to disagree.

7.455 Turning to the specific claims by the United States, we recall that the United States has identified Articles 8 and 50-55 of the *1997 Electronic Publications Regulation* as the provisions giving rise to an inconsistency with China's trading rights commitments. Before addressing the merits of these claims, however, we note that in comments on a US reply to a question from the Panel, China argues that the provisions identified by the United States have been superseded by the *Publications*

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[352] China's response to question No. 24(a) and China's response to question No. 90 (with respect to the applicability of the *1997 Electronic Publications Regulation* in the context of the US claim under the GATS).

[353] This is supported by Article 63 of the *2008 Electronic Publications Regulation* which provides that the *1997 Electronic Publications Regulation* is to be repealed upon entry of the force of the former regulation.

[354] Appellate Body Report on *EC – Bananas III* (*Article 21.5 – Ecuador II*), para. 270.

[355] United States' first oral statement, paras. 44-46.

[356] Article 3.7 of the DSU.

[357] We note that while a panel may make findings with respect to a repealed measure, it would not be appropriate to make recommendations pursuant to Article 19 of the DSU with respect to a WTO-inconsistent repealed measure that has ceased to have legal effect. See Appellate Body Reports on *US – Certain EC Products*, para. 81; *US – Upland Cotton*, para. 272; and *EC – Bananas III (Ecuador Second Recourse to Article 21.5)*, para. 271.

[358] United States' first written submission, footnote 29; China's response to question No. 24(c).

Regulation.[359] China notes that Article 2 of the *Publications Regulation* makes clear that that Regulation covers also electronic publications.

7.456 We agree that the *Publications Regulation* covers electronic publications. But the mere fact that the *Publications Regulation* covers electronic publications, and that the *Publications Regulation* postdates the *1997 Electronic Publications Regulation*, does not demonstrate that the relevant provisions of the *1997 Electronic Publications Regulation* were not applicable on the date of establishment of the Panel, or would not have been applied by China. For instance, it seems reasonably possible that the *Publications Regulation* and the *1997 Electronic Publications Regulation* were concurrently applicable to electronic publications. In support of its contention that the *Publications Regulation* superseded the *1997 Electronic Publications Regulation*, China has offered no analysis of the legal relationship between the two regulations at issue. Nor has it referred, for instance, to any separate rules or jurisprudence which would support its contention.[360] In these circumstances, we are unable to accept China's assertion that the provisions cited by the United States had been superseded by the *Publications Regulation*.

Article 8

7.457 Article 8 provides that no entity or individual may engage in business operations concerning electronic publications without approval. Article 8 also stipulates that the import of electronic publications is a business operation concerning electronic publications.

7.458 We note that the United States first identified Article 8 as a provision giving rise to an inconsistency with China's trading rights commitments in response to a question which the Panel put forward after the first substantive meeting with the parties.[361] In its response, the United States did not, however, explain why and how Article 8 in its view gives rise to an inconsistency. After the second substantive meeting with the parties, the Panel inquired about the US claim under Article 8 in a further question to the United States.[362] The purpose of that question was to help the Panel understand what the US claim concerning Article 8 was and to determine on that basis whether the United States had made a prima facie case in its written submissions or oral statements.

7.459 In its response to the additional question from the Panel, the United States explained that its claims in respect of Article 8 are that China does not allow all enterprises in China and all foreign enterprises and individuals to import electronic publications and that China grants trading rights in a discriminatory and discretionary way.[363] Thus, based on that second response, we understand the United States to raise claims under paragraphs 5.1, 83(d) and 84(a) as well as under paragraphs 5.2 and 84(b).

7.460 In the relevant response, the United States refers back to its first written submission. As noted, however, the United States' first written submission does not even specify Article 8 as a provision that is being challenged. Since the United States has failed to identify any other references

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[359] China's comments on the United States' response to question No. 154.

[360] We note that Article 1 of the *1997 Electronic Publications Regulation* states that that Regulation was formulated in accordance with the *Publications Regulation* in force at the time. Similarly, Article 1 of the *2008 Electronic Publications Regulation* states that that Regulation was formulated in accordance with the *Publications Regulation* in force. To us, this does not indicate that the *Publications Regulation* in force has superseded the *1997 Electronic Publications Regulation*.

[361] United States' response to question No. 1. Article 8 is mentioned at para. 45 of the United States' first written submission in a section entitled "Factual Background". Article 8 is not mentioned, however, in the section of the same written submission – Section IV – where the United States alleges that China's measures are inconsistent with China's trading rights commitments.

[362] United States' response to question No. 153.

[363] *Ibid*.

to Article 8 in its second written submission or its oral statements, the US reply confirms that the United States explained the nature and basis for the claimed inconsistency of Article 8 for the first time in response to the Panel question after the second meeting.

7.461 We recall that the United States as the complaining party bears the burden and responsibility of establishing a prima facie case of inconsistency.[364] From the foregoing it is clear that the United States has not made a prima facie case in its written submissions or oral statements to the Panel. Also, as the United States had several opportunities to establish its claim, there was no need for the Panel to afford the United States an additional opportunity to do so.

7.462 Panels are under a duty of impartiality towards the parties. The Appellate Body report on *Japan – Agricultural Products II* indicates in this respect that this duty implies, in part, that panels must not help the complaining party by making a prima facie case for it.[365] Equally, it would be improper, in our view, for a panel to help the complaining party meet its burden of establishing a prima facie case. In the instant case, we consider that we would, in effect, be helping the United States if we were to allow it to try to make a prima facie case for the first time in response to a Panel question put forward after the second meeting. When the Panel put forward the relevant question after the second meeting, the United States did not have any further opportunity to address the Panel at its own initiative. In the light of this, and since the United States has not used the previous opportunities given to it to try to make a prima facie case, it would, in our view, be improper for the Panel to give the United States such a further opportunity.

7.463 As a consequence, we rest our determination as to whether the United States has made a prima facie case, not on the US reply to the Panel's question, but on the US written submissions and oral statements to the Panel. As indicated, however, the US reply serves to confirm that the United States has explained the nature and basis of its claims concerning Article 8 only in its response to the Panel's question, and that the United States has not met its burden of making a prima facie case in its written submissions or oral statements. We therefore conclude that the United States has not established that Article 8 results in China acting inconsistently with paragraphs 5.1, 83(d) and 84(a) or paragraphs 5.2 and 84(b). Also, we note that the United States has not established that Article 8 results in an inconsistency when considered together with other challenged measures.

Articles 50-51

7.464 We now turn to analyse the US claims in relation to Articles 50 and 51. Article 50 provides that the GAPP, together with other agencies, must draw up plans for the total number, structure and deployment of electronic publication import entities. Article 51 stipulates that the GAPP must only approve applications for the establishment of an electronic publication import entity if it fits in with these plans.

7.465 According to the United States, Articles 50 and 51 are inconsistent with China's trading rights commitments because they inject qualifying criteria and government discretion into a process that China committed to be "non-discretionary". Thus, we understand the United States to raise a claim under paragraph 84(b), similar to the one it has raised in respect of a parallel provision in Article 42 of the *Publications Regulation*.

[364] See Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.
[365] See Appellate Body Report on *Japan – Agricultural Products II*, para. 129.

7.466 In response to a question from the Panel, the United States identified a further claim, based, it seems, on paragraphs 5.2 and 84(b), alleging "discrimination" against foreign importers and privately-held importers in China.[366]

7.467 At paragraph 259 of its first written submission, the United States contends, as noted above, that the *1997 Electronic Publications Regulation* is inconsistent with China's trading rights commitments by imposing limits on which electronic publication import entities may import electronic publications into China. However, the same paragraph identifies only one commitment with which China is alleged to be acting inconsistently – the commitment concerning the "non-discretionary" grant of trading rights. We therefore do not consider that the United States at paragraph 259 meant to put forward an additional claim.[367]

7.468 Finally, we note that in response to a question from the Panel, the United States has asserted that the three criteria for which the GAPP is to elaborate plans are inconsistent with the second sentence of paragraph 84(b), which makes clear that any requirements for obtaining trading rights must be for customs and fiscal purposes only and must not constitute a barrier to trade.[368]

7.469 Before examining these US claims, we note China's argument that the plans for the total number, structure and deployment of electronic publication import entities are not applicable to foreign enterprises and individuals.[369] China's argument is based on the state ownership requirement contained in Article 42 of the *Publications Regulation*.[370] Neither Article 50 nor Article 51 sets out such a requirement, however. As a result, we are unable to accept China's argument.

Paragraph 84(b)

7.470 We address first the claim concerning the commitment to grant trading rights in a "non-discretionary" way. We note that the plans referred to in Articles 50 and 51 exhaustively list the criteria which are to be, and may be, taken into account by the GAPP in addition to those specified in Article 51. Thus, we do not think that the GAPP has discretion, under Article 51, to apply additional criteria which would determine whether or not applications are approved.

7.471 In response to a question from the Panel, the United States contended that the plans for the total number, structure and distribution of electronic publication import entities are discretionary because they are formulated and applied according to the preferences of the GAPP.[371] It is correct that Article 50 requires the GAPP to elaborate plans for the total number, structure and distribution of electronic publication import entities. We are not persuaded, however, that the GAPP would enjoy discretion in determining whether particular applicants satisfy these plans. As we have explained at paragraph 7.429 above when discussing the State plan referred to in Article 42 of the *Publications Regulation*, in the absence of evidence to the contrary, we do not think we can simply assume that under the relevant plans the GAPP would enjoy discretion in granting trading rights. Regarding the United States' assertion that the GAPP would have discretion in applying the plans, we note that no evidence or argument has been provided in support of this assertion.

7.472 We agree that the "total number, structure and deployment of electronic publication import entities" can be viewed as three separate "qualifying criteria". The United States has not convinced us, however, that the mere existence of these criteria demonstrates that the GAPP has discretion

[366] United States' response to question No. 154(b).
[367] The United States' response to question No. 154(b) appears to confirm that the United States did not mean to put forward an additional claim.
[368] United States' response to question No. 162.
[369] China's comments on the United States' response to question No. 154.
[370] China's response to question No. 174.
[371] United States' response to question No. 154(b).

whether or not to approve particular applications.[372] With regard to the fact that the GAPP's plans appear not to be available in written form, we refer to our considerations at paragraph 7.430 above.

7.473 Moreover, we note that Articles 50 and 51 are concerned with "electronic publication import entities". The term "electronic publication import entities" indicates to us that these provisions do not deal with foreign individuals.[373] We further observe that Articles 50 and 51 do not explicitly state whether "electronic publication import entities" need to be registered in China. We recognize that the term "electronic publication import entity" is unqualified. In our view, this does not necessarily mean, however, that the term could cover also foreign enterprises not registered in China. We note in this respect that we have not been given any other trade-related Chinese laws or regulations that could indicate whether an "import entity" needs to be registered in China. Also, Article 55 of the *1997 Electronic Publications Regulation* states that after obtaining a licence to import electronic publications, an entity needs to obtain, in addition, a business licence from the local administrative department for industry and commerce. It seems unlikely that entities not registered in China could obtain such a business licence. In view of these elements, and the lack of US arguments and evidence on this issue, we consider that the United States has not demonstrated that the term "electronic publication import entities" as it appears in Articles 50 and 51 could cover foreign enterprises not registered in China. We accept, however, that the term "electronic publication import entities" could cover foreign-invested enterprises registered in China.

7.474 As to whether the term "electronic publication import entities" could cover Chinese branches of foreign-registered enterprises, it is sufficient to note that the United States has not asserted that the *1997 Electronic Publications Regulation* affects branches in China and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine this issue further.[374]

7.475 It follows that even if as a result of the requirement in Articles 50 and 51 concerning conformity with the plans China enjoyed discretion in the granting of trading rights to electronic publication import entities, the United States has not established that the electronic publication import entities subject to the requirement could include foreign enterprises not registered in China. Also, as indicated, the United States has not asserted that Articles 50 and 51 affect Chinese branches of foreign enterprises not registered in China.

7.476 With regard to enterprises registered in China, specifically foreign-invested enterprises, we recall our view that the term "electronic publication import entities" could cover such enterprises. We are, however, not convinced, based on the above considerations, that, as a result of the requirement in Articles 50 and 51 concerning conformity with the plans, China does not approve applications for the establishment of "electronic publication import entities" in a non-discretionary way, and that it therefore does not grant such entities the right to import in a non-discretionary way.

7.477 Consequently, we conclude that the United States has not established that Articles 50 and 51 result in China acting inconsistently with its commitment in paragraph 84(b) to grant trading rights to foreign enterprises and foreign individuals in a non-discretionary way. Also, we note that the United

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[372] The fact that China must elaborate plans using these criteria, as noted by the United States in its reply to question No. 162, in our view does not demonstrate that the GAPP has discretion whether or not to approve particular applications based on the elaborated plans.

[373] In contrast, Article 8 refers to individuals, stating that no entity or individual may, without a permit, engage in electronic publication business operations such as the import of such publications.

[374] Also, it is in any event not clear to us from the information on the record whether Chinese laws or regulations on branches of foreign enterprises allow foreign-registered enterprises to set up Chinese branches in the sector at issue.

States has not established that Articles 50 and 51 result in an inconsistency when considered together with other challenged measures.

Paragraphs 5.2 and 84(b)

7.478 Regarding the second US claim in respect of Articles 50 and 51, the United States argues that the plans for the total number, structure and deployment discriminate against foreign importers and privately-held importers in China because, allegedly, these importers are "held by the GAPP to be categorically incapable" of satisfying this plans. In support of this allegation, the United States refers to a reply from China to a question from the Panel.[375]

7.479 We note that the United States first indicated that paragraphs 5.2 and 84(b) were a basis for its claim in response to a Panel question put forward after the second meeting. For the same reasons as those we have given above in relation to the US claims concerning Article 8, we rest our determination as to whether the United States has made a prima facie case of inconsistency with paragraphs 5.2 and 84(b), not on the US response to the Panel's question, but on the US written submissions and oral statements to the Panel. The US response serves to confirm, however, that the United States has not identified paragraphs 5.2 and 84(b) as the basis of its claim until its response to the Panel's question, and that the United States has therefore not met its burden of making a prima facie case in its written submissions or oral statements. We therefore conclude that the United States has not established that Articles 50 and 51 result in China acting inconsistently with paragraphs 5.2 and 84(b). Also, we note that the United States has not established that Articles 50 and 51 result in an inconsistency when considered together with other challenged measures.

Paragraph 84(b), second sentence

7.480 Finally, we recall the US assertion that the three criteria for which the GAPP is to elaborate plans are inconsistent with the second sentence of paragraph 84(b).

7.481 We note that the United States first indicated that the second sentence of paragraph 84(b) was a basis for its claim in response to a Panel question put forward after the second meeting. For the same reasons as those we have given above in relation to the US claims concerning Article 8, we rest our determination as to whether the United States has made a prima facie case of inconsistency with the second sentence of paragraph 84(b), not on the US response to the Panel's question, but on the US written submissions and oral statements to the Panel. The US response serves to confirm, however, that the United States has not identified the second sentence of paragraph 84(b) as the basis of its claim until its response to the Panel's question, and that the United States has therefore not met its burden of making a prima facie case in its written submissions or oral statements. We therefore conclude that the United States has not established that Articles 50 and 51 result in China acting inconsistently with the second sentence of paragraph 84(b). Also, we note that the United States has not established that Articles 50 and 51 result in an inconsistency when considered together with other challenged measures.

Articles 52-55

7.482 We next consider the US claims in respect of Articles 52-55. Article 52 provides that before an application is submitted to the GAPP, it is to be submitted to the competent local press and publication bureau. Article 53 deals with the documents and proofs to be provided in support of an application. Article 54 provides a time-line for decisions by the GAPP and requires the GAPP to provide reasons for any rejections. Finally, Article 55 stipulates that after the GAPP has given its approval, the entity concerned needs to obtain an import-export permit from the foreign trade and

[375] China's response to question No. 46(b).

economic cooperation administration in accordance with China's Foreign Trade Law and a business licence from the local industrial and commercial administration according to law.

7.483 The United States argues that by conditioning trading rights on successfully obtaining multiple Chinese Government approvals, Articles 52-55 are inconsistent with China's trading rights commitments. According to the United States, this injects government discretion into a process that China committed to be "non-discretionary". In response to a question from the Panel, the United States further stated that multiple decision-makers determine whether to approve applications on the basis of discretionary plans for the total number, structure and deployment of electronic publication import entities. The United States considers that these multiple layers are opaque and facilitate China's trading rights violation. The United States observes, however, that it is the arbitrary nature of this regime that gives rise to the violation. The United States also submits that China subjects foreign importers and privately held importers in China to a discriminatory and discretionary decision-making system that is onerous as well as opaque and that results in the denial of their trading rights.[376]

7.484 We note that the basis on which the United States is challenging Articles 52-55 is less than clear. We understand the United States to raise a claim concerning alleged discretion under paragraph 84(b).[377] Since the United States refers to a discriminatory "decision-making system", it appears that the United States also raises a claim concerning alleged discrimination under paragraphs 84(b) and 5.2.

Paragraphs 5.2 and 84(b)

7.485 Regarding, first, the claim concerning alleged discrimination against foreign importers and privately held importers in China, we note that Articles 52-55 appear to apply to all applicants wishing to establish an electronic publication import entity, including Chinese wholly state-owned enterprises. Even assuming for the sake of argument that the decision-making process was onerous and opaque, as the United States alleges, the United States has not established that this would be any less true for wholly state-owned enterprises than for privately held enterprises in China. Furthermore, regarding foreign enterprises not registered in China, the United States has not established that such enterprises are subject to the decision-making process which it says is onerous and opaque. In this regard, we recall that Articles 52-55 apply to "electronic publication entities", and that the United States has not demonstrated that this term could cover foreign enterprises not registered in China. We also recall that the United States has not asserted that Articles 52-55 affect Chinese branches of foreign enterprises not registered in China. Since Articles 52-55 are concerned, like Articles 50-51, with "electronic publication import entities", we also think they do not deal with foreign individuals. We therefore conclude that the United States has not established its claim that Articles 52-55 discriminate against foreign importers or privately held enterprises in China and thus give rise to a breach of paragraphs 5.2 and 84(b). Also, we note that the United States has not established that Articles 52-55 result in an inconsistency when considered together with other challenged measures.

Paragraph 84(b)

7.486 Regarding the US claim concerning alleged discretion, we note that the United States has not explained how Articles 52-55 confer discretion. It is not clear to us that they do. Even if it were the case that Article 52 required the consent of the local press and publication bureau[378], the United States has not specifically argued, let alone demonstrated, that this local bureau enjoys discretion as to whether to give its consent. It does not seem plausible to assume that the local bureau faces constraints that are less strict than those faced by the GAPP. Therefore, the local bureau would

[376] United States' response to question No. 154(a).
[377] United States' first written submission, para. 259.
[378] China's translation of Article 52 does not refer to any consent requirement.

probably need to follow the GAPP's plans for the total number, structure and deployment of electronic publication import entities. We recall in this respect that we have rejected the US claim that Articles 50 and 51 confer impermissible discretion. Furthermore, we note that Article 55 refers to permits or licences to be obtained in accordance with other laws that are not being challenged. The United States has not demonstrated that the grant of a permit or licence under these other laws is discretionary. In addition, we recall that Articles 52-55 are concerned with "electronic publication import entities", and that they do not deal with foreign individuals. We further recall that the United States has not demonstrated that the term "electronic publication import entities" could cover foreign enterprises not registered in China, and that it has not asserted that Articles 52-55 affect Chinese branches of foreign enterprises not registered in China.

7.487 Based on the foregoing considerations, we are not convinced that, as a result of Articles 52-55, China does not approve applications in a non-discretionary way, and that it therefore does not grant the right to import in a non-discretionary way. Consequently, we conclude that the United States has not established that Articles 52-55 result in China acting inconsistently with its commitment in paragraph 84(b) to grant foreign enterprises and foreign individuals trading rights in a non-discretionary way. Also, we note that the United States has not established that Articles 52-55 result in an inconsistency when considered together with other challenged measures.

(vii) Film Regulation

7.488 The **United States** notes that the *Film Regulation* governs, *inter alia*, the importation of films for theatrical release into China, including feature films, documentary films, science and educational films, animation films, and special topic films.[379] The United States also notes that Article 5 of this measure provides in relevant part that the State shall implement a licensing system for film importation and that:

> "[N]o entity or individual shall, without permission, be engaged in the activities of ... import ... of films, or import ... a film for which a permit has not been obtained. The permits or approval documents granted in accordance with these Regulations shall not be leased, lent, sold, or assigned in any other form."

7.489 The United States further points out that according to Article 30 only enterprises designated by SARFT may engage in the business of importing films. As a result, the United States maintains, no enterprise or individual can import films without having been designated. The United States contends that "designation" means that SARFT exercises its discretion to decide who may import films and that no application and approval procedures apply.

7.490 The United States asserts in this regard that China has designated only a single wholly state-owned entity – the China Film Import and Export Corporation, a subsidiary of China Film Group – to import films for theatrical release.[380] The United States contends that this monopoly applies to all films for theatrical release, regardless of whether a film is imported on a revenue-sharing basis or a flat-fee basis.

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[379] The United States refers to Article 2 of the *Film Regulation*.

[380] The United States refers to the China Film Group's homepage, available at http://www.chinafilm.com/gzzy/index_image/20070204/2100.html (saying that it provides that China Film Group "is the sole importer of foreign theatrical movies in China ..." (Exhibit US-23)) as well as: United Nations Educational, Scientific and Cultural Organization, "Trends in Audiovisual Markets: China, Mongolia & South Korea" (June 2007), p. 32 (Exhibit US-12); Screen Digest and Nielsen NRG, "Cinema and Home Entertainment in China" (January 2007), pp. 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), p. 31 (Exhibit US-25) and China eCapital Corporation, "Chinese Media & Entertainment Research: The Chinese Film Market", March 18, 2005, pp. 40, 65, 79, and 107 (Exhibit US-26).

7.491 The United States claims that China's measures granting China Film Group a monopoly on the right to import films for theatrical release are inconsistent with China's trading rights commitments. The United States submits that this monopoly not only deprives enterprises in China (other than China Film Group) as well as foreign enterprises and individuals of the right to import films for theatrical release. It also discriminates against foreign-invested enterprises and foreign individuals, in contravention of China's trading rights commitments. The United States considers that Article 30 of the *Film Regulation* constitutes the legal basis for this monopoly, providing that only enterprises designated by the Chinese Government are permitted to import films for theatrical release.

7.492 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 5 and 30 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[381]

7.493 **China** argues that paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol govern only trade in goods. However, in China's view, the United States has failed to establish that motion pictures for theatrical release, i.e., motion pictures intended to be shown in movie theatres, could be considered as goods. China submits that the relevant Chinese measures, including the *Film Regulation*, do not regulate the importation of goods but regulate services related to the licensing of rights for the exploitation of motion pictures. Consequently, China considers that paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol do not apply and that the US claim lacks any legal basis.

7.494 China submits that the commercial exploitation of motion pictures for theatrical release consists of the organization of public projections in movie theatres involving three main service providers: producers, distributors, and movie theatres. China explains that the distribution of motion pictures is organized on the basis of copyright licensing agreements whereby the producer grants the distributor the right to use copies of the motion picture in order to organize its distribution for the period of time and in the territories agreed with the producer.

7.495 China further notes that, traditionally, motion pictures are imprinted on cinematographic film.[382] China points out that the negative of the film is developed in a laboratory in order to create the master negative and other subordinate prints. The distributor will receive copies of this master negative as well as other related delivery materials (including soundtracks, and advertising materials) in order to organize the distribution of the motion picture on its territory. China notes that at the end of the period of release, all licensed rights will in principle immediately revert to the licensor free of any claim and the distributor will either need to: (i) return all delivered materials as well as all materials created by the distributor or (ii) destroy all materials. As far as financial arrangements are concerned, China points out that the box office revenue is usually shared between producers, distributors and movie theatres, according to agreed ratios (revenue-sharing). Distributors and producers may also agree on a lump-sum payment (fee) to the producer for the distribution rights.

7.496 China observes that a motion picture consists of a sequence of pictures that is projected on to a screen in rapid succession and accompanied by a soundtrack. As such, China notes, it is intangible and cannot be possessed. China also notes that motion picture distributors do not buy the motion picture as such, but only get the limited right to organise its release in movie theatres, and that movie-

[381] United States' response to question No. 1.

[382] China observed, however, that the delivery of motion pictures in physical materials is increasingly being replaced by delivery in digital form, i.e., by delivery without any physical support. According to China, such use of digital technology in the motion picture business is likely to render the use of physical carriers obsolete.

goers do not buy the motion picture as such, but only the right to attend the projection. In China's view, motion pictures for theatrical release cannot therefore be considered as "goods", i.e., as items that are tangible and capable of being possessed.[383]

7.497 China acknowledges that the delivery materials that carry the motion picture traditionally are tangible items, i.e., the film reel. China argues, however, that the existence of these materials does not allow treating motion pictures as goods. According to China, 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., an artistic works that is to be projected in movie theatres. China submits that the film reel is used for the sole purpose of providing the service of theatrical distribution. In China's view, it is merely an accessory to the service that is provided.[384]

7.498 China points out in this regard that, as reflected in agreements concerning theatrical distribution, the film reels are only "delivery materials", provided for the sole purpose of organizing the distribution of the motion picture, and only in quantities necessary to permit production, distribution and projection of the picture. Secondly, China notes that they are only copies of the "master negative", and they can only be used in accordance with the conditions agreed by the copyright owner. In addition, China states that they are usually provided by the producer free of charge or at their cost price, which confirms that they do not "contain" the commercial value of the motion picture. Finally, China recalls that after the exploitation of the motion picture, they are either returned to the producer or destroyed. Moreover, China notes that all rights concerning materials created from the delivery materials (such as alternate language tracks, dubbed or sub-titled versions) belong to the licensor. In other words, neither the distributor nor the theatres "possess" the motion picture that the delivery materials temporarily carry.

7.499 China submits that international classification instruments, such as the United Nations' Central Product Classification (the "CPC"), confirm that the activities involved in the exploitation of motion pictures for theatrical release are classified as services, and that the only goods category is the film reel, which China contends is described as being used only for the purpose of providing the services necessary for the projection of the relevant motion picture.

7.500 Regarding the measure at issue, China asserts that the Chinese measures challenged by the United States do not treat the importation of motion pictures as the importation of goods, but as a licensing service for the exploitation rights of motion pictures for their theatrical distribution. China submits that under these measures, the "importation" of motion pictures consists of three main steps. First, the importation entity designated by the SARFT organizes the distribution of foreign motion pictures in Chinese theatres through a licence granted by the copyright owner. China notes in this regard that Article 33 of the *Film Regulation* provides in relevant part that "a film importation entity shall use the film work after obtaining the licence from copyright owner and can only use it within the scope of such license". China points out that in practice, the entity enters into a licence agreement with the foreign producers or distributors of the selected motion pictures. Secondly, China notes that the designated entity ensures the temporary importation of the materials containing the motion

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[383] China refers to the Appellate Body report on *US – Softwood Lumber IV*, para. 59.

[384] China considers relevant in this context the judgment of the European Court of Justice in the case *Federación de Distribuidores Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión* where the Court stated:

> "The exploitation of cinematographic films in a theatre or on television, in the context of which the producers authorize the distributors to make copies of their films and to organize public performances by means thereof, all in return for remuneration, constitutes a provision of services. Where it is of a trans-frontier nature, since producers and distributors are not established in the same Member State, it comes under the provisions of the Treaty with regard to freedom to provide services." (Judgment of the European Court of Justice of 4 May 1993, Case C-17/92, ECR 1993 I 02239 *et seq.*) (Exhibit CN-6).

picture, for the purpose of submitting it to the SARFT for content review. Thirdly, China explains that once the content of the motion picture has been reviewed and approved, the designated entity proceeds with the customs clearance of the delivery materials for the purpose of the distribution of motion pictures to Chinese distributors and theatres.

7.501 China submits that, accordingly, the "importation" of motion pictures in the meaning of the Chinese measures refers to the licensing of rights for the exploitation of foreign motion pictures in Chinese movie theatres. China asserts that the "right to import" motion pictures granted to the designated importation entity is in no way the right to import goods, but the right to obtain a copyright licence. According to China, the measures at issue regulate the licensing service for the exploitation rights of motion pictures for their theatrical distribution. In China's view, since the challenged measures treat the importation of motion pictures as a licensing service, it follows that the challenged measures do not fall under paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol.

7.502 China further argues that its GATS Schedule confirms the absence of any legal basis for the US claim. China points out in this respect that it made an additional commitment in Sector 2D concerning the "importation of motion pictures for theatrical release". In China's view, this commitment confirms that the concept of "importation" used by China in the context of the regulation of the motion picture business refers to services and that measures affecting the importation of motion pictures do not fall under WTO provisions relating to the importation of goods. China considers that this additional commitment also reflects the common intention of WTO Members to treat under the GATS the importation into China of motion pictures for theatrical release. China also notes that it specified in its Schedule that its commitment with regard to the importation of motion pictures was "without prejudice to compliance with China's regulations on the administration on films". China submits that in doing so, China expressly reserved its right to regulate services associated with the importation of motion pictures for theatrical release. China considers, therefore, that its measures establishing a system of designation for the importation of motion pictures fall under the GATS. China asserts that any other interpretation would undermine China's right to regulate the motion picture business under the GATS.

7.503 The **United States** responds that the product which is the subject of its claim is tangible, hard-copy cinematographic film that can be used to project motion pictures in a theater. The United States submits that China apparently seeks to deny the tangibility of films merely by substituting the term "motion picture" for "film" and then asserting that a motion picture is intangible. To the United States, it appears that China seeks to separate the hard-copy cinematographic film from the content that it carries, focus only on the content, and assert that the content is not a good. However, the United States notes that none of its claims depends on the premise that content is a good distinct from a carrier medium. The United States submits that goods may be of interest to consumers for different reasons. In the United States' view, films for theatrical release happen to be of interest to consumers because of their content. The United States considers that the fact that the tangible film carries content does not transform the film into something other than a good. The United States points out that all of the relevant products subject to the trading rights claims consist of a hard-copy carrier medium containing content, and that China has not argued that reading materials (e.g., books, etc.), finished AVHE products or finished sound recordings are not goods.

7.504 The United States rejects China's argument that films for theatrical release are not goods because they are exploited through a series of services, because the commercial value of the motion picture lies in the revenue generated by these services, and because the delivery materials containing film are mere accessories of such services. The United States submits that the vast majority of goods are commercially exploited through a series of associated services and that China's argument would transform virtually all goods into services. The United States provides the example of a stethoscope, a good that can be imported and commercially exploited through the provision of health care services. According to the United States, the fact that the stethoscope is used to provide health care services

does not mean that the stethoscope is not a good. The United States also observes that China has provided no textual basis in the WTO Agreement in support of its assertion that a good used to provide a service is no longer a good.

7.505 The United States further argues that China itself treats films as goods. First, China concedes that films must go through customs clearance. Additionally, China's accession schedule of tariff concessions, which only covers goods, includes under heading 3706, "[c]inematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track". Finally, Article 2 of the Regulations of the People's Republic of China on Import and Export Duties, provides that "[u]nless otherwise provided for by laws and administrative regulations, the Customs shall, in accordance with these Regulations, collect import or export duties on all goods permitted by the People's Republic of China to be imported into or exported out of the Customs territory …". The United States notes in this respect that in its submissions China itself admits that it applies customs duties to films.

7.506 The United States argues, in addition, that Articles III:10 and IV of the GATT 1994, which deal with cinematographic films, belie China's argument that films for theatrical release are not goods. Regarding Article III:10, the United States notes that it sets forth an exception to the national treatment principle for films, which principle only applies to trade in goods. In the United States' view, if a film were not a good, it would not be covered by Article III in the first place, and no exception would be necessary. As for Article IV, the United States argues that although it makes reference to services, it provides the form that internal quantitative regulations for a particular good – films – may take, i.e., screen quotas.

7.507 Regarding international classifications of films, the United States considers that they demonstrate that films for theatrical release are goods. The United States points out that 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". Similarly, the United Nations' CPC classifies cinematographic film as a good in Subclass 3895, in addition to classifying the associated services in Subclass 96113.

7.508 In relation to the measure at issue, the United States observes that China is asking the Panel to ignore the goods-related aspects of the relevant measures and conclude that the measures are only subject to services rules even where they affect both trade in goods and services. This, the United States maintains, is in contravention of the Appellate Body's guidance, that a measure need not be analysed under either the goods or services rules, but rather may be subject to both.[385] In the United States' view, China's measures themselves refer to the importation of the good separate from and in addition to the provision of services using the good. Article 5 of the *Film Regulation* is typical. It sets forth the requirements for "film production, import, export, distribution, and screening, and the public screening of films". The United States notes that this language refers to both import of films and the distribution and screening of films. Since the relevant measure affects both the good and certain associated services involving that good, it is subject to both goods and services disciplines.

7.509 The United States notes that China can only point to a single provision – Article 33 – which makes reference to the licensing process to support its contention that the relevant measures regulate

[385] The United States refers to the Appellate Body reports on *Canada – Periodicals* (p. 17), where the Appellate Body indicated that 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", and *EC – Bananas III* (para. 221), where the Appellate Body indicated that 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…".

services. The United States recalls in this regard that films are treated by China as goods during the importation process since they are subject to customs procedures. While the relevant measures may contain provisions affecting services (copyright licensing), the United States considers that it has identified other provisions of those measures that regulate trade in goods. Thus, the United States submits, China's measures on films are subject to disciplines governing both goods and services.

7.510 Finally, the United States considers that China's attempt to use its services commitments with respect to motion pictures as a shield for its trading rights-inconsistent measures is meritless. The United States does not agree that these services commitments reserved China's right to maintain measures that are inconsistent with its trading rights commitments – let alone the right to maintain a designation system for the importation of motion pictures for theatrical release. Moreover, in the United States' view, the text of China's GATS Schedule has no relevance to a determination of whether China's measures restricting who may import films are inconsistent with China's trading rights commitments.

7.511 **China** responds that the United States is attempting to move the target of its claim from "film for theatrical release" to "cinematographic film". China submits that the term "film" has a dual meaning as it can refer either to an artistic work or to a material on which this artistic work may be recorded. According to China, in order to distinguish the artistic work, on the one hand, and the material, on the other hand, two different concepts are used in international classifications, i.e., "motion pictures for theatrical release" (referring to the artistic work) and "cinematographic film" (referring to the material). China argues that in line with international classifications, the Chinese measures also make a clear distinction between "motion pictures for theatrical release" and "cinematographic film". The term "film" in the English version of relevant Chinese measures, corresponding to the concept of "motion picture", is translated from the Chinese term "*Dian Ying*". By contrast, the term "cinematographic film" is translated from the Chinese term "*Dian Ying Jiao Pian*", which refers to film ("*Jiao Pian*") used to project motion pictures ("*Dian Ying*").[386]

7.512 China also notes that Article 2 of the *Film Regulation* specifies the kinds of films to which it applies: "feature films, documentary films, science and educational films, cartoon and puppet films, and special subject films". Thus, China notes, films are defined in relation to their content, and not in relation to the material used for their exploitation. China considers that the Chinese measures therefore relate to the importation of motion pictures, i.e., the content or the artistic work, and not to the importation of cinematographic film as such, i.e., the material or physical carrier.[387]

7.513 China submits that the new US claim relating to cinematographic film, or hard-copy cinematographic film, does not fall within the Panel's terms of reference, since they relate to film for theatrical release. China therefore requests the Panel not to make findings in relation to the new claim. China further requests the Panel to dismiss the US claim relating to film for theatrical release, because, having changed the subject of its claim, the United States no longer pursues the establishment of a prima facie case with regard to that claim.

7.514 Furthermore, China argues that, in any event, there is no doubt that, in the specific context of the commercial exploitation of motion pictures for theatrical release, the impact of the Chinese

[386] China points out in this respect that Article 30 of the *Film Regulation* provides that the importer of motion pictures ("*Dian Ying*" in the original Chinese text), not the importer of cinematograph film ("*Dian Ying Jiao Pian*"), requires designation.

[387] China asserts that it has never disputed that cinematographic film is a good, but considers this fact irrelevant in the present case. China also notes that cinematographic film is only one of various types of carriers of motion pictures for theatrical release (e.g., laser discs or hard drives). They may even be transmitted without any physical carrier. In China's view, the most important feature is that they are intended only for public show in theatres. This feature distinguishes them from motion pictures for home entertainment using carriers such as DVDs or video tapes.

measures on the goods involved in this activity does not justify scrutiny of such measures under WTO disciplines on goods. First, China recalls in this regard its position, based on Articles 30 and 33 of the *Film Regulation*, that the system of designation of entities which are granted the right to import motion pictures for theatrical release relates to trade in services. China submits, in other words, that its measures regulate the importation of motion pictures for theatrical release as part of the supply of services, and not as the importation of goods.

7.515 Secondly, China argues that the United States improperly focuses on the good – cinematographic film – rather than on the measure at issue. In China's view, the measure determines the applicable WTO rules. In this respect, China considers that a measure regulating the supply of a service, although it may have an impact on a tangible good, should be examined under the disciplines governing trade in services only, if the affected good is an accessory to the relevant service. China submits that, in the context of measures affecting the services related to the exploitation of motion pictures for theatrical release, cinematographic film should be treated as a mere accessory to these services. According to China, this accessory nature of cinematographic film is characterized by the following aspects: (i) cinematographic film is not an object traded in its own right, i.e., it will not be traded outside of the services that the Chinese measures regulate; (ii) the exploitation of motion pictures for theatrical release through a series of services regulated by the relevant Chinese measures does not require a transfer of ownership of cinematographic film; (iii) the supply of the cinematographic film is part of the provision of the services of exploitation of motion pictures for theatrical release and cannot be considered independently from these services, as specified in the licensing agreements organizing the theatrical release; and (iv) cinematographic film has no own commercial value in the context of the services of exploitation of motion pictures for theatrical release, and does not generate revenue other than the revenue arising from the supply of these services. In China's view, it is therefore not possible to consider that the Chinese measures affect cinematographic film independently of the regulation of the services related to the exploitation of motion pictures for theatrical release. According to China, the right to import cinematographic film in the context of these measures exists only as a logical outcome of the right to import a motion picture for theatrical release.

7.516 China notes that the United States is attempting to rebut China's arguments by referring to examples which are allegedly similar to the case of cinematographic films. However, China observes, in presenting these examples, the United States is repeating the same mistake and focuses on the product rather than on the measure. China submits that if one takes an example of a measure affecting a good which is not commercially exploited in itself but which is accessory to services, the "products-based" approach proposed by the United States appears all the more irrelevant. China notes that if such an approach was applied to, e.g., a lottery ticket imported into a country in order to allow its inhabitants to participate in the lottery, this approach would lead to the conclusion that measures which regulate the approval of entities allowed to organize lotteries, i.e., an entertainment service, fall under WTO rules on goods when they affect the importation of the lottery ticket. China considers that such a conclusion would completely overlook the fact that the ticket has no other purpose than to provide lottery services.

7.517 Additionally, China argues that contrary to what the United States alleges, Article IV of the GATT 1994 does not support the applicability of the WTO disciplines applicable to goods to the Chinese measures. China submits that Article IV, because it deals with screen quotas, relates in essence to trade in services. China notes that the GATT Secretariat, when referring to Article IV during the Uruguay Round negotiations for audiovisual services, underlined that "the only subject matter relating to trade in services to be directly addressed in the original thirty five articles of the GATT is that of cinema quotas".[388] China argues that Article IV contains disciplines on measures regulating services related to the exploitation of motion pictures for theatrical release. China submits

[388] China refers to document MTN.GNS/AUD/W/1, para.2 (Exhibit CN-82).

that the purpose of screen time limitations is to reserve a certain exhibition time for domestic motion pictures for theatrical release, and not for domestic cinematographic film *per se*. Otherwise, China maintains, the screen time of a copy of cinematographic film carrying a foreign movie but printed in domestic laboratories would be counted as part of the quota for domestic motion pictures.

7.518 The **United States** counters that China's contention that the United States has shifted the focus of its claim is baseless. The United States maintains that its claims from the beginning have related to an integrated product that includes a carrier medium carrying content that can be commercially exploited by projection in a theatre.

7.519 The United States further argues that China's attempt to separate goods containing content from the content itself also fails to overcome the US claims. The United States points out that Article IV of the GATT 1994 refers to the "exhibition of cinematograph films" in relation to screen quotas. Thus, even when discussing the commercial exploitation of the artistic work in a theatre, the GATT 1994 uses the term "cinematograph film", not motion pictures. Regarding the fact that the Harmonized System describes the product as cinematographic film "for the projection of motion pictures", this language demonstrates, in the United States' view, that the Harmonized System contemplates a physical product with integrated content that may be commercially exploited in a particular way. According to the United States, this HS description does not take films out of the category of goods, but instead confirms that films containing content to be exploited are goods.[389]

7.520 Regarding the use of the term "*Dian Ying*" in China's measures, the United States notes that China has conceded that the carrier medium containing content must go through customs clearance as part of the importation process. The United States considers, therefore, that the motion picture, i.e., the content, is part of the integrated product that is treated as an importable good for purposes of China's measures.

7.521 The **Panel** will first address what is the subject of the US claim. The US request for the establishment of a panel refers, in relevant part, to "films for theatrical release".[390] By itself, as China's arguments show, this expression may be somewhat ambiguous, in that the term "films" could mean either the motion picture, i.e., the content projected in a theatre, or the film used for projecting motion pictures, i.e., exposed and developed cinematographic film. The US claim is, however, based on China's trading rights commitments, which relate to trade in goods. The US panel request thus suggests that the US claim about films for theatrical release should be understood as a claim about goods that can be traded. Before the Panel, the United States confirmed this, stating that the subject of its claim is hard-copy cinematographic film, in any tangible form, that can be used to project motion pictures in a theatre.[391] Or as the United States also put it, the US claim relates to an integrated product – a good – that consists of a carrier medium carrying content that can be used for projection in a theatre.

7.522 In response to a question from the Panel, the United States has further clarified that hard-copy cinematographic film comprises positive and negative film.[392] The United States pointed out in this respect that the good which a film producer/licensor would send to China pursuant to a film distribution agreement is typically either an exposed and developed "internegative" or an "interpositive". The United States explained that an "internegative" is a copy of the "master

[389] The United States also notes that China's accession schedule of tariff concessions incorporates the HS description of these products under heading 3706.

[390] United States' panel request WT/DS363/5, p. 2.

[391] United States' responses to question Nos. 14, 15 and 163. We note China's view that it is redundant to refer to "hard-copy", or "tangible", cinematographic film as, in its view, cinematographic film is always in hard copy and refers to a tangible material. China's comments on the United States' response to Panel question No. 163.

[392] United States' response to question No. 13(a).

negative", which in turn is the first copy of the film produced by the producer/licensor. The "master negative" is ordinarily retained by the producer/licensor and not sent to the distributor. The "internegative" is the visual part of the film without sound track, whereas the "interpositive" is the "internegative" with the sound track added.[393]

7.523 In our view, the United States has not changed the subject of its claim, as China asserts. The United States has merely clarified the meaning of the expression "films for theatrical release", by confirming that this expression is intended to describe goods – cinematographic films, whether negative or positive – that can be used for projecting motion pictures in theatres. Since we do not believe that the United States in referring to hard-copy cinematographic film put forward a new claim, we see no justification for not addressing the substance of this claim. Nor do we agree that in referring to hard-copy cinematographic film the United States has abandoned its claim in relation to "films for theatrical release".

7.524 As to whether the US claim concerns a good, China is of the view that a motion picture projected in a theatre could not be considered a good.[394] China does not dispute, however, that cinematographic film is a good, observing that cinematographic film is one of several possible carriers of motion pictures for theatrical release.[395] In considering this issue, we recall, first of all, that the US claim concerns hard-copy cinematographic film. In this regard, we find relevant heading 3706 of the Harmonized Commodity Description and Coding System (HS). Heading 3706 defines as a separate good "cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track".[396] As pointed out by the United States, China's own Schedule of Concessions, i.e., its goods schedule, contains a heading with the same number and which covers "[c]inematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track".[397] Furthermore, in response to a question from the Panel, China confirmed that it charges customs duties on the importation of exposed and developed cinematographic film.[398]

7.525 We also find instructive the explanatory note accompanying heading 3706 of the Harmonized System. It provides that "this heading covers developed standard or substandard width cinematographic film for the projection of motion pictures, negative or positive …".[399] This indicates that exposed and developed cinematographic films are films "for theatrical release", and that both negative and positive cinematographic films are considered as goods. It further indicates that, despite the fact that exposed and developed cinematographic films are used to provide a service, namely, the projection and exhibition of motion pictures in theatres, they are considered as goods. Furthermore, and as also pointed out by the United States, the explanatory note shows that a physical carrier containing content is treated as a good.[400]

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[393] United States' responses to question Nos. 13(a) and (b).

[394] China considers that a motion picture is an intangible artistic work (content) and constitutes neither a good nor a service (China's response to question No. 177(a)).

[395] China's response to question No. 178; China's comments on the United States' response to question No. 164.

[396] Exhibit US-53.

[397] Exhibit JPN-2.

[398] China's response to question No. 132.

[399] Exhibit US-53.

[400] It is pertinent to note in this context that the Appellate Body in *Canada – Periodicals* considered that periodicals are goods comprised of two components: editorial content and advertising content. According to the Appellate Body, "[b]oth components can be viewed as having services attributes, but they combine to form a physical product – the periodical itself". Appellate Body Report on *Canada – Periodicals*, DSR 1997:I, 449 at 463.

7.526 In the light of the above, we consider that "films for theatrical release", as that expression is used in the US panel request, i.e. hard-copy cinematographic films in any tangible form (including hard-copy "internegatives" and "interpositives"), are goods for the purposes of China's trading rights commitments.

7.527 In sum, we have determined that we can address the US claim in respect of films for theatrical release, and that the expression "films for theatrical release" describes goods. As we explain in more detail below, the fact that "films for theatrical release", as that expression is used in the US panel request, are goods does not dispose of China's argument that the relevant provisions of the *Film Regulation* should be assessed under the GATS rather than under the Accession Protocol. Therefore, we now proceed to consider China's argument that its trading rights commitments are inapplicable to the relevant provisions of the *Film Regulation*.

Applicability

7.528 The United States is asking us to apply China's trading rights commitments to Articles 5 and 30 of the *Film Regulation*, which both address who may import films. Article 5 provides in relevant part that "[t]he State shall implement a licensing system with respect to film production, import, export, distribution, and screening, and the public screening of films. No entity or individual shall, without permission, be engaged in the activities of production, import, distribution or screening of films, or import, export, distribute or screen a film for which a permit has not been obtained". Article 30 provides that "[t]he business of importing films shall be conducted by film import entities designated by the [SARFT]; without being designated, no entity or individual shall engage in the business of importing films".

7.529 As we see it, Article 5 in relevant part regulates who may engage in the activity of importing films.[401] Article 30 in relevant part also regulates the business of importing films by establishing who may conduct that business. Since Articles 5 and 30 regulate who may engage in the business of importing "films", these articles evidently affect "films".

7.530 China submits that the term "film" in the English version of Articles 5 and 30 is translated from the Chinese term "*Dian Ying*", and not the Chinese term "*Dian Ying Jiao Pian*". China states that "*Dian Ying*" means "motion picture" and refers to film as an artistic work, whereas "*Dian Ying Jiao Pian*" means "cinematographic film", i.e., the physical film ("*Jiao Pian*") used to project motion pictures ("*Dian Ying*").[402] China considers, therefore, that Articles 5 and 30 regulate who may import motion pictures, not who may import cinematographic film. By this, China appears to mean that these provisions regulate who may import content which would be projected in a theatre.[403] China also contends that the term "import" in the English version of Articles 5 and 30 is translated from the Chinese term "*Jinkou*", which China says covers the introduction into China of anything of foreign origin, including content.[404]

7.531 The United States counters that "*Dian Ying*" can be translated as "film" or "motion picture".[405] China responds that this reflects the fact that the term "film" is the ordinary English translation of

[401] Article 5 also regulates films, in that it stipulates that only films which have been approved may be imported. The United States has not challenged that aspect of Article 5 under China's trading rights commitments, however.

[402] China's second written submission, para. 35; China's comments on the United States' response to question No. 158.

[403] China's response to question No. 177; China's comments on the United States' response to question No. 164.

[404] China's response to question No. 177(a).

[405] The United States refers to the *New Century Chinese English Dictionary* (Exhibit US-103). United States' response to question No. 158.

"*Dian Ying*", whereas the term "motion picture" is used mainly in American English. According to China, "*Dian Ying*" refers to film as an artistic work.[406] The United States notes that Article 31 of the *Film Regulation* sets forth the requirement that imported films are subject to "import procedures at Customs". The United States points out that in this context the Chinese text of the measure also uses the word "*Jinkou*" to mean "import". In the United States' view, this shows that China uses the term "*Jinkou*" to refer to the import of goods subject to customs procedures.[407]

7.532 We have requested the independent translator to advise on the correct translation of the terms "*Dian Ying*" and "*Jinkou*" as they appear in Articles 5 and 30. Turning first to the latter term, "*Jinkou*", the independent translator confirms that "import" is the correct translation. According to the independent translator, there is nothing implicit in the term "*Jinkou*" to indicate whether only goods can be covered, or whether the term can also apply to content. In light of this, the term "*Jinkou*" does not shed much useful light on the correct translation of the term "*Dian Ying*" as it could apparently be used to refer to the import of content as well as goods.

7.533 With regard to the other Chinese term, "*Dian Ying*", the independent translator's first point is to note that the term is satisfactorily rendered in English as "film". The independent translator recognizes, however, that the term "film" in English has a broad scope, as it could be used to refer to the film as intellectual property or the material on which the film is printed.[408] The independent translator has, therefore, provided additional advice in commenting on the suggested translation. Thus, the independent translator considers that there is considerable merit in China's contention that particularly in legal texts, where the language is more formal and distinctions which might appear contrived in vernacular usage are more carefully observed, the term "*Dian Ying*" on its own is intended exclusively to refer to the content of a film (i.e., the artistic work) and not to the material (i.e., the physical medium) on which the film is printed, or the film stock. The independent translator further observes that even in vernacular usage it would be hard to imagine a context where the term "*Dian Ying*" alone referred to the material on which the film is printed, the film stock, rather than the content.

7.534 The United States responds that the independent translator's conclusion that the term "*Dian Ying*" is correctly translated as "film" should be the end of the analysis. In the United States' view, the additional comments offered by the independent translator do not assist in analysing the US claims in this dispute. The United States argues that it has not asserted that unexposed, content-free film stock is the good at issue. Rather, the United States asserts that the good at issue is film for theatrical release, i.e., a physical carrier medium that has content embedded on it. China, in contrast, has argued that the "film" being discussed is simply an intangible work. According to the United States, the independent translator does not discuss this difference. Instead, the United States submits, the independent translator focuses on the film material itself, with no content involved.

7.535 In our view, it is not implausible that Articles 5 and 30 are concerned with who may conduct the business of bringing into China content that can be commercially exploited by projection in theatres.[409] Contrariwise, it seems somewhat less plausible that Articles 5 and 30 are about who may import content of the described kind on a physical carrier, that is to say, that they are about who may

[406] China's comments on the United States' response to question No. 158.

[407] United States' comments on China's response to question No. 177(a).

[408] The independent translator observes in this respect that at least in British English there would not seem to be any prima facie distinction between "film" and "motion picture".

[409] We note in this context that Article 2 of the *Film Regulation* specifies that the films to which the *Film Regulation* applies include "feature films, documentary films, science and educational films, animation films, and special topic films". This is consistent with the view that the regulatory concern is with the type of content that is to be produced, imported, distributed and screened, and not with content on a physical carrier.

import hard-copy cinematographic film.[410] If this were the case, the *Film Regulation* might not apply to content brought into China without any physical carrier, which China says is a growing trend in the industry.[411]

7.536 At any rate, we do not think that resolving this issue is critical for the purposes of our analysis. As we have stated above, we consider that Articles 5 and 30 in relevant part regulate who may conduct the business of importing "films". If the term "films" were understood as meaning "hard-copy cinematographic films", Articles 5 and 30 would necessarily affect "hard-copy cinematographic films" and thus goods. On the other hand, if the term "films" were understood as meaning "contents that can be commercially exploited by projection in theatres", Articles 5 and 30 would not necessarily affect hard-copy cinematographic films. However, as the parties have explained, typically, "contents that can be commercially exploited by projection in theatres" would be brought into China under the terms of a licensing/distribution agreement between a film producer/licensor and one or more distributors.[412]

7.537 As pointed out above, China contends that, in practice, the designated film importing entity would itself enter into a licensing/distribution agreement with a foreign film producer/licensor. According to China, once the content has been reviewed and approved, the designated importing entity proceeds with the customs clearance of the delivery materials.[413] Delivery materials are provided by the producer/licensor to allow the distributor to organize the distribution of the film within China. In cases where the film content is brought into China on exposed and developed cinematographic film as a carrier medium, these delivery materials include the hard-copy cinematographic film (the "internegative" or "interpositive").

7.538 China's explanation makes clear that even if the term "film" were understood as meaning "content that can be commercially exploited by projection in theatres", Articles 5 and 30 would affect hard-copy cinematographic film as a good, provided, of course, relevant content is to be imported on hard-copy cinematographic film.[414] This is because only licensed and designated film import entities are allowed to be engaged in the business or activity of importing relevant contents, including in cases where the carrier to be used to bring the contents into China is exposed and developed cinematographic film.[415]

7.539 Accordingly, no matter which of the above-mentioned translations of Articles 5 and 30 is considered to be the correct one, in cases where what is imported is hard-copy cinematographic film, Articles 5 and 30 would necessarily affect hard-copy cinematographic film and, therefore, a good. As is clear from the above, the US claim in respect of Articles 5 and 30 relates to hard-copy cinematographic films.

7.540 We do not understand China to contest that Articles 5 and 30 have, or may have, an effect on hard-copy cinematographic films (the "internegative" or "interpositive") and, therefore, on goods. However, China argues that Articles 5 and 30 are not subject to the trading rights commitments set forth in China's Accession Protocol. In China's view, Articles 5 and 30 are subject only to WTO disciplines on services, as set forth in the GATS and China's Schedule of Commitments.

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[410] In response to question No. 180, China stated that the *Film Regulation* would apply in the same way to motion pictures transmitted without any physical carrier.

[411] China's first written submission, footnote 20 and para. 62.

[412] United States' response to question No. 13(b).

[413] This is provided for in Article 31 of the *Film Regulation*.

[414] China has confirmed that when cinematograpic film is used as a physical carrier, importation of a good takes place (China's response to question No. 177).

[415] In response to question No. 179, China confirmed that if a foreign motion picture is imported as exposed and developed cinematographic film containing such motion picture, the designated film importing entity will import such cinematographic film.

7.541 In discussing this issue, the parties have referred to the Appellate Body report on *EC – Bananas III*, which provides in relevant part:[416]

> "Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus in on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis."

7.542 It is important to bear in mind that this statement relates to the applicability of the GATS versus the GATT 1994, not the GATS versus the trading rights commitments in China's Accession Protocol. As discussed below, China argues that Articles 5 and 30 regulate the service of licensing, specifically the licensing of the right to exploit foreign motion pictures by organising their theatrical distribution and exhibition. It is clear from the above-quoted statement of the Appellate Body that Articles 5 and 30 could possibly be scrutinized under the GATS to the extent they affect the supply of a service. We consider that they could also be scrutinized under China's trading rights commitments to the extent they affect who may import a good. In particular, Chinese provisions that restrict who may import a good may impermissibly restrict the right to trade in that good. Therefore, the mere fact that Articles 5 and 30 may regulate a service in our view would not remove them from the scope of application of China's trading rights commitments.

7.543 As discussed above, if the term "films" in Articles 5 and 30 were understood as meaning "hard-copy cinematographic films", Articles 5 and 30 would directly regulate who may engage in importing of the goods at issue, i.e., "hard-copy cinematographic films". They would therefore appear to be subject, in principle, to China's trading rights commitments. On the other hand, if the term "films" were understood as meaning "contents that can be commercially exploited by projection in theatres", Articles 5 and 30 would not directly regulate who may engage in importing of the goods at issue, i.e., "hard-copy cinematographic films". But, as previously explained, in those cases where relevant content is to be imported on hard-copy cinematographic film, Articles 5 and 30 would necessarily affect who may engage in importing of hard-copy cinematographic films, because Articles 5 and 30 would then provide that only licensed and designated importers may engage in the import of content on cinematographic film. In the light of this, we think that under this translation Articles 5 and 30 would also appear to be subject, in principle, to China's trading rights commitments.

7.544 China nevertheless submits that we should not review Articles 5 and 30 in the light of its trading rights commitments. It argues, in essence, that Articles 5 and 30 regulate the service of licensing – the licensing of the right to exploit foreign motion pictures by organizing their theatrical distribution and exhibition – and that although Articles 5 and 30 may have an impact on hard-copy cinematographic film, they should not be scrutinized under China's trading rights commitments.

[416] Appellate Body Report on *EC – Bananas III*, para. 221.

China submits that hard-copy cinematographic film should be treated as a mere "accessory" to the aforementioned service, and that Articles 5 and 30 should, therefore, be examined under the disciplines governing trade in services only.

7.545 According to China, Articles 5 and 30 regulate the service of licensing of rights to the exploitation of motion pictures, by regulating who may obtain such a copyright licence.[417] As a general matter, we would accept that the licensing of rights can be considered a service that is provided by the film producer to the film importing entity. Also, Article 33 of the *Film Regulation* stipulates that a film importation entity must obtain permission from the copyright owner to use his film work and that it must use the film work within the scope of the licence obtained. Thus, Article 33 appears to contemplate the existence of a licensing agreement between a foreign film producer and the film importing entity.

7.546 Nevertheless, there are elements which cast doubt on China's position that Articles 5 and 30 regulate the service of licensing of rights. It is true that in those cases where a foreign film producer wishes to enter into a licensing agreement with a film importing entity, Articles 5 and 30 allow the SARFT to control with which film import entities foreign film producers could enter into such an agreement. But certain films imported into China may no longer be copyright-protected.[418] Pursuant to Articles 5 and 30, they could, however, be imported only by licensed and designated importers. Also, the United States has confirmed that in some instances a film producer itself may wish to import the film into another market, e.g., the Chinese market, to distribute the film in that market.[419] In this situation, which China has not addressed, there would appear to be no need for a licensing agreement between the film producer and the importer, since the film producer would be the importer.

7.547 At any rate, for the sake of argument, we are prepared to proceed with our analysis on the assumption that foreign film producers must enter into licensing agreements with licensed and designated film import entities in all cases. China submits that in the context of provisions like Articles 5 and 30 which, in China's view, regulate licensing services, any effect these provisions have on who may import hard-copy cinematographic film should not be examined under China's trading rights commitments. In support of this position, China has provided a number of arguments which we now turn to address.

7.548 China argues that hard-copy cinematographic film has no own commercial value and does not itself generate revenue since it is only used to make film prints to be distributed to theatres. China also argues that the ownership of the hard-copy cinematographic film is not transferred to the film importing entity under a licensing agreement, and that the hard-copy must either be destroyed or returned. We are not persuaded that we should not apply China's trading rights commitments because of these elements. We note that other types of goods, such as commercial samples, also may not, themselves, have a commercial value or generate revenue. Yet we do not think this would remove them from the scope of applicable WTO disciplines on trade in goods. Also, the fact that only a single hard copy may cross China's border for every film imported in our view does not provide a convincing rationale for not applying China's trading rights commitments. Other goods, such as certain tunnel construction machinery and equipment, may likewise not cross a particular border very often, yet the importing Member would charge customs duties on the importation of such goods in the

[417] China also stated that the service regulated is the distribution service (China's response to question No. 177). We understand from China's submissions that licensing and distribution are linked, in that the licensing agreement confers the right to exploit a film through theatrical release, which includes the right to make or use copies of the film and to organise its distribution to theatres. At any rate, we note that in its final comments to the Panel, China stated that its measure regulate the importation of films for theatrical release "as a copyright licensing for the exploitation of the motion pictures in Chinese theatres" (China's comments on the United States' response to question No. 164).

[418] The parties appear to agree that this is a possibility. Parties' responses to question No. 53(b).

[419] United States' response to question No. 13(b).

same way as they would in the case of goods that are imported very frequently and/or in large quantities. Likewise, we do not see why the applicability of WTO goods disciplines should turn on whether the importer of a good has become its owner. In our view, an importing Member could not prohibit the importation of a book that is being loaned to the importer, arguing that the disciplines of the GATT 1994 would not be applicable since the book in question has not been sold and no change in ownership has occurred.

7.549 China further argues that hard-copy cinematographic film is not a good traded in its own right, in the sense that it would not be traded in the absence of a services agreement under which the film producer licences the right to exploit the content by organizing its theatrical distribution and exhibition. China submits that the supply of the hard-copy cinematographic film cannot, therefore, be considered independently from the services agreement. In our view, the mere fact that an import transaction involving hard-copy cinematographic film is carried out as part, and in fulfilment, of a services agreement cannot be sufficient to remove it from the scope of China's trading rights commitments. Many goods are traded to meet the demand of services suppliers who use these goods to provide a service, and so they would not be traded if the relevant service were no longer provided. For instance, a hospital may need to import special surgical tools. Those tools would obviously be used by the hospital for the purpose of providing health care services. Nevertheless, we consider that a possible governmental ban on the importation of these surgical tools should be scrutinized under WTO disciplines on trade in goods. It is correct that, in the case of hard-copy cinematographic film, imports occur as a result of a contractual obligation under a licensing agreement. This element does not change our assessment, however. In our view, it merely serves to demonstrate the existence of a link between the hard-copy cinematographic film and the relevant service.

7.550 Taken together, the elements identified by China could support the view that hard-copy cinematographic film is an "accessory" to the licensing service to be provided by a film producer under a licensing agreement. However, even considering the various elements together, we are not persuaded that this would justify non-application of China's trading rights commitments to Articles 5 and 30 in cases where their application would otherwise be warranted.

7.551 To begin with, we note that the relevant paragraphs of the Accession Protocol refer, without qualification, to the right to trade in "all goods".[420] No distinction is made between goods like hard-copy cinematographic film that are imported as part of licensing agreements and goods that are imported "in their own right".

7.552 Also, we observe that the above-quoted passage from the Appellate Body report on *EC – Bananas III* addresses, *inter alia*, whether measures affecting a "service supplied in conjunction with a particular good" could be scrutinized under both the GATS and the GATT 1994. The passage contains the statement that it is to be determined on a case-by-case basis whether such measures are to be scrutinized under the GATT 1994, the GATS, or both. We understand this to mean that it must be determined in each case whether such measures fall within the scope of the GATT 1994, the GATS, or both, by examining whether such measures affect trade in goods as goods and whether they affect the supply of services as services.[421] We are not convinced that the Appellate Body meant to suggest that such measures could be analysed under only one of these agreements if they would also fall within the scope of application of the other agreement.[422] At any rate, the statement in question does

[420] E.g., paragraphs 5.1 and 84(a).

[421] We recall that the mere fact that a measure affects a service supplied in conjunction with a particular good does not necessarily imply that the measure falls within the scope of either the GATT 1994, or the GATS, or both. For instance, the Member concerned may not have undertaken a commitment regarding the relevant mode of supply of a service, or regarding the particular service.

[422] The United States appears to have the same understanding of the Appellate Body's guidance (United States' comments on China's response to question No. 199(a)).

not provide any criteria by reference to which it could be established, in a particular case, whether it would be appropriate not to apply an otherwise applicable agreement to measures affecting a service supplied in conjunction with a particular good. As a result, we do not think that the Appellate Body's statement provides us with clear guidance on the precise issue before us.

7.553 China has not identified any other WTO jurisprudence which would support its position. China has, however, referred to a judgment by the European Court of Justice based on the *Treaty Establishing the European Community* (hereafter the "*EC Treaty*").[423] According to China, the Court determined that licensing agreements between film producers in one EC member State and distributors in another EC member State come under the provisions of the aforementioned *EC Treaty* with regard to the freedom to provide services. China points out that the Court disregarded claims under the *EC Treaty* with regard to the free movement of goods. China also referred to the opinion of the Advocate General in the same case.[424] The Advocate General stated in relevant part that:

> "[A]lthough the exploitation in one Member State of a cinematograph film produced in another Member State presupposes a trans-frontier movement of goods in the sense that at least one copy of the film must be imported … the essential feature of the exploitation of a film does not lie in that physical trade in film bands. … The (trans-frontier) transfer of the material base of a film is only a logical outcome of [the producer's making available the rights to distribution together with the right to public exhibition], so that it is not possible to speak of movement of goods within the meaning of the Treaty".

7.554 In considering China's reference to jurisprudence of the European Court of Justice, we note that the Court applied the rules of the *EC Treaty*, not WTO rules, and that the rules applied by the Court are in any event different from those we are called on to apply in this case.[425] Therefore, the fact that it may be legally appropriate for the Court not to apply EC rules on the free movement of goods to an import transaction involving hard-copy cinematographic film does not mean that it would be legally appropriate for a WTO panel not to apply China's trading rights commitments to an analogous import transaction.

7.555 We are not convinced that merely because the import transaction involving hard-copy cinematographic film may not be the "essential feature" of the exploitation of the relevant film, China's trading rights commitments should not be applied to Articles 5 and 30, even though they would otherwise be applicable. We cannot make light of the fact that the trading rights commitments contained in China's Accession Protocol are legally binding and an integral part of the WTO Agreement.[426] We recall in this connection that in accordance with Article 19.2 of the DSU, in our findings, we must not add to Members' obligations or diminish Members' rights. We also note that China has not identified any serious legal or practical consequences which would arise if China's trading rights commitments are applied to hard-copy cinematographic films, but which would not arise if these commitments are applied to other goods.

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[423] Judgment of the European Court of Justice of 4 May 1993, Case C-17/92 (*Federación de Distribuidores Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión*), ECR 1993 [I] 02239 *et seq*. (Exhibit CN-5).

[424] Opinion of the Advocate General of 18 February 1993, Case C-17/92 (*Federación de Distribuidores Cinematográficos v Estado Español and Unión de Productores de Cine y Televisión*) ECR 1993 [I] 02239 (Exhibit CN-6).

[425] For instance, we note that the *Treaty Establishing the European Community* establishes a general freedom to provide services. In contrast, the WTO disciplines on trade in services applicable to China depend, in part, on the level and extent of the commitments taken by China.

[426] Paragraph 2.1 of the Accession Protocol.

7.556 Finally, we must address China's attempt to justify its position by reference to its Schedule of Commitments. China has made an additional commitment in Sector 2D ("Audiovisual Services") of its Schedule which states that "[w]ithout prejudice to compliance with China's regulations on the administration on films, 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". China submits that, through this commitment, it expressly reserved its right to regulate the importation of motion pictures for theatrical release as a licensing service and to allow only designated entities to import motion pictures.[427] China considers that its right to regulate the motion picture business under the GATS would be undermined if Articles 5 and 30 were not assessed exclusively under the GATS.

7.557 As we see it, the commitment in question relates to the importation of motion pictures for theatrical release for distribution on a revenue-sharing basis. Specifically, China has committed to allow the importation of up to 20 motion pictures per year for distribution on a revenue-sharing basis. Any additional imported motion pictures would need to be distributed on the basis of, e.g., an agreed licence fee (lump-sum payment).

7.558 The "without prejudice" clause contained in China's additional commitment in our view does not mean that China's trading rights commitments should not be applied to Articles 5 and 30. While China may be able to condition an additional commitment relating to motion pictures on being able to apply its WTO-consistent domestic *Film Regulation*s, inclusion of such a condition in China's Schedule of Commitments does not provide legal cover in cases where any such regulations are inconsistent with other WTO disciplines, such as China's trading rights commitments.[428] In other words, it is our view that by including a reference to its *Film Regulation*s in its additional commitment, China has not reserved a "right" to regulate licensing services in a manner that would result in a breach of its trading rights commitments.[429] As a result, we consider that China's additional commitment in Sector 2D does not support the conclusion that Articles 5 and 30 should not be scrutinized under China's trading rights commitments.

7.559 In sum, even if we assume that foreign film producers must, in all cases, enter into licensing agreements with licensed and designated film import entities, we are not persuaded by China's position that any effect Articles 5 and 30 have on who may import hard-copy cinematographic film should not be examined under China's trading rights commitments.

7.560 We thus conclude that no matter which of the above-mentioned translations of Articles 5 and 30 is considered to be the correct one, these provisions are subject to China's trading rights commitments, in that they would either directly regulate who may engage in importing of "hard-copy cinematographic films" or necessarily affect who may engage in importing of such goods.

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[427] China's response to question No. 36(a).

[428] Nothing in Article XVIII of the GATS suggests that by undertaking additional commitments Members could diminish its other WTO obligations. We note in this context the statement of the Appellate Body in *EC – Poultry* with regard to schedules of concessions to the effect that the term "concessions" suggests that an importing Member "may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations" (Appellate Body Report on *EC – Poultry*, para. 98). While this statement does not relate to Schedules of Commitments, we believe that the logic followed by the Appellate Body applies equally to "additional commitments" under the GATS.

[429] In its reply to question No. 36(c), China has referred to footnote 6 of China's Schedule of Commitments, which relates to Sector 4B. The footnote reads: "The restrictions on mode 1 shall not undermine the rights of WTO Members to the right to trade as stipulated in Chapter 5 of China's Protocol of accession to the WTO". In our view, the absence in Sector 2D of a similar footnote does not imply that China's additional commitment regarding motion pictures has been accepted to undermine the rights of other Members to the right to trade.

Consistency

7.561 Having determined that China's trading rights commitments are applicable to Articles 5 and 30 of the *Film Regulation*, we now turn to address the merits of the US claims that Articles 5 and 30 give rise to an inconsistency with China's trading rights commitments.

Article 5

7.562 So far as concerns Article 5, we first recall that it establishes a licensing system for the import of films. In response to a question from the Panel, China confirmed that all importers of films must obtain a licence and indicated that importers are granted licences through a designation process.[430] Regarding the US claim in respect of Article 5, we note that the United States has referred to, and reproduced, this provision, but not explained why and how it is inconsistent with one or more of the cited provisions of the Accession Protocol. In the light of this, we consider, and conclude, that the United States has not met its burden of establishing that Article 5 gives rise to an inconsistency with the trading rights commitments under China's Accession Protocol. Nor has the United States established that Article 5 results in an inconsistency when considered together with other challenged measures.

Article 30

7.563 Regarding Article 30, we recall that it imposes a designation requirement. Pursuant to Article 30, no entity or individual may engage in the business of importing films without being a film importing entity designated as such by the SARFT.

7.564 The United States claims that Article 30 is inconsistent with China's obligation to allow all enterprises in China and foreign enterprises and individuals to import films. According to the United States, the designation requirement is more than a mere administrative formality. In the United States' view, it serves a gate-keeping function to limit the number of enterprises selected by the SARFT.[431]

7.565 The United States further claims that the designation requirement introduces significant discretion into a process that China committed to be "non-discretionary". The United States submits that it empowers the SARFT to assign trading rights to only those importers of its own choosing on no basis other than its own discretion.[432]

Paragraph 84(b)

7.566 We begin our analysis with the second US claim, which we understand to be based on paragraph 84(b). We recall that in accordance with Article 30 no entity or individual has the right to import films without being designated. It also provides that the business of importing films is to be conducted by designated film import entities. Thus, it would appear that China can designate only film import entities, not individuals.

7.567 We further note that Article 30 does not explicitly state whether film import entities need to be registered in China. We recognize that the term "film import entity" is unqualified. In our view, this does not necessarily mean, however, that the term could cover also foreign enterprises not registered in China. We note in this respect that we have not been given any other trade-related Chinese laws or regulations that could indicate whether an "import entity" needs to be registered in China. We also note Article 16 of the *Film Enterprise Rule*, which parallels Article 30. The *Film*

[430] China's responses to question Nos. 170 and 171.
[431] United States' responses to question No. 11(a) and (d).
[432] *Ibid*.

Enterprise Rule contemplates only enterprises in China as importers of films. In view of these elements, and the lack of US arguments and evidence on this issue, we consider that the United States has not demonstrated that the term "film import entities" as it appears in Article 30 could cover foreign enterprises not registered in China and that such enterprises could be designated as "film import entities". We accept, however, that enterprises registered in China, including foreign-invested enterprises, could be designated as "film import entities".

7.568 As to whether the term "film import entities" could cover Chinese branches of foreign-registered enterprises, it is sufficient to note that the United States has not asserted that Article 30 affects branches in China and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine this issue further.[433]

7.569 In examining Article 30, we observe, finally, that designation under Article 30 is not automatic. Rather, we infer from China's responses to questions from the Panel that it is up to the SARFT to initiate the designation process.[434] We also note that Article 30 contains no criteria to be followed by the SARFT in deciding whom to designate. Moreover, China has not contested the US contention that SARFT can designate importers "of its own choosing". Accordingly, it appears to us that under Article 30 China needs to exercise discretion in order to grant the right to import films. We therefore consider that, as a result of Article 30, China does not grant the right to import films to film import entities in a non-discretionary way.[435]

7.570 With these observations about Article 30 in mind, we now turn to the claimed inconsistency with paragraph 84(b). In view of the fact that the discretion relates to the designation of "film import entities", and not individuals, we conclude that Article 30 does not result in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. Furthermore, the United States has not established that Article 30 results in an inconsistency with paragraph 84(b) in respect of foreign individuals when considered together with other challenged measures.

7.571 On the other hand, we recall that in our view "film import entities" within the meaning of Article 30 include foreign-invested enterprises in China. We therefore conclude that, as a result of Article 30, China does not grant trading rights to foreign-invested enterprises in China which wish to import films into China "in a non-discretionary way", and that, for that reason, China is acting inconsistently with its obligation under paragraph 84(b).

7.572 We also recall that the United States has not asserted that Article 30 affects Chinese branches of foreign enterprises not registered in China, and that it has not demonstrated that China could designate foreign enterprises not registered in China as "film import entities". Accordingly, we conclude that the United States has not established that Article 30 results in China acting

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[433] Also, it is in any event not clear to us from the information on the record whether Chinese laws or regulations on branches of foreign enterprises allow foreign-registered enterprises to set up Chinese branches in the sector at issue.

[434] China has confirmed that designation can occur exclusively at the Government's own initiative (China's response to question No. 25(a)). China has further indicated that with respect to import entities for films for theatrical release, only a designation process is provided for (China's response to question No. 25(b)). In support of the latter statement, China specifically referenced Article 30 of the *Film Regulation*. Finally, China has stated that Article 30 sets forth that importers of foreign films for theatrical release are to be designated by the SARFT (China's response to question No. 170).

[435] If the term "films" in Article 30 were understood as meaning "contents that can be commercially exploited by projection in theatres", China would, by implication, also have discretion in granting the right to import hard-copy cinematographic films, since only designated importers of contents could import hard-copy cinematographic films.

inconsistently with its obligation under paragraph 84(b) in respect of foreign enterprises not registered in China. The United States has also not established that Article 30 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

Paragraphs 5.1, 83(d) and 84(a)

7.573 We understand the other US claim in respect of Article 30 to be based on paragraphs 5.1, 83(d) and 84(a). We recall that Article 30 provides that no entity or individual may engage in the business of importing films without being designated, and that the business of importing films is to be conducted by designated film import entities. Thus, as previously noted, it would appear that China cannot designate individuals.

7.574 Regarding "entities", they can obtain the right to import films only if the SARFT decides to designate them as film import entities. We have found earlier that the United States has not established that foreign enterprises not registered in China could be designated as "film import entities". If they could not be designated, however, they could not, pursuant to Article 30, engage in the business of importing films. We also recall that the United States has not asserted that Article 30 affects Chinese branches of foreign enterprises not registered in China.

7.575 Having regard to enterprises registered in China, which we have said could be designated as "film import entities", we note that there is no process whereby entities can submit applications.[436] To us, this suggests that the designation requirement is not applied merely to ensure compliance with customs or fiscal requirements, or requirements imposed for "normal business regulation" purposes. Also, the fact that entities are designated exclusively at the initiative of the SARFT in our view suggests that the designation requirement is not applied to allow any and all entities to import films. We therefore see no reason to disagree with the United States' contention that the designation requirement set out in Article 30 serves a gate-keeping function. In fact, in response to a question from the Panel, China has indicated that its designation requirements "result in [a] limited number of importers".[437] We note in this respect that evidence submitted by the United States shows that China has assigned the right to import films for theatrical release to only one entity, namely, the China Film Import and Export Corporation, which is a subsidiary of China Film Group and a Chinese wholly state-owned enterprise.[438]

7.576 In the light of the foregoing, we are of the view that by providing in Article 30 that the business of importing films is to be conducted by SARFT-designated film import entities, and that no entity or inidividual may engage in the business of importing without being designated, China has failed to ensure that all enterprises in China (including foreign-invested enterprises) and foreign enterprises not registered in China and foreign individuals have the right to import cinematographic

[436] China's response to question No. 25(a).

[437] China's response to question No. 172. In its reply, China suggests that the purpose of its various designation requirements is not to limit the number of importers, but to select entities allowed to import cultural goods. At the same time, as indicated, China specifically noted that "the designation system would result in a limited number of importers".

[438] This evidence includes Article II of the *Film Distribution and Exhibition Rule*; Article 12 of the *Digital Film Rule* (Exhibit US-66), which provides that only the China Film Group may engage in the business of importing digital films; and the China Film Group's homepage (Exhibit US-23). China has not contested that China Film Import and Export Corporation is the only designated importer of films for theatrical release.

In relation to the fact that there is only one designated film importing entity, the United States argues that Article 30 of the *Film Regulation* constitutes the legal basis for the China Film Import and Export Corporation's "monopoly" on the right to import films. However, we see nothing in the text of Article 30 that would indicate that China is legally barred from designating additional importers.

films.[439] We therefore consider, and conclude, that Article 30 results in China acting inconsistently with its obligations under paragraphs 5.1 and 83(d) (in respect of enterprises in China) and paragraph 84(a) (in respect of enterprises in China and foreign enterprises and foreign individuals).

Paragraph 5.2

7.577 Finally, we note that in response to a question from the Panel, the United States suggested that the *Film Regulation* results in an inconsistency with paragraph 5.2.[440] It is not clear, however, whether any such claim would concern Article 5 or Article 30 or both, nor why an inconsistency is alleged to arise. Consequently, we conclude that the United States has not established any claim under paragraph 5.2. We also note that the United States has not established that the *Film Regulation* results in an inconsistency with paragraph 5.2 when considered together with other challenged measures.

(viii) Film Enterprise Rule

7.578 The **United States** notes that the *Film Enterprise Rule* further regulates the importation of films for theatrical release into China. The United States points out that Article 2 of this measure limits its application to domestic enterprises involved in, *inter alia*, the importation and exportation of films. Article 3 reiterates that the State implements a licensing system with respect to the importation of films. The United States further notes that consistently with the *Film Regulation* and the *Film Distribution and Exhibition Rule*, Article 16 states that the "[t]he business of importing films shall be exclusively conducted by film import enterprises that are approved by SARFT". According to the United States, the *Film Distribution and Exhibition Rule* indicates that only one such enterprise has been so approved: China Film Import and Export Corporation.

7.579 As indicated in connection with the *Film Regulation*, the United States claims that China's measures granting China Film Group a monopoly on the right to import films for theatrical release are inconsistent with China's trading rights commitments. In the United States' view this monopoly not only deprives enterprises in China (other than China Film Group) as well as foreign enterprises and individuals of the right to import films for theatrical release. It also discriminates against foreign-invested enterprises and foreign individuals, in contravention of China's trading rights commitments. As noted above, the United States considers that Article 30 of the *Film Regulation* constitutes the legal basis for this monopoly. The United States submits that Article 16 of the *Film Enterprise Rule* confirms this restriction.

7.580 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 3 and 16 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[441]

7.581 **China** argues that paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol govern only trade in goods. For reasons explained above in relation to the US challenge to the *Film Regulation*, China considers that the United States has failed to establish that motion pictures for theatrical release, i.e.,

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[439] If the term "films" in Article 30 were understood as meaning "contents that can be commercially exploited by projection in theatres", China would, by implication, also have failed to ensure that all enterprises in China and foreign enterprises and individuals have the right to import hard-copy cinematographic films, since only designated importers of contents could import hard-copy cinematographic films.

[440] United States' response to question No. 1.

[441] *Ibid*.

motion pictures intended to be shown in movie theatres, could be considered as goods. China submits that the relevant Chinese measures, including the *Film Enterprise Rule*, do not regulate the importation of goods but regulate services related to the licensing of rights for the exploitation of motion pictures. Consequently, China considers that paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol do not apply and that the US claim lacks any legal basis.

7.582 The **Panel** first recalls its determination above that it can address the US claim in respect of films for theatrical release, and that this claim concerns goods. The Panel therefore proceeds to consider China's argument that its trading rights commitments are, nevertheless, inapplicable to the relevant provisions of the *Film Enterprise Rule*.

Applicability

7.583 The United States is asking us to apply China's trading rights commitments to Articles 3 and 16 of the *Film Enterprise Rule*, which both address who may import films. Article 3 provides in relevant part that "[t]he State institutes a licensing system to the operation qualifications for production, distribution, projection, import and export of films". Article 16 provides in relevant part that "[t]he business of importing films shall be exclusively conducted by film importing enterprises that are approved by SARFT".

7.584 We note that Article 3 (licensing requirement) and Article 16 (approval requirement) of the *Film Enterprise Rule* are similar to Article 5 (licensing requirement) and Article 30 (designation requirement) of the *Film Regulation*. Also, China's arguments in support of its position that we should not apply China's trading rights commitments to Articles 3 and 16 of the *Film Enterprise Rule* are the same as those we have discussed previously when addressing the same issue in relation to Articles 5 and 30 of the *Film Regulation*. In the light of these elements, we consider that the reasons which led us to conclude that Articles 5 and 30 of the *Film Regulation* are subject to China's trading rights commitments are also applicable, *mutatis mutandis*, to Articles 3 and 16. We thus conclude that these provisions are subject to China's trading rights commitments.

Consistency

7.585 Having satisfied ourselves that China's trading rights commitments are applicable to Articles 3 and 16 of the *Film Enterprise Rule*, we now turn to address the merits of the US claims that Articles 3 and 16 give rise to an inconsistency with China's trading rights commitments.

Article 3

7.586 So far as concerns Article 3, we first recall that it establishes a licensing system for the import of films. In response to a question from the Panel, China confirmed that all importers of films must obtain a licence and that importers are granted licences through a designation process.[442] Regarding the US claim in respect of Article 3, we note that the United States has referred to this provision in response to a question from the Panel, but has not explained why and how it is inconsistent with one or more of the cited provisions of the Accession Protocol.[443] In the light of this, we consider, and conclude, that the United States has not met its burden of establishing that Article 3 gives rise to an inconsistency with the trading rights commitments under China's Accession Protocol. Nor has the

[442] China's responses to question Nos. 170 and 171.

[443] United States' response to question No. 1. Article 3 is mentioned at para. 66 of the United States' first written submission in a section entitled "Factual Background". Article 3 is not mentioned, however, in the section of the same written submission – Section IV – where the United States alleges that China's measures are inconsistent with China's trading rights commitments.

The United States' first written submission mentions Article 3

United States established that Article 3 results in an inconsistency when considered together with other challenged measures.

Article 16

7.587 Regarding Article 16, we note that unlike Article 30 of the *Film Regulation*, it refers to the need to be "approved" by the SARFT, not "designated". The United States argues that, despite the different terminology, the approval process provided for in Article 16 is not different from the designation process provided for in Article 30 of the *Film Regulation*. The United States notes in this respect that Article 16, like Article 30, is devoid of criteria or other conditions confining the SARFT's discretion. The United States further argues that the *Imported Cultural Products Rule* confirms that a designation and not an approval requirement applies to film importers.[444] According to the United States, Article 10 of the *Imported Cultural Products Rule* states that "[m]otion picture import business shall be exclusively run by import units designated by SARFT".[445]

7.588 In response to questions on this issue from the Panel, China initially stated that for films for theatrical release only a designation process is provided for, and that there is no approval process.[446] Subsequently, and as already pointed out, China indicated that licences under Article 3 of the *Film Enterprise Rule* are granted through a designation process.[447] China also stated, however, that Article 16 provides that importers of films must be approved by the SARFT, and that this contrasts with Article 30 of the *Film Regulation*, under which film importers must be designated by the SARFT. China then went on to explain that, in accordance with China's Law on Legislation, the *Film Regulation* prevails over the *Film Enterprise Rule*.[448] Finally, in response to the question whether Article 16 sets out an approval or a designation requirement, China said that the licence to import films is granted through a designation process.[449]

7.589 It is difficult to reconcile China's various replies. China's view that Article 3 of the *Film Enterprise Rule* is applied using a designation process would appear to suggest that Article 16 is likewise so applied, notwithstanding the fact that Article 16 uses the term "approved".[450] On the other hand, China could be understood as indicating that Article 16 would not be applied using a designation process, but that China nonetheless designates importers, because Article 30 of the *Film Regulation* sets out a designation requirement which prevails over the approval requirement contained in Article 16.

7.590 We note that China has not submitted the text of the relevant provision of the Law on Legislation.[451] We are therefore unable to review it. As a result, it is also unclear to us whether China would apply only Article 30 of the *Film Regulation*, or whether China would apply Article 16 so as to be consistent with Article 30, e.g., by approving only enterprises which it would at the same time designate under Article 30. Since there is no evidence on the record to demonstrate that Article 16 is not applied by China when determining who may conduct the business of importing films, our analysis proceeds on the basis that it is applied.

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[444] United States' response to question No. 11(a).

[445] Exhibit US-10.

[446] China's response to question No. 25(b). In support of its statement, China referred to Article 30 of the *Film Regulation*.

[447] China's response to question No. 170.

[448] *Ibid*.

[449] China's response to question No. 171.

[450] China's response to question No. 171 would also support this understanding.

[451] The United States has submitted the text of some provisions of the *Legislation Law* as Exhibit US-72, but not the provision relied on by China.

7.591 Pursuant to Article 16, only "approved" film import enterprises may conduct the business of importing films. The United States claims that Article 16 is inconsistent with China's obligation to allow all enterprises in China and foreign enterprises and foreign individuals to import films. According to the United States, the approval requirement in Article 16 is more than a mere administrative formality. In the United States' view, it serves a gate-keeping function to limit the number of enterprises selected by the SARFT.[452]

7.592 The United States further claims that the approval requirement introduces significant discretion into a process that China committed to be "non-discretionary". The United States submits that it empowers the SARFT to assign trading rights to only those importers of its own choosing on no basis other than its own discretion.[453]

Paragraph 84(b)

7.593 We begin our analysis with the second US claim, which we understand to be based on paragraph 84(b). We recall that in accordance with Article 16 only "approved" film import enterprises have the right to import films. There does not appear to be a process whereby applications could be filed. Article 16 also contains no criteria to be followed by the SARFT in deciding which enterprises to approve. It is different, in this respect, from the approval process set out, e.g., in Articles 41 and 42 of the *Publications Regulation*. Article 16 is similarly different from the criteria-based approval process established in the *Film Regulation* for film distribution entities.[454] Moreover, China has not contested the US contention that the SARFT can approve importers "of its own choosing". We thus infer that the SARFT enjoys discretion as to which enterprises to approve. Accordingly, it appears that under Article 16 China needs to exercise discretion in order to grant the right to import films.

7.594 We understand from Article 2 of the *Film Enterprise Rule*[455] that it applies only to enterprises inside China.[456] The United States has also pointed this out.[457] As a result, it appears that the only enterprises that could be approved are enterprises in China, which include foreign-invested enterprises. Since the SARFT enjoys discretion as to which enterprises to approve, we conclude that, as a result of Article 16, China does not grant trading rights to foreign-invested enterprises in a non-discretionary way.

7.595 Regarding foreign enterprises not registered in China and foreign individuals, we note that Article 16 states that the business of importing films "shall be exclusively conducted by film import enterprises that are approved by SARFT". As we understand it, this phrase has the effect of excluding foreign enterprises not registered in China and foreign individuals from the business of importing films.[458] We therefore consider that Article 16 does not give China the discretion to grant the right to trade to such enterprises or individuals as importers. Accordingly, we conclude, that the United States has not met its burden of establishing that Article 16 gives rise to an inconsistency with paragraph 84(b) in relation to foreign enterprises not registered in China and to foreign individuals.

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[452] United States' responses to question Nos. 11(a) and (d).

[453] *Ibid*.

[454] Articles 36 and 37 of the *Film Regulation*.

[455] Article 2 states in relevant part that "[t]hese Provisions are applicable to the management of entry criteria for companies, enterprises and other economic organizations inside China that engage in the business of the ... import and export of films, and for outside companies, enterprises and other economic organizations that participate in the production and projection of films".

[456] We nonetheless note that, e.g., Article 15 explicitly also applies to individuals.

[457] United States' first written submission, para. 66.

[458] This understanding is also consistent with the provisions of Article 30 of the *Film Regulation*.

7.596 Regarding Chinese branches of foreign-registered enterprises, we observe that the United States has not asserted that Article 16 affects such branches and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine whether, as a result of any effect Article 16 may have on Chinese branches of foreign-registered enterprises, Article 16 gives rise to an inconsistency with paragraph 84(b) in relation to foreign enterprises not registered in China.

Paragraphs 5.1, 83(d) and 84(a)

7.597 The other US claim in respect of Article 16 appears to be based on paragraphs 5.1, 83(d) and 84(a). We recall in this regard that Article 16 appears to apply only to enterprises in China and other economic organizations in China. Thus, Article 16 has the effect that enterprises, or other economic organizations, in China that have not been approved by the SARFT cannot engage in the business of importing films. In other words, they can obtain the right to import films only if the SARFT decides to approve them. As indicated, there appears to be no process whereby they can submit applications. To us, this suggests that the approval requirement is not applied merely to ensure compliance with customs or fiscal requirements, or requirements imposed for "normal business regulation" purposes. Also, the fact that enterprises in China appear to be approved exclusively at the initiative of the SARFT in our view suggests that the approval requirement is not applied to allow any and all enterprises in China to import films. We therefore see no reason to disagree with the United States' contention that the approval requirement set out in Article 16 serves a gate-keeping function. In this respect, we recall that evidence submitted by the United States shows that China has assigned the right to import to only one enterprise in China.

7.598 In the light of the foregoing, we consider that by providing in Article 16 that only SARFT-approved enterprises may import films, China has failed to ensure that all enterprises in China have the right to import films. Therefore, we conclude that in respect of enterprises in China, Article 16 results in China acting inconsistently with its obligations under paragraphs 5.1, 83(d) and 84(a).

7.599 Regarding foreign enterprises not registered in China and foreign individuals, we recall our view that Article 16 has the effect of excluding foreign enterprises not registered in China, and foreign individuals, from the business of importing films. Therefore, we consider that China does not permit such enterprises or individuals to import films. We thus conclude that Article 16 results in China acting inconsistently with paragraph 84(a) in respect of such enterprises or individuals.

7.600 Regarding Chinese branches of foreign-registered enterprises, we recall that the United States has not asserted that Article 16 affects such branches. Accordingly, we do not examine whether, as a result of any effect Article 16 may have on Chinese branches of foreign-registered enterprises, Article 16 gives rise to an inconsistency with paragraph 84(a) in relation to foreign enterprises not registered in China.

Paragraph 5.2

7.601 Separately, we note that in response to a question from the Panel, the United States suggested that the *Film Enterprise Rule* results in an inconsistency with paragraph 5.2.[459] It is not clear, however, whether any such claim would concern Article 3 or Article 16 or both, nor why an inconsistency with either provision is alleged to arise. Consequently, we conclude that the United States has not established any claim under paragraph 5.2. We also note that the United States has not established that the *Film Enterprise Rule* results in an inconsistency with paragraph 5.2 when considered together with other challenged measures.

[459] United States' response to question No. 1.

(ix) Film Distribution and Exhibition Rule

7.602 The **United States** notes that the *Film Distribution and Exhibition Rule* primarily addresses the distribution and projection of films for theatrical release in China. However, it also notes that Article II of this measure addresses the importation of films, providing that the "unifying imports and using imports to generate exports" shall continue to be a principle to be upheld. As further pointed out by the United States, Article II also states in relevant part that China Film Group film import/export company shall be "entrust[ed] ... to unify the importing of films consigned from foreign countries ...". According to the United States, the *Film Distribution and Exhibition Rule* thus clarifies how the requirements of the *Film Regulation* are to be fulfilled, i.e., exactly one domestic enterprise, owned by the State, is to import films for theatrical release: a Chinese wholly state-owned enterprise called China Film Import and Export Corporation.

7.603 The United States submits that the *Film Distribution and Exhibition Rule* explicitly establishes China's film importation monopoly, designating China Film Group as the exclusive importer of foreign films into China. As indicated in connection with the *Film Regulation*, the United States claims that China's measures granting China Film Group a monopoly on the right to import films for theatrical release are inconsistent with China's trading rights commitments. In the United States' view this monopoly not only deprives enterprises in China (other than China Film Group) as well as foreign enterprises and individuals of the right to import films for theatrical release. It also discriminates against foreign-invested enterprises and foreign individuals, in contravention of China's trading rights commitments.

7.604 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Article II of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[460]

7.605 **China** notes that the US panel request does not refer to this measure in relation to the US claim concerning trading rights. China considers that this measure has not been adequately identified within the meaning of Article 6.2 of the DSU. Consequently, China requests the Panel to find that this measure is not within the Panel's terms of reference.

7.606 The **Panel** recalls its decision at paragraph 7.60 above that the *Film Distribution and Exhibition Rule* is not within its terms of reference with respect to the US claim regarding China's trading rights commitments, and so the Panel refrains from addressing the merits of the US claim in respect of Article II of this measure.

(x) 2001 Audiovisual Products Regulation

7.607 The **United States** notes that according to its Article 2, the *2001 Audiovisual Products Regulation* applies to, *inter alia*, the importation of audiovisual products (including audio and video tapes, records, and audio and video CDs) into China. Thus, the United States points out, China includes sound recordings within the legal regime governing the importation of audiovisual products. The United States also notes that according to Article 5 of the *2001 Audiovisual Products Regulation*, the State institutes a licensing system for the importation of audiovisual products and that no entity or individual may engage in the importation of audiovisual products without the necessary permit. The United States points out that Article 5 further elaborates on the confines of China's audiovisual

[460] United States' response to question No. 1.

product import regime by providing that permits and approval documents may not be rented, lent, sold or assigned.

7.608 The United States further argues that China regulates imported audiovisual products, including AVHE products, according to whether they are finished or unfinished. According to the United States, finished AVHE products are legitimately produced and replicated outside of China and require no additional production or replication in China before being made available to consumers. Unfinished AVHE products, on the other hand, are master copies to be used to publish and manufacture copies for sale in China.[461]

7.609 Regarding what enterprises may import finished audiovisual products into China, the United States refers to Article 27 of the *2001 Audiovisual Products Regulation*, which states:

> "The import of finished audiovisual products shall be handled by finished audiovisual product import entities designated by the cultural administration under the State Council. Any entity or individual which has not been designated may not engage in the import of finished audiovisual products."

7.610 Regarding enterprises that import unfinished audiovisual products, the United States points out that they must be approved by MOC using a formal application process. The United States indicates that Chapter II (Articles 8-10) of the *2001 Audiovisual Products Regulation* establishes the application and approval procedures applicable to these enterprises. The United States also refers to Article 28, which provides, in relevant part, that importers of audiovisual products for publication must bring their MOC-issued approval documents "to process import procedures at Customs".

7.611 The United States contends that these designation requirements (finished audiovisual products) and approval requirements (unfinished audiovisual products) are more than mere administrative formalities. In the United States' view, they serve a gate-keeping function to limit the number of enterprises selected by the Chinese Government to import audiovisual products into China. The United States notes in this respect that under these requirements, only CNPIEC (a Chinese wholly state-owned enterprise) has been designated to import finished audiovisual products.[462] Also, according to the United States, only Chinese wholly state-owned enterprises may be approved to engage in the importation of unfinished audiovisual products.[463]

7.612 The United States claims that the designation requirements for finished audiovisual products and the approval requirements for unfinished audiovisual products are inconsistent with China's trading rights commitments, because they inject qualifying criteria and government discretion into a process that China committed to be "non-discretionary".

7.613 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 5 and 27-28 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working

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[461] The United States refers to Articles 27 and 28 of the *2001 Audiovisual Products Regulation* and to Articles 8, 10, 13 and 14 of the *Audiovisual Products Importation Rule*. The United States further points out that unfinished sound recordings include master recording discs.

[462] The United States refers to Article 5 of the *Imported Cultural Products Rule* (stating that the "[i]mport of finished audiovisual products shall be exclusively handled by the China [National] Books Import and Export Corporation") (Exhibit US-10) and Article I of the *Circular on Uniform Anti-Fake Logo for Audiovisual Products* (providing that "[a]ccording 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).

[463] The United States refers to Article 42 of the *Publications Regulation* and Article 4 of the *Imported Cultural Products Rule*.

Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[464]

7.614 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.615 China notes that the US claim in respect of this measure targets both finished and what the United States calls "unfinished" products, the latter being, in China's view, audiovisual products imported for publication purposes. China submits that the concept of "unfinished audiovisual products" used by the United States in its claim does not appear in the Chinese regulations concerned. China notes that the concept used in Chinese regulations is that of "audiovisual products used for publication", which refers to master copies with audiovisual content that are to be published in China via copyright licensing agreements.[465]

7.616 China argues that the United States wrongly assumes, and fails to establish, that these "unfinished" audiovisual products are goods. In China's view, it follows that the US claim concerning trading rights for "unfinished" audiovisual products lacks any legal basis and should be rejected.

7.617 China submits that these master copies carry audiovisual content that is subject to a copyright licensing agreement between the foreign right holder and a Chinese publisher. China explains that this licensing agreement sets the conditions according to which the audiovisual content will be exploited in China's territory. China states that the master copy is used for the sole purpose of making copies in accordance with the licensing agreement. According to China, the master copy would eventually be returned or destroyed. China considers, therefore, that the importation of the master copy is only an accessory of copyright licensing. Consequently, China submits, the importation of audiovisual products used for publication does not correspond to the importation of goods, but to copyright licensing.

7.618 In other words, China argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* regulate the importation of audiovisual products used for publication as the licensing of the right to make copies of an audiovisual content, and not as the importation of goods. In China's view, the "right to import" audiovisual products used for publication consists of the right to enter into a copyright agreement for the publication of copies of an audiovisual content, and not of the right to import goods intended for resale.

7.619 China submits that this is reflected in the procedure applicable to foreign audiovisual products used for publication. In particular, China notes that Article 29 of the *2001 Audiovisual Products Regulation* states that "as regards the importation of audiovisual products used for publication, the copyright thereof shall be registered with the administrative department of copyright under the State Council". China also notes that Article 14 of *Audiovisual Products Importation Rule* specifies that "in the event of importing the audiovisual products for publication, application shall be filed with, and the following documents and materials shall be submitted to, the Ministry of Culture: … draft of the copyright trade agreement (versions in Chinese and foreign language), certificate of original copyright, authorization letter of copyright and the certification of registration issued by the copyright

[464] United States' response to question No. 1.

[465] China refers to Articles 27 and 28 of the *2001 Audiovisual Products Regulation* and to the *Audiovisual Products Importation Rule*.

certification agencies of the State …". According to China, these measures demonstrate that copyright licensing is a prerequisite for the import operation.

7.620 China argues that since the challenged measures regulate a service, i.e., the licensing of copyrights for publication of audiovisual content, China's commitments concerning the right to import goods do not apply to such measures.

7.621 The **United States** responds that there is no textual basis for China's assertion that unfinished AVHE products and unfinished sound recordings are not goods. In the United States' view, the fact that these tangible goods carry content does not take them out of the category of goods. If it did, then reading materials, finished AVHE products, and finished sound recordings, would not be goods, an assertion that China has not advanced in this dispute.

7.622 The United States also notes that the 2007 Harmonized System, which the United States says was implemented under the Harmonized System Convention, describes products under HS heading 8523, in pertinent part, as follows: "[d]iscs, tapes, solid-state non-volatile storage devices, 'smart cards' and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs".[466] In the United States' view, this description makes clear that these products are goods. The United States also argues that master copies of videocassettes, VCDs and DVDs, as well as master recording discs, to be reproduced and sold in China, would be covered by the broad description for HS heading 8524, because these master copies are "records, tapes and other recorded media for sound or other similarly recorded phenomena". The United States further points out that the CPC also classifies "recorded media for sound or other similarly recorded phenomena" other than films under goods subclass 47520.

7.623 In addition, the United States submits that China treats these products as goods. The United States notes that China's tariff schedule, which has not yet implemented the 2007 changes to the HS, incorporates the description of these products under HS heading 8524.[467] Moreover, the United States points out that in response to a question from the Panel, China concedes that it charges customs duties for hard-copy audiovisual products (including sound recordings) intended for publication.[468] Furthermore, the United States observes that Article 2 of the *Audiovisual Products Importation Rule* defines audiovisual products as "audio tapes, video tapes, records, and audio and video CDs which have recorded content" and cross-references the HS codes for these products, which are provided in Annex 1 to the measure. In the United States' view, this further reinforces the conclusion not only that these items are goods, but that China treats them as goods.

7.624 Regarding China's assertion that its measures do not regulate the right to import master copies of AVHE products or sound recordings, but simply deal with rights to enter into copyright agreements, the United States argues that, as with films, China may have provisions regulating copyright licensing, but this does not change the fact that other Chinese provisions directly regulate who can import the good subject to that licensing.[469] The United States notes in this connection that China does not contest the conclusion that finished AVHE products and finished sound recordings are goods, even though these products are also copyright protected.

7.625 The **Panel** begins by recalling that the provisions of the *2001 Audiovisual Products Regulation* apply to both hard copy sound recordings and other audiovisual products.[470] The

[466] Exhibit US-55.
[467] Exhibit JPN-2.
[468] China's response to question No. 132.
[469] The United States refers to Articles 8-10 of the *2001 Audiovisual Products Regulation* and Articles 3, 7 and 8 of the *Audiovisual Products Importation Rule*.
[470] Article 2 of the *2001 Audiovisual Products Regulation*.

provisions of the *2001 Audiovisual Products Regulation* identified by the United States as provisions giving rise to an inconsistency with China's trading rights commitments are Articles 5, 27 and 28. The US claims in respect of Articles 5 and 28 concern both finished and what the United States termed unfinished audiovisual products, i.e., audiovisual products used for publication.[471] The US claim in respect of Article 27 concerns only finished audiovisual products. The Panel will first address the latter claim.

7.626 Before addressing the claim in respect of Article 27, however, we note that in response to a question from the Panel, the United States suggested that the *2001 Audiovisual Products Regulation* results in an inconsistency with paragraphs 5.1, 83(d), 84(a) and 5.2.[472] It is not clear, though, in respect of which of the provisions at issue – Articles 5, 27 or 28 – claims are made and under which of these paragraphs. Nor is it clear why an inconsistency is alleged to arise. Consequently, the United States in our view has not met its burden of establishing its claims under the aforementioned paragraphs.

Article 27

7.627 We recall that Article 27 provides that entities or individuals that have not been designated may not engage in the import of finished audiovisual products. It also provides that the import of finished audiovisual products must be handled by finished audiovisual product import entities designated by the MOC. Thus, it would appear that China can designate only finished audiovisual product import entities, not individuals.

7.628 We further note that Article 27 does not explicitly state whether finished audiovisual product import entities need to be registered in China. We recognize that the term "finished audiovisual product import entity" is unqualified. In our view, this does not necessarily mean, however, that the term "finished audiovisual product import entity" could cover also foreign enterprises not registered in China. We note in this respect that we have not been given any other trade-related Chinese laws or regulations that could indicate whether an "import entity" needs to be registered in China. In view of the foregoing, and the lack of US arguments or evidence on this issue, we consider that the United States has not demonstrated that the term "finished audiovisual product import entity" as it appears in Article 27 could cover foreign enterprises not registered in China and that such enterprises could be designated as finished audiovisual product import entities. We accept, however, that foreign-invested enterprises in China could be designated as finished audiovisual product import entities.

7.629 As to whether the term "finished audiovisual product import entities" could cover Chinese branches of foreign-registered enterprises, it is sufficient to note that the United States has not asserted that the *2001 Audiovisual Products Regulation* affects branches in China and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine this issue further.[473]

7.630 The United States contends that Article 27 authorizes the MOC to appoint, based on its own discretion, the entities of its own choosing that are permitted to engage in importation.[474] The United States claims that the designation requirement is inconsistent with China's trading rights commitments, because it injects qualifying criteria and government discretion into a process that

[471] United States' response to question No. 155.

[472] United States' response to question No. 1.

[473] Also, it is in any event not clear to us from the information on the record whether Chinese laws or regulations on branches of foreign enterprises allow foreign-registered enterprises to set up Chinese branches in the sector at issue.

[474] United States' response to question No. 9.

China committed to be "non-discretionary". We understand this claim to be based on paragraph 84(b).[475]

7.631 In considering Article 27, we observe that designation is not automatic. Rather, it is up to the MOC to initiate the designation process.[476] Article 27 contains no criteria to be followed by the MOC in deciding whom to designate. Moreover, China has not contested the US contention that MOC can designate importers "of its own choosing". Thus, it appears to us that the MOC enjoys discretion as to whom to designate. Accordingly, under Article 27, China needs to exercise discretion in order to grant the right to import finished audiovisual products.

7.632 With these observations about Article 27 in mind, we now turn to the claimed inconsistency with paragraph 84(b). In view of the fact that the discretion relates to the designation of "finished audiovisual product import entities", and not individuals, we conclude that Article 27 does not result in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. Furthermore, the United States has not established that Article 27 results in an inconsistency with paragraph 84(b) in respect of foreign individuals when considered together with other challenged measures.

7.633 On the other hand, we recall that in our view foreign-invested enterprises in China could be designated as "finished audiovisual product import entities" within the meaning of Article 27. We therefore conclude that, as a result of Article 27, China does not grant trading rights to foreign-invested enterprises for the import of finished audiovisual products "in a non-discretionary way", and that, for that reason, China is acting inconsistently with its obligation under paragraph 84(b).

7.634 We also recall that the United States has not asserted that Article 27 affects Chinese branches of foreign enterprises not registered in China, and that it has not demonstrated that China could designate foreign enterprises not registered in China as "finished audiovisual product import entities". We thus conclude that the United States has not established that Article 27 results in China acting inconsistently with its obligation under paragraph 84(b) in respect of foreign enterprises not registered in China. The United States has also not established that Article 27 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

7.635 Regarding the US argument that the designation requirement injects qualifying criteria, we note that we do not see how it does. The United States itself has stated in response to a question from the Panel that designation is discretionary and that there are no independent criteria governing how the competent agency designates importers.[477]

Article 5

7.636 According to Article 5, the State is to institute a licensing system for, *inter alia*, the import of audiovisual products. It further provides that no entity or individual may engage in the import of audiovisual products without the necessary licence.

7.637 The United States argues that Article 5 establishes an approval requirement. In the United States' view, Article 5 relates to both finished audiovisual products and audiovisual products imported for publication.[478] China has not specifically addressed the issue of whether Article 5 applies to both

[475] We note that at para. 261 of its first written submission, the United States argues that the designation requirement serves a gate-keeping function to limit the number of enterprises selected to import audiovisual products into China. However, the US submission does not put forward a claim that the designation requirement is, therefore, inconsistent with one or more of China's trading rights commitments.

[476] China has confirmed this in responses to question Nos. 25(a) and (b) and 31(c).

[477] United States' response to question No. 9.

[478] United States' response to question No. 155.

finished audiovisual products and audiovisual products imported for publication. We note that the US claim in respect of Article 5 concerns only audiovisual products imported for publication.[479] It is clear from Article 28 of the *2001 Audiovisual Products Regulation* that the *2001 Audiovisual Products Regulation* applies to audiovisual products imported for publication.[480] Since Article 5 applies broadly to "audiovisual products", it appears to us that it covers such products.

7.638 The United States claims that the approval requirement introduces qualifying criteria and discretion into a process that China committed to be "non-discretionary", and that it is therefore inconsistent with China's trading rights commitments. We understand this claim to be based on paragraph 84(b).[481] In considering this claim, we must first examine China's argument that the provisions of the *2001 Audiovisual Products Regulation* are not subject to China's trading rights commitments.

7.639 The United States has indicated that its claim in respect of audiovisual products imported for publication concerns hard-copy, tangible products such as CDs or DVDs.[482] More specifically, the claim concerns "master copies", such as videocassettes, VCDs and DVDs, or physical sound recordings, to be used to publish and manufacture copies for sale in China.[483]

7.640 As to whether these master copies are goods, we note that China does not appear to dispute that they are.[484] In considering this issue, we find relevant heading 8524 of the 1996 Harmonized Commodity Description and Coding System (HS), which defines as goods "[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".[485] Similarly, heading 8523 of the 2007 Harmonized System defines as goods "[d]iscs, tapes, solid-state non-volatile storage devices, 'smart cards' and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs".[486] In our view, both descriptions are sufficiently broad to cover master copies, such as master video cassettes, VCDs and DVDs as well as master sound recordings discs.

7.641 As pointed out by the United States, China's own Schedule of Concessions, i.e., its goods schedule, incorporates the old HS heading 8524.[487] Furthermore, China has confirmed that it charges customs duties on the importation of hard-copy audiovisual products intended for publication.[488] The fact that master copies consist of a physical carrier containing content in our view does not mean that they are not goods.

7.642 In the light of the above, we consider that the audiovisual products intended for publication that are the subject of the US claim – tangible master copies – are goods for the purposes of China's trading rights commitments. Therefore, we proceed to consider China's argument that its trading

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[479] United States' first written submission, paras. 261-262.

[480] Article 28 provides that "[a]udiovisual 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".

[481] We note that at para. 261 of its first written submission, the United States argues that the approval requirement serves a gate-keeping function to limit the number of enterprises selected to import audiovisual products into China. However, the US submission does not put forward a claim that the approval requirement is, therefore, inconsistent with one or more of China's trading rights commitments.

[482] United States' response to question No. 15.

[483] United States' response to question No. 18.

[484] China's comments on the United States' response to question No. 164.

[485] Exhibit JPN-2 (extracts from Schedule CLII, in HS96 nomenclature).

[486] Exhibit US-55.

[487] Exhibit JPN-2.

[488] China's response to question No. 132.

rights commitments are, nevertheless, inapplicable to Article 5 of the *2001 Audiovisual Products Regulation*.

7.643 As we see it, Article 5 in relevant part regulates who may engage in the activity of importing audiovisual products intended for publication. Article 5 applies to "audiovisual products". It would appear that this term could cover the relevant master copies as goods. We note in this respect the provisions of Article 2 of the *2001 Audiovisual Products Regulation*. According to the US translation of Article 2, the *2001 Audiovisual Products Regulation* applies to "such activities as the … import … of recorded audio and video tapes, records, and audio and video CD's".[489] Thus, if the term "audiovisual products" in Article 5 covered tangible master copies as goods, Article 5 would directly regulate who may engage in importing of such master copies. Thus understood, Article 5 would be subject, in principle, to China's trading rights commitments.

7.644 Although China pointed out that master copies carry audiovisual content that is subject to a copyright licensing agreement, and that its measures regulate the right to import audiovisual content[490], China has not specifically argued that the term "audiovisual products" in Article 5 should be understood as meaning "audiovisual content that can be commercially exploited".[491] In any event, in those cases where audiovisual content is imported on a hard-copy master copy, Article 5 would necessarily affect who may engage in importing of hard-copy master copies, because only licensed importers could engage in importing of audiovisual content on master copies. Thus, even if the term "audiovisual products" in Article 5 were understood as indicated, Article 5 would appear to be subject, in principle, to China's trading rights commitments.

7.645 Accordingly, regardless of whether the reference in Article 5 to "audiovisual products" is understood as meaning a good or audiovisual content, in cases where what is imported are hard-copy master copies, Article 5 would necessarily affect hard-copy master copies and, therefore, goods.

7.646 We do not understand China to contest that Article 5 has, or may have, an effect on hard-copy master copies and, therefore, on goods. China argues, however, that Article 5 regulates the service of licensing – the licensing of copyrights for the publication of copies of audiovisual content – and that although Article 5 may have an impact on hard-copy master copies, it should not be scrutinized under China's trading rights commitments, but under the disciplines governing trade in services. According to China, Article 5 regulates the service of licensing of copyrights by regulating who may enter into a copyright agreement for the publication of copies of audiovisual content.[492]

7.647 We would accept that the licensing of copyrights can be considered a service that is provided by the foreign right holder to the Chinese publisher. Also, as pointed out by China, Article 29 of the *2001 Audiovisual Products Regulation* states that "[a]s regards the importation of audiovisual products used for publication, the copyright thereof shall be registered with the administrative department of copyright under the State Council". Thus, Article 29 appears to contemplate the existence of a licensing agreement between a foreign right holder and a Chinese publisher.

7.648 We recognize that in those cases where the Chinese publisher is the importing entity, Article 5 appears to allow the MOC to control with which import entities foreign right holders could

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[489] China's translation is not substantially different. China translates the relevant passage of Article 2 as: "… shall apply to such activities as … importation … of audiovisual products with recorded contents such as audio tapes, video tapes, gramophone records, compact discs and laser discs, etc.".

[490] China's response to question No. 192.

[491] In response to question No. 192, China draws a distinction between "audiovisual goods" and "audiovisual content". Article 5 refers to "audiovisual products", however. Also, Article 2 of the *2001 Audiovisual Products Regulation* appears to distinguish between "audiovisual products" and the "contents" they carry.

[492] E.g., China's response to question No. 192.

enter into a licensing agreement. It is not clear, however, whether in the case of imports of audiovisual products for publication the import entity necessarily needs to be the Chinese publisher.[493] At any rate, we are prepared to proceed with our analysis on the assumption that foreign right holders need to enter into licensing agreements with licensed import entities in all cases.

7.649 China submits that in the context of a provision like Article 5 which, in China's view, regulates licensing services, any effect that provision has on who may import hard-copy master copies should not be examined under China's trading rights commitments. In support of this position, China puts forward the argument that a master copy is only an "accessory" to a service, i.e., copyright licensing.

7.650 We note that a number of elements identified by China – including the fact that master copies are used for the sole purpose of making copies of an audiovisual content and that they must be returned or destroyed – could support the view that hard-copy master copies are accessories to the licensing service to be provided by foreign right holders under a licensing agreement.

7.651 Nevertheless, we are not persuaded that this would justify non-application of China's trading rights commitments to Article 5. We note in this regard that we have examined the same issue for hard-copy cinematographic films in the context of our analysis above of the *Film Regulation*. The reasons we have given there in our view are also applicable, *mutatis mutandis*, to the master copies at issue in the present context.

7.652 In sum, even if it is assumed that foreign right holders must, in all cases, enter into licensing agreements with licensed import entities, we are not convinced by China's position that any effect Article 5 has on who may import hard-copy master copies should not be examined under China's trading rights commitments. We thus conclude that Article 5 is subject to China's trading rights commitments.

7.653 Having determined that China's trading rights commitments, which include paragraph 84(b), are applicable to Article 5, we now turn to address the merits of the US claim. We begin by recalling that in accordance with Article 5 only licensed entities or individuals have the right to import audiovisual products. Thus, reading Article 5 in isolation, it could appear that China can licence not just entities, but also individuals, to import audiovisual products. However, as already discussed above, Article 27 of the *2001 Audiovisual Products Regulation* suggests that only entities may be designated to import finished audiovisual products. Similarly, Article 28 of the *2001 Audiovisual Products Regulation*, which applies to finished audiovisual products and audiovisual products imported for publication, refers to entities, but omits reference to individuals. Article 28 states in relevant part that "[a]n 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". Article 28 of the *2001 Audiovisual Products Regulation* appears to be paralleled by Article 26 of the *Audiovisual Products Importation Rule*. Like Article 28, Article 26 seems to apply to audiovisual products imported for publication, in that it refers to "master tapes (master discs)" separately from finished audiovisual products. Moreover, while it refers to "audiovisual product import units", i.e., entities, it does not refer to individuals. Elsewhere, e.g., in Article 19, the *Audiovisual Products Importation Rule* differentiates between units and individuals.

7.654 Articles 27 and 28 are part of the context of Article 5. Since they appear to indicate that only entities could be importers of audiovisual products, including those intended for publication, we are not persuaded that individuals could be licensed under Article 5 to import audiovisual products

[493] Referring to Article 29, China has merely indicated that copyright licensing is a prerequisite for import operations.

intended for publication. We note that this is also consistent with our understanding that similar measures, like the *Publications Regulation*, the *1997 Electronic Publications Regulation* and the *Film Regulation*, also do not allow individuals to be approved or designated as importers of the relevant products.

7.655 Regarding the grant of licences to "entities", we note that Article 5 does not explicitly state whether import entities need to be registered in China to be licensed. We recall, however, our finding above that under Article 27 foreign-invested enterprises in China can be designated as "finished audiovisual product import entities", and that it has not been demonstrated that foreign enterprises not registered in China could, likewise, be designated as "finished audiovisual product import entities". We see no reason to consider that these types of enterprise would be treated differently by China when they wish to import audiovisual products that are for publication rather than finished audiovisual products.[494] In light of this, and the lack of US arguments and evidence on this issue, we consider that the United States has not demonstrated that under Article 5 foreign enterprises not registered in China could be licensed to import audiovisual products for publication. We accept, however, that foreign-invested enterprises in China could be licensed to import such products. Also, we note that the United States has not asserted that Article 5 affects Chinese branches of foreign enterprises not registered in China, and that this results in an inconsistency with China's trading rights commitments.

7.656 In considering Article 5, we note, additionally, that there does not appear to be any process for submitting applications and obtaining a licence, nor is there any indication that licences are granted automatically. We also observe that Article 5 contains no criteria to be followed by the MOC in deciding whom to licence as importer of audiovisual products intended for publication.[495]

7.657 The foregoing elements suggest that China enjoys discretion as to the entities to be licensed as importers. We note that China has not stated otherwise.[496] Accordingly, we consider that, under Article 5, China needs to exercise discretion in order to grant the right to import audiovisual products intended for publication to foreign-invested enterprises in China. We thus conclude that, as a result of Article 5, China does not grant trading rights to foreign enterprises "in a non-discretionary way" and that, for this reason, China is acting inconsistently with its obligations under paragraph 84(b).

7.658 Since the United States has not demonstrated that foreign enterprises not registered in China could be licensed to import audiovisual products for publication, and since the United States has not asserted that Article 5 affects Chinese branches of foreign enterprises not registered in China, we further conclude that the United States has not established that Article 5 results in China acting inconsistently with its obligation under paragraph 84(b) in respect of foreign enterprises not registered in China. The United States has also not established that Article 5 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

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[494] We recall in this connection that Article 28 prescribes the same import procedures for finished audiovisual products and audiovisual products imported for publication.

[495] We note in this context that the United States has referred to Articles 8 and 9 of the *2001 Audiovisual Products Regulation* which establish conditions and a process for approval as "audiovisual publishing entity". The United States has not explained, however, the relevance of these provisions to the import of audiovisual products for publication. As Articles 8 and 9 relate to the activity of publishing audiovisual products, not of importing such products, it is not clear to us that these articles are relevant.

[496] We recall China's statement in response to a question from the Panel that the licences to be obtained by importers of films for theatrical release pursuant to Article 5 of the *Film Regulation* and Article 3 of the *Film Enterprise Rule* are granted through a designation process (China's response to question No. 170). China made no such statement with regard to Article 5 of the *2001 Audiovisual Products Regulation*. We nonetheless note that Article 5 is very similar to the aforementioned provisions relating to films for theatrical release. China confirmed that designation may occur at the government's initiative only (China's response to question No. 25(a)).

7.659 Furthermore, as we have not been persuaded that individuals could be licensed under Article 5, we conclude that the United States has not established that Article 5 results in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. The United States has also not established that Article 5 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

7.660 Regarding the US argument that the licensing requirement in Article 5 injects qualifying criteria[497], we observe that we do not see how it does.

Article 28

7.661 We now address the US claim in respect of Article 28. Article 28 provides, *inter alia*, that audiovisual products imported for publication "shall be submitted to the cultural administration under the State Council for review of their contents". It goes on to say that upon approval by the MOC, "approval documents shall be issued". Article 28 then provides, and this is the part referred to by the United States, that entities importing audiovisual products for publication must bring their MOC-issued approval documents "to process import procedures at Customs". As we understand it, Article 28 deals with approvals given to audiovisual products for publication which are to be imported. It does not appear to deal with approvals given to entities who wish to engage in the business of importing audiovisual products for publishing.

7.662 The United States has not explained why and how Article 28 results in China acting inconsistently with its trading rights commitments. It is also unclear, therefore, which of these commitments is at issue. In the light of this, we conclude that the United States has failed to meet its burden of establishing that Article 28 is inconsistent with China's trading rights commitments under the Accession Protocol. Also, we note that the United States has not established that Article 28 results in an inconsistency when considered together with other challenged measures.

(xi) Audiovisual Products Importation Rule

7.663 The **United States** notes that pursuant to Article 3 of the *Audiovisual Products Importation Rule*, which was issued on the basis of the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule* also applies to the importation of both finished and unfinished audiovisual products into China. As also noted by the United States, Article 2 of this measure defines audiovisual products as "audio tapes, video tapes, records, audio and video CDs which have recorded contents".

7.664 The United States also refers to Article 7 of the *Audiovisual Products Importation Rule*, which says that the State shall maintain a licensing system for the importation of audiovisual products. The United States further points out that Article 8 reaffirms that only those enterprises "designated" by MOC may import finished audiovisual products into China and that no entity or individual may import finished audiovisual products without such a designation. Finally, the United States notes that according to Article 10 the publishing of imported unfinished audiovisual products may be conducted by audiovisual publishers to the extent that they have been approved by MOC to do so.

7.665 The United States argues that Articles 7 and 8 of the *Audiovisual Products Importation Rule* replicate the designation and approval requirements found in the *2001 Audiovisual Products Regulation* for importers of finished audiovisual products. The United States claims that this element of the *Audiovisual Products Importation Rule* is inconsistent with China's trading rights commitments in the same way as the *2001 Audiovisual Products Regulation*.

[497] See *supra*, para. 7.638.

7.666 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Articles 7-10 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China, foreign individuals and Chinese privately invested enterprises in China.[498]

7.667 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.668 China notes that the US claim in respect of this measure targets both finished and what the United States calls "unfinished" products. China argues that, for reasons explained above in relation to the US challenge to the *2001 Audiovisual Products Regulation*, the United States wrongly assumes, and fails to establish, that these "unfinished" audiovisual products are goods. In China's view, the US claim concerning trading rights for "unfinished" audiovisual products therefore lacks any legal basis and should be rejected.

7.669 The **Panel** notes that the provisions of the *Audiovisual Products Importation Rule* apply to both hard-copy sound recordings and other hard-copy audiovisual products.[499] The provisions of the *Audiovisual Products Importation Rule* identified by the United States as provisions giving rise to an inconsistency with China's trading rights commitments are Articles 7-10. We note that Article 3 of the *Audiovisual Products Importation Rule* specifically states that it applies to the importation of both finished audiovisual products and audiovisual products used for publishing. The US claims in respect of Articles 7 and 10 concern audiovisual products imported for publication.[500] The US claims in respect of Articles 8 and 9 concern finished audiovisual products. The Panel will address these claims in turn.

7.670 Before addressing these claims, we note that in response to a question from the Panel, the United States suggested that the *Audiovisual Products Importation Rule* results in an inconsistency with, *inter alia*, paragraphs 5.1, 83(d), 84(a) and 5.2.[501] It is not clear, however, which claim is made in respect of each of the provisions at issue, i.e., Articles 7-10. Nor is it clear why an inconsistency is alleged to arise. Consequently, we conclude that the United States has not established any claims under the aforementioned paragraphs. Nor has the United States established that Articles 7, 8, 9 or 10

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[498] United States' response to question No. 1.

[499] Article 2 of the *Audiovisual Products Importation Rule*.

[500] At para. 263 of the United States' first written submission, the United States observes that the *Audiovisual Products Importation Rule* replicates the licensing requirement found in the *2001 Audiovisual Products Regulation* for importers of finished audiovisual products. However, as discussed above, the United States is challenging the licensing requirement of the *2001 Audiovisual Products Regulation* in respect of "unfinished" audiovisual products. Since the United States is claiming that the *Audiovisual Products Importation Rule* is inconsistent with China's trading rights commitments in the same way as the *2001 Audiovisual Products Regulation*, we are assuming that the United States is challenging Article 7 in respect of "unfinished" audiovisual products. We also note China's response to question No. 182, where China says that Article 8 of the *Audiovisual Products Importation Rule* is the same as Article 27 of the *2001 Audiovisual Products Regulation*, in that the former provides detailed rules concerning importation in accordance with the latter. Thus, the same logic would appear to extend to Article 7 of the *Audiovisual Products Importation Rule* and Article 5 of the *2001 Audiovisual Products Regulation*.

[501] United States' response to question No. 1.

result in an inconsistency with these paragraphs when considered together with other challenged measures.

Article 7

7.671 As noted above, Article 7 provides that the State is to implement a licensing system for the importation of audiovisual products. The United States argues that Article 7 replicates the licensing requirement in the *2001 Audiovisual Products Regulation*. The United States claims that this element of the *Audiovisual Products Importation Rule* is inconsistent with China's trading rights commitments in the same way as the corresponding element of the *2001 Audiovisual Products Regulation*. Thus, we understand this claim to concern audiovisual products intended for publication and to be based on China's commitment in paragraph 84(b) that it would grant trading rights to foreign enterprises and individuals in a "non-discretionary" way. More particularly, the United States appears to claim that the approval requirement introduces qualifying criteria and discretion into a process that China committed to be "non-discretionary", and that it is therefore inconsistent with paragraph 84(b).

7.672 We first recall our determination above that the audiovisual products intended for publication that are the subject of US claims – tangible master copies – are goods for the purposes of China's trading rights commitments. Article 7 applies to "audiovisual products". As this term is unqualified, it would appear that this term could cover the relevant master copies as goods. We note in this respect the provisions of Article 2 of the *Audiovisual Products Importation Rule*. It identifies as covered audiovisual products audio tapes, video tapes, records, and audio and video CDs with recorded content and refers to an annex which provides the HS codes for the covered products. Hence, if the term "audiovisual products" in Article 7 covered tangible master copies as goods, Article 7 would directly regulate who may engage in importing of such master copies. Thus understood, Article 7 would be subject, in principle, to China's trading rights commitments.

7.673 But even if the term "audiovisual products" in Article 7 should be understood as meaning "audiovisual content that can be commercially exploited", in those cases where audiovisual content is imported on a hard-copy master copy, Article 7 would necessarily affect who may engage in importing of hard-copy master copies, because only licensed importers could engage in importing of content on master copies. Thus, even if the term "audiovisual products" in Article 7 were understood as indicated, Article 7 would appear to be subject, in principle, to China's trading rights commitments.

7.674 China considers, however, that its trading rights commitments under the Accession Protocol are inapplicable to Article 7 of the *Audiovisual Products Importation Rule*. We note that Article 7 of the *Audiovisual Products Importation Rule* is very similar to Article 5 of the *2001 Audiovisual Products Regulation*. Also, China's arguments in support of its position that we should not apply China's trading rights commitments to Article 7 of the *Audiovisual Products Importation Rule* are the same as those we have discussed previously when addressing the same issue in relation to Article 5 of the *2001 Audiovisual Products Regulation*.[502] In the light of these elements, we consider that the reasons which led us to conclude that Article 5 of the *2001 Audiovisual Products Regulation* is

[502] We note that, in addition, China referred to Article 14 of the *Audiovisual Products Importation Rule* which provides that:

> "In regard to audiovisual products imported for the purpose of publishing, application shall be made to the Ministry of Culture and the following documents and materials submitted: … Draft of the copyright trade agreement (Chinese and foreign language versions), original copyright certificate, copyright authorization letter and registration and authentication document from the State copyright authentication agency …".

subject to China's trading rights commitments are also applicable, *mutatis mutandis*, to Article 7.[503] We thus conclude that the provisions of Article 7 are subject to China's trading rights commitments.

7.675 Having satisfied ourselves that China's trading rights commitments are applicable to Article 7, we now turn to address the merits of the US claim that Article 7 gives rise to an inconsistency with paragraph 84(b). We note in this respect that under Article 7 only licensed importers appear to have the right to import audiovisual products intended for publication.

7.676 Article 7 mentions neither entities nor individuals. It could thus appear that China could license both entities and individuals. However, we note that the *Audiovisual Products Importation Rule* has been drawn up on the basis of the *2001 Audiovisual Products Regulation*.[504] We also recall that we have not been persuaded that under Article 5 of the *2001 Audiovisual Products Regulation*, which is the equivalent of Article 7, individuals could be licensed to import audiovisual products intended for publication. For these reasons, we do not see a basis for reaching a different conclusion with regard to Article 7.[505]

7.677 Regarding the grant of licences to "entities", we note that Article 7 does not explicitly state whether import entities need to be registered in China. We recall, however, our view that under Article 5 of the *2001 Audiovisual Products Regulation* foreign-invested enterprises in China could be licensed to import audiovisual products for publication, and that it has not been demonstrated that foreign enterprises not registered in China could be licensed to import such products. As Article 7 is based on Article 5, we see no basis for reaching a different conclusion with regard to Article 7.

7.678 As to whether Chinese branches of foreign-registered enterprises could be licensed, we note that the United States has not asserted that the *Audiovisual Products Importation Rule* affects branches in China and that this results in an inconsistency with China's trading rights commitments. In fact, the United States has never even mentioned the possibility of foreign-registered enterprises setting up Chinese branches. Accordingly, we do not examine this issue further.[506]

7.679 We note, finally, that there does not appear to be any process for submitting applications and obtaining a licence, nor is there any indication that licences are granted automatically. We also note that Article 7 contains no criteria to be followed by the MOC in deciding whom to licence as importer of audiovisual products intended for publication.

7.680 The foregoing elements suggest to us that China enjoys discretion as to the entities to be licensed as importers. We note that China has not stated otherwise.[507] Accordingly, we consider that under Article 7 China needs to exercise discretion in order to grant foreign-invested enterprises in

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[503] In respect of Article 14 of the *Audiovisual Products Importation Rule*, we note that even if it supported the view that foreign right holders in all cases need to enter into licensing agreements with licensed import entities, we are not convinced by China's position that any effect Article 7 has on who may import hard-copy master copies should not be examined under China's trading rights commitments.

[504] See Article 1 of the *Audiovisual Products Importation Rule*.

[505] As previously pointed out, Article 26 of the *Audiovisual Products Importation Rule* addresses import procedures to be followed for master tapes and discs and refers to audiovisual product import units, but not individuals.

[506] Also, it is in any event not clear to us from the information on the record whether Chinese laws or regulations on branches of foreign enterprises allow foreign-registered enterprises to set up Chinese branches in the sector at issue.

[507] We recall China's statement in response to a question from the Panel that the licences to be obtained by importers of films for theatrical release pursuant to Article 5 of the *Film Regulation* and Article 3 of the *Film Enterprise Rule* are granted through a designation process (China's response to question No. 170). China made no such statement with regard to Article 7 of the *Audiovisual Products Importation Rule*. We nonetheless note that Article 7 is very similar to the aforementioned provisions relating to films for theatrical release.

China the right to import audiovisual products intended for publication. We thus conclude that, as a result of Article 7, China does not grant trading rights to foreign enterprises "in a non-discretionary way" and that, for this reason, China is acting inconsistently with its obligations under paragraph 84(b).

7.681 Since the United States has not demonstrated that foreign enterprises not registered in China could be licensed to import audiovisual products for publication, and since the United States has not asserted that Article 7 affects Chinese branches of foreign enterprises not registered in China, we further conclude that the United States has not established that Article 7 results in China acting inconsistently with its obligation under paragraph 84(b) in respect of foreign enterprises not registered in China. The United States has also not established that Article 7 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

7.682 Furthermore, as we have not been persuaded that individuals could be licensed under Article 7, we conclude that the United States has not established that Article 7 results in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. The United States has also not established that Article 7 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

7.683 Regarding the US argument that the licensing requirement in Article 7 injects qualifying criteria[508], we observe that we do not see how it does.

Article 8

7.684 We recall that Article 8 provides that entities or individuals which have not been designated may not engage in the import of finished audiovisual products.[509] It also provides that the import of finished audiovisual products must be entrusted to "audiovisual units" designated by the MOC. Thus, it would appear that China can designate only audiovisual units, not individuals.

7.685 We further note that Article 8 does not explicitly state whether audiovisual units need to be registered in China. We recognize that the term "audiovisual units" is unqualified. In our view, this does not necessarily mean, however, that the term "audiovisual units" could cover also foreign enterprises not registered in China. We note in this respect that we have not been given any other trade-related Chinese laws or regulations that could indicate whether an "import unit" needs to be registered in China. In view of the foregoing, and the lack of US arguments and evidence on this issue, we consider that the United States has not demonstrated that the term "audiovisual units " as it appears in Article 8 could cover foreign enterprises not registered in China and that such enterprises could be designated as audiovisual units. We accept, however, that foreign-invested enterprises in China could be designated as audiovisual units.

7.686 As to whether the term "audiovisual units" could cover Chinese branches of foreign-registered enterprises, it is sufficient to recall that the United States has not asserted that the *Audiovisual Products Importation Rule* affects branches in China and that this results in an inconsistency with China's trading rights commitments. Accordingly, we do not examine this issue further.

7.687 The United States argues that Article 8 replicates the designation requirement in the *2001 Audiovisual Products Regulation*. The United States claims that this element of the *Audiovisual Products Importation Rule* is inconsistent with China's trading rights commitments in the same way as the *2001 Audiovisual Products Regulation*. Thus, we understand this claim to be based on China's commitment in paragraph 84(b) that it would grant trading rights to foreign enterprises and

[508] See *supra*, para. 7.671.
[509] We note that Article 8, as translated by the United States, refers to "units" rather than entities.

individuals in a "non-discretionary" way. More particularly, the United States appears to claim that the designation requirement introduces qualifying criteria and discretion into a process that China committed to be "non-discretionary", and that it is therefore inconsistent with paragraph 84(b). The United States appears to contend that Article 8 authorizes the MOC to appoint entities of its own choosing to engage in importation.[510]

7.688 We understand that designation under Article 8 is not automatic. Rather, it is up to the MOC to initiate the designation process.[511] Article 8 contains no criteria to be followed by the MOC in deciding whom to designate. Moreover, China has not contested the US contention that the MOC can designate importers "of its own choosing". Thus, it appears to us that the MOC enjoys discretion as to whom to designate. Accordingly, under Article 8, China needs to exercise discretion in order to grant the right to import finished audiovisual products.

7.689 With the foregoing in mind, we now turn to the claimed inconsistency with paragraph 84(b). In view of the fact that the discretion relates to the designation of "audiovisual units", and not individuals, we conclude that Article 8 does not result in an inconsistency with paragraph 84(b) with respect to the grant of trading rights to foreign individuals. Furthermore, the United States has not established that Article 8 results in an inconsistency with paragraph 84(b) in respect of foreign individuals when considered together with other challenged measures.

7.690 On the other hand, we recall that in our view foreign-invested enterprises in China could be designated as "audiovisual units" within the meaning of Article 8. We therefore conclude that, as a result of Article 8, China does not grant trading rights to foreign-invested enterprises in China for the import of finished audiovisual products "in a non-discretionary way", and that, for that reason, China is acting inconsistently with its obligation under paragraph 84(b).

7.691 We also recall that the United States has not asserted that Article 8 affects Chinese branches of foreign enterprises not registered in China, and that it has not demonstrated that China could designate foreign enterprises not registered in China as "audiovisual units". We thus conclude that the United States has not established that Article 8 results in China acting inconsistently with its obligation under paragraph 84(b) in respect of foreign enterprises not registered in China. The United States has also not established that Article 8 results in an inconsistency with paragraph 84(b) when considered together with other challenged measures.

7.692 Regarding the US argument that the designation requirement injects qualifying criteria[512], we note that we do not see how it does. The United States has itself stated in response to a question from the Panel that designation is discretionary and that there are no independent criteria governing how the competent agency designates importers.[513]

Article 9

7.693 Article 9 provides that "[s]uch units as libraries, audiovisual reference libraries, R&D institutions and schools wishing to import finished audiovisual products for research and reference in teaching shall entrust finished audiovisual product import [entities] designated by the [MOC] to handle the examination and approval importing procedures". It appears that the procedures at issue are those concerning the examination of the content of finished audiovisual products and the approval of importation of such products.

[510] United States' response to question No. 9.
[511] China appears to have confirmed this in response to question Nos. 25(a) and (b) and 31(c).
[512] See *supra*, para. 7.687.
[513] United States' response to question No. 9.

7.694 The United States has not explained why and how Article 9 results in China acting inconsistently with its trading rights commitments. It is also unclear, therefore, which of these commitments is at issue. In the light of this, we conclude that the United States has failed to meet its burden of establishing that Article 9 is inconsistent with China's trading rights commitments under the Accession Protocol. Also, we note that the United States has not established that Article 9 results in an inconsistency when considered together with other challenged measures.

Article 10

7.695 Article 10 provides that "[a]udiovisual publishing entities may engage in the publishing of imported audiovisual products within the limits of their approved scope of publishing". Thus, Article 10 appears to be about the activity of "publishing" rather than importing, and about "imported" products.

7.696 The United States has not explained why and how Article 10 results in China acting inconsistently with its trading rights commitments. It is also unclear, therefore, which of these commitments is at issue. In the light of this, we conclude that the United States has failed to meet its burden of establishing that Article 10 is inconsistent with China's trading rights commitments under the Accession Protocol. Also, we note that the United States has not established that Article 10 results in an inconsistency when considered together with other challenged measures.

(xii) Audiovisual (Sub-) Distribution Rule

7.697 The **United States** notes that the *Audiovisual (Sub-) Distribution Rule*, which was promulgated pursuant to the *2001 Audiovisual Products Regulation*, is principally focused on the distribution of AVHE products, including sound recordings. The United States points out, however, that according to Article 21 Chinese-foreign contractual enterprises, which are the only foreign-invested enterprises that may be engaged in the sub-distribution of audiovisual products, are not allowed to engage in the importation of audiovisual products into China.

7.698 The United States claims that Article 21 of the *Audiovisual (Sub-) Distribution Rule* is inconsistent with China's trading rights commitments, because it denies Chinese-foreign contractual audiovisual product distribution enterprises the right to import AVHE products, including sound recordings.

7.699 In response to a question from the Panel, the United States indicated that the inconsistencies claimed in relation to this measure arise as a result of Article 21 of the measure, and under paragraphs 5.1 and 5.2 of the Accession Protocol and paragraphs 83(d) and 84(a)-(b) of the Working Party Report. The United States further indicated that, in its view, the parties whose trading rights are being restricted under this measure are foreign enterprises, including foreign-invested enterprises in China and foreign individuals.[514]

7.700 **China** argues that none of the challenged measures is inconsistent with China's obligations under paragraphs 5.1, 5.2 or 1.2 of the Accession Protocol. China submits in this respect that the United States fails to take account of China's right to regulate trade in a manner consistent with the WTO Agreement, including Article XX of the GATT 1994, and that the measures governing the importation of reading materials and finished audiovisual products, including finished sound recordings, are justified under Article XX(a) of the GATT 1994.

7.701 The **Panel** notes that the United States has identified Article 21 of the *Audiovisual (Sub-) Distribution Rule* as the provision giving rise to an inconsistency with China's trading rights

[514] United States' response to question No. 1.

commitments. Article 21 provides that "[a] Chinese-foreign contractual joint venture for sub-distribution of audiovisual products may not engage in the import of audiovisual products". Article 2 of the *Audiovisual (Sub-) Distribution Rule* indicates that the term "audiovisual products" applies to sound recordings and other audiovisual products, as it specifically states that the term refers to audio tapes, video tapes, records, and audio and video CDs with audiovisual recorded contents.

7.702 The United States claims that Article 21 denies Chinese-foreign contractual joint ventures the right to import audiovisual products. Chinese-foreign contractual joint ventures are enterprises in China. Therefore, we understand the United States' claim to be based on paragraphs 5.1, 83(d) and 84(a).

Paragraphs 5.1, 83(d) and 84(a)

7.703 The legal effect of Article 21 is that Chinese-foreign contractual joint ventures for the sub-distribution of audiovisual products do not have, and cannot obtain, the right to import audiovisual products. We therefore consider that, by maintaining Article 21, China has failed to ensure that "all enterprises in China", which includes Chinese-foreign contractual joint ventures for the sub-distribution of audiovisual products, have the right to import all goods. This is contrary to China's obligations under paragraphs 5.1, 83(d) and 84(a). We thus conclude that Article 21 is inconsistent with China's trading rights commitments under the Accession Protocol.

7.704 Since Article 21 concerns only Chinese-foreign contractual joint ventures, we further conclude that the United States has not established that Article 21 results in China acting inconsistently with paragraph 84(a) in respect of foreign individuals or foreign enterprises other than foreign-invested enterprises in China.

Paragraphs 5.2 and 84(b)

7.705 As indicated, the United States has also claimed that the *Audiovisual (Sub-) Distribution Rule* results in an inconsistency with paragraphs 5.2 and 84(b). The United States has not explained, however, why and how it considers an inconsistency with these paragraphs arises. Consequently, we conclude that the United States has not met its burden of establishing an inconsistency with paragraph 5.2 or 84(b). Also, we note that the United States has not established that Article 21 results in an inconsistency with these paragraphs when considered together with other challenged measures.

(xiii) Summary of conclusions

7.706 As indicated above, in view of the large number of measures and provisions challenged, we summarize below the Panel's main conclusions.

Catalogue (Articles X.2-X.3) and *Foreign Investment Regulation* (Articles 3-4)

(a) Article X.2 of the *Catalogue* of Prohibited Foreign Investment Industries, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(b) Article X.3 of the *Catalogue* of Prohibited Foreign Investment Industries, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(c) The Panel has exercised judicial economy in respect of the US claims under paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises. In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Articles X.2 and X.3, in conjunction with Articles 3 and 4, result in China acting inconsistently with either of the aforementioned paragraphs.

Several Opinions (Article 4)

(a) Article 4 results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(b) The Panel has exercised judicial economy in respect of the US claims under paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises. In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Article 4 results in China acting inconsistently with either of the aforementioned paragraphs. Consequently, no inconsistency with paragraph 1.2 has been established either.

Publications Regulation (Articles 41-43)

(a) The United States has not established that Article 43 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(b) In respect of three requirements contained in Article 42, Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2, except for audiovisual products. In relation to five other requirements contained in Article 42, the United States has not established that Article 42 results in China acting inconsistently with paragraph 5.1, or paragraphs 83(d) or 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.

(c) The United States has not established that Article 42 results in China acting inconsistently with paragraph 5.2 as well as paragraph 84(b) (discrimination) in respect of foreign individuals and foreign enterprises not registered in China. Consequently, no inconsistency with paragraph 1.2 has been established either. To the extent that Article 42 affects foreign-invested enterprises, the Panel has exercised judicial economy in respect of one US claim based on the aforementioned paragraphs. In respect of another US claim, the United States has not established that Article 42 results in China acting inconsistently with paragraph 5.2 or paragraph 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(d) The United States has not established that Article 42 results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(e) Article 41 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

Importation Procedure (paragraphs 2 and 8)

(a) The Panel did not rule on the US claims in respect of the *Importation Procedure*.

1997 Electronic Publications Regulation (Articles 8 and 50-55)

(a) The United States has not established that Article 8 results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.

(b) The United States has not established that Article 8 results in China acting inconsistently with paragraph 5.2 or paragraph 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(c) The United States has not established that Article 8 results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(d) The United States has not established that Articles 50 and 51 result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(e) The United States has not established that Articles 50 and 51 result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(f) The United States has not established that Articles 50 and 51 result in China acting inconsistently with the second sentence of paragraph 84(b) (requirements for obtaining trading rights). Consequently, no inconsistency with paragraph 1.2 has been established either.

(g) The United States has not established that Articles 52 to 55 result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(h) The United States has not established that Articles 52 to 55 result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

Film Regulation (Articles 5 and 30)

(a) The United States has not established that Article 5 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(b) Article 30 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(c) Article 30 results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(d) The United States has not established any inconsistency with paragraph 5.2.

Film Enterprise Rule (Articles 3 and 16)

(a) The United States has not established that Article 3 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(b) Article 16 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(c) Article 16 results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(d) The United States has not established any inconsistency with paragraph 5.2.

Film Distribution and Exhibition Rule (Article II)

(a) The Panel did not rule on the US claims in respect of the *Film Distribution and Exhibition Rule*.

2001 Audiovisual Products Regulation (Articles 5, 27-28)

(a) Article 5 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(b) Article 27 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(c) The United States has not established that Article 28 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(d) The United States has not established any inconsistency with paragraph 5.1, 83(d), 84(a) or 5.2. Consequently, no inconsistency with paragraph 1.2 has been established either.

Audiovisual Products Importation Rule (Articles 7-10)

(a) Article 7 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(b) Article 8 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(c) The United States has not established that Article 9 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(d) The United States has not established that Article 10 results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(e) The United States has not established any inconsistency with paragraph 5.1, 83(d), 84(a) or 5.2. Consequently, no inconsistency with paragraph 1.2 has been established either.

Audiovisual (Sub-) Distribution Rule (Article 21)

(a) Article 21 results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence paragraph 1.2.

(b) The United States has not established any inconsistency with paragraph 5.2 or 84(b). Consequently, no inconsistency with paragraph 1.2 has been established either.

7.707 We note that our findings of inconsistency in respect of the *Film Regulation* and the *Film Enterprise Rule* constitute final conclusions, as do the findings of inconsistency in respect of the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, insofar as they concern audiovisual products intended for publication. The Panel's findings of inconsistency in respect of other measures and the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, insofar as they concern finished audiovisual products, are tentative conclusions. This is because China has argued that if we find any inconsistencies in respect of the latter category of measures and products, they would be justified under Article XX(a) of the GATT 1994. Thus, before coming to any final conclusions on these measures, we must assess the merits of China's Article XX(a) defence.

2. China's defence based on the "right to regulate trade" and Article XX(a) of the GATT 1994

7.708 The **Panel** now turns to address the broad defence raised by China based on the "right to regulate trade", as confirmed by paragraph 5.1 of the Accession Protocol, and Article XX(a) of the GATT 1994. Specifically, China argues that the challenged measures, except to the extent that they apply to films for theatrical release and audiovisual products intended for publication, are covered by its "right to regulate trade" in a WTO-consistent manner, and are consistent with, and therefore justified by, the provisions of Article XX(a). China submits that, for this reason, its measures are fully compatible with its WTO obligations.

7.709 Article XX(a) of the GATT 1994 provides:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> ..."

7.710 Before examining China's defence, it is useful to give an overview of the parties' main arguments.

7.711 **China** argues that what the United States is challenging through its claims based on China's trading rights commitments is a series of measures on the basis of which China selects and limits the number of entities to which the right to import the products at issue is granted. In China's view, its measures establishing a system for the selection of import entities fall within the scope of its "right to regulate trade", as defined in paragraph 5.1 of the Accession Protocol, and are fully justified under Article XX(a). China considers, therefore, that its measures are fully compatible with its WTO obligations.

7.712 China submits that Chinese regulations governing the importation of cultural goods establish a content review mechanism and a system for the selection of import entities directed at protecting public morals in China. China notes that cultural goods are unique in that they may have a potentially serious impact on societal and individual morals. China argues that imported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct which are specific to China.

7.713 China explains that as a result of the high level of protection of public morals adopted by China in this sector, China set up an effective and efficient content review mechanism which prohibits the importation of cultural goods, the content of which could have a negative impact on public morals. China notes that the content review mechanism is operated through a system for the selection of import entities which play an essential role in the content review process. China submits that although this may result in limitations of the right to trade, the system is consistent with China's "right to regulate trade" as defined in paragraph 5.1 and justified under Article XX(a).

7.714 China points out that the measures at issue define which contents have a negative impact on public morals and must therefore not be allowed to be imported into China. China notes that these contents cover a wide range of issues, ranging from the depiction or condoning of violence or pornography, to other important values, including the protection of Chinese culture and traditional values. China further argues that the measures at issue establish a content review mechanism for imported cultural goods based on a selection of import entities that ensures an effective contribution of these entities to the content review. China submits, therefore, that the laws and regulations providing for this selection system are designed to protect public morals.

7.715 Moreover, China submits that the selection of import entities is "necessary" to protect public morals. According to China, the selection of import entities is a decisive element of the effective and efficient content review mechanism for imported cultural goods. More specifically, China argues that its selection criteria, i.e., (i) an appropriate organizational structure of the selected entities, (ii) a reliable, competent and capable personnel within the selected entities, (iii) appropriate geographical coverage by the selected entities and (iv) a limited number of selected entities, contribute to an efficient and effective content review and to the fulfilment of its objective, i.e., the prohibition of cultural products with inappropriate content. China also argues that the selection of import entities is necessary to avoid any possible circumvention of the content review process in the case of imported products. Furthermore, China submits that the selection of import entities has a limited impact on international trade. For China, it is clear, therefore, that the contribution of the import entities to content review is necessary to protect public morals.

7.716 China also argues that its measures limiting the right to import to certain selected enterprises are not arbitrary in view of the fact that domestic publishers of cultural goods face comparable limitations, are applied reasonably and in good faith, and therefore comply with the requirements of the chapeau of Article XX.

7.717 The **United States** argues that China has not met its burden to demonstrate that its measures satisfy the requirements of Article XX(a). In the United States' view, China's measures are neither necessary to protect public morals, nor are they consistent with the chapeau of Article XX. The United States submits that, fundamentally, denying trading rights to all foreign importers and to all privately owned Chinese importers cannot be justified under Article XX. The United States argues that content review, which is China's concern, is independent of importation and can be performed by individuals or entities unrelated to the importation process at any time before, during or after that process. The United States observes in this regard that CNPIEC – the monopoly importer of AVHE products and sound recordings – conducts content review before it even begins negotiating importation.[515] The United States further points out that Article 31 of the *Film Regulation* provides that "[t]hose intending to import films for public screening shall, before importing, submit the film to the Film Censorship Board for review". Thus, the United States argues, for imported films the designated state-owned importer does not even perform the content review.

7.718 The United States considers that the measures at issue are not "necessary" within the meaning of Article XX(a), and that they constitute "arbitrary or unjustifiable discrimination" and a "disguised

[515] The United States refers to China's first written submission, para. 225.

restriction on international trade". The United States argues that while China asserts that its selected importers play a critical role in content review, it never explains why the entities involved in content review need to monopolize the importation process. The United States recalls that according to the Appellate Body, "a necessary measure is ... located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[516] The United States contends that, given the absence of a nexus between the challenged measures and the protection of public morals, China's measures denying trading rights lie far too distant from the pole of indispensability to qualify as "necessary" within the meaning of Article XX(a).

7.719 The United States further recalls that the Appellate Body has not found a measure to be necessary where there is a "reasonably available WTO-consistent alternative".[517] The United States submits that in the present case, there are many such alternatives at hand. According to the United States, content review can be conducted before, during or after importation by any number of entities, with no need to give China's state-owned enterprises a monopoly on importing. The United States asserts that China's "in-house" content review regime for domestic producers offers a fully WTO-consistent alternative to China's measures. In the United States' view, the existence of this regime by itself demonstrates that China's measures are not necessary.

7.720 Furthermore, the United States considers that China's arguments regarding the chapeau of Article XX are unpersuasive. The United States recalls that under the chapeau, "measures are not [to be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." According to the United States, as applied, China's measures ban foreign and private Chinese importers from the business of importing the relevant products into China, thereby protecting the business interests of a limited group of Chinese state-owned enterprises. The United States submits that China has never explained why content review cannot be conducted by foreign enterprises, foreign individuals and privately held enterprises in China. Nor does the United States consider that China has shown that entities engaging in content review must also be the exclusive importers of the relevant products into China.

7.721 The **Panel** notes that, in essence, China's defence presents the issue whether the measures which the Panel has found to be inconsistent with paragraph 5.1 of the Accession Protocol and/or paragraphs 83(d), 84(a) and/or 84(b) of the Working Party Report (and thus with paragraph 1.2 of the Accession Protocol) may nevertheless be maintained – on the grounds that they are covered by China's right to regulate trade in a WTO-consistent manner and that the right to regulate trade takes precedence over the relevant obligations contained in the aforementioned paragraphs.

7.722 In connection with China's argument, it is well to recall some of the conclusions we have arrived at earlier. First, the relevant obligation in paragraph 5.1, but also the relevant obligations in paragraphs 83(d) as well as 84(a) and (b), should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner. Secondly, the "right to regulate trade" in a WTO-consistent manner in our view includes, by implication, a consequent right to regulate importers of the relevant goods. More specifically, the "right to regulate trade" permits China to regulate importers of the relevant goods if: (i) the regulation of importers has a reasonable link to the regulation of the goods at issue, and thus is incidental to the regulation of the relevant goods and (ii) the regulation of importers is WTO-consistent.

7.723 In relation to the last point, we note that the parties have focused their arguments on the second condition, i.e., on whether the Chinese measures at issue, which restrict certain importers' right

[516] The United States refers to Appellate Body Report on *Korea – Various Measures on Beef*, para. 161.

[517] The United States refers to Appellate Body Reports on *US – Gambling*, para. 308, and *Korea – Various Measures on Beef*, para. 166.

to trade, are WTO-consistent, and in particular, whether they are consistent with Article XX(a). Our analysis proceeds accordingly. For the purposes of our analysis concerning the second condition, we will assume that China's restrictions of the right to trade are incidental to regulation of the relevant goods. Should we find that the WTO-consistency condition is satisfied, we would need to examine, in addition, whether the first condition is, in fact, met.

7.724 Consistent with the foregoing, we consider next which of the relevant measures China claims are justified under Article XX(a).

(a) Measures claimed to be justified by Article XX(a)

7.725 The **Panel** understands from China's submissions that the measures China claims are justified under Article XX(a) concern reading materials, which include books, newspapers, periodicals and electronic publications; and finished audiovisual products, including finished sound recordings.[518] China is not seeking to defend under Article XX(a) any of the relevant measures concerning film for theatrical release.[519] This is because of China's position that these measures are not subject to China's trading rights commitments under the Accession Protocol. As previously pointed out, China has put forward the same argument in relation to relevant provisions of Chinese rules and regulations which concern audiovisual products imported for publication.[520] It is, therefore, our understanding that China does not invoke Article XX(a) in respect of relevant provisions concerning these products.[521]

7.726 Thus, taking account of our earlier findings of inconsistency based on the Accession Protocol, we deduce that China's Article XX(a) defence covers the following measures and provisions (except to the extent that they apply to films for theatrical release and audiovisual products intended for publication):

(a) The *Catalogue* and the *Foreign Investment Regulation* (Articles X.2 and X.3 as well as Articles 3 and 4);[522]

(b) the *Several Opinions* (Article 4);[523]

(c) the *Publications Regulation* (Article 42 in conjunction with Article 41, and Article 41);

(d) the *2001 Audiovisual Products Regulation* (Article 27);

(e) the *Audiovisual Products Importation Rule* (Article 8); and

(f) the *Audiovisual (Sub-)Distribution Rule* (Article 21).

7.727 We note that China in its submissions to the Panel has not explained specifically for each of the above-mentioned provisions why they are justified under Article XX(a). In response to a request from the Panel for elaboration, China merely stated that "all trading rights related provisions in

[518] E.g., China's first written submission, paras. 200-209.
[519] China's response to question No. 182.
[520] China's first written submission, para. 126.
[521] This understanding is consistent with the fact that in its first written submission, at para. 154, China only references finished audiovisual products.
[522] That the *Catalogue* and, by implication, the *Foreign Investment Regulation* are covered by China's Article XX(a) defence is clear to us from China's response to question No. 182.
[523] That the *Several Opinions* is covered by China's Article XX(a) defence is clear to us from China's response to question No. 182 and footnote 49 of China's first written submission.

identified measures could be justified under Article XX(a), because the system of selecting importation entities undertaking content review is, as a whole, necessary to protect public morals".[524]

7.728 Since China asserts that its restrictions of the right to trade are connected to a content review mechanism, it is well to make clear at the outset that only some of the above-mentioned measures contain provisions which prohibit relevant products (reading materials and finished audiovisual products) from carrying certain content, and which require that the content of such products must be reviewed before they are imported into China. Also, it is important to point out that the part played by import entities in the content review process differs depending on the product at issue.

7.729 Hence, we note that neither the *Foreign Investment Regulation* nor the *Catalogue*, nor the *Several Opinions*, contain provisions which prohibit relevant products from carrying certain content and require that their content must be reviewed before the products are imported. The same holds true for the *Audiovisual (Sub-)Distribution Rule*.[525]

7.730 The remaining measures contain provisions of the described type. Specifically, the *Publications Regulation* in Articles 26 and 27 identifies content which publications may not contain. Article 44 states that publications imported by approved or designated publication import entities may not include any content prohibited under Article 26 or 27. It further stipulates that publication import entities are "responsible for examining the content of the publications" imported. China has explained that the GAPP, i.e., the competent Chinese Government authority, has a subsidiary role, but that it may intervene in the day-to-day content review. In particular, China has pointed out that the GAPP carries out annual inspections of the publication import entities, to make sure that they fulfil their obligations in respect of content review. Furthermore, pursuant to Article 44, publication import entities may request the GAPP to review a publication if they are unable to determine whether the publication is in conformity with Articles 26 and 27. Finally, pursuant to Article 45, a publication import entity must, before importing publications, provide the GAPP with a list of the publications they intend to import. China has stated that, based on the list, the GAPP may decide to review the content of certain publications itself. If it finds that the importation of the publication in question should be prohibited, the GAPP can prevent the relevant publication import entity from importing the publication.

7.731 The *2001 Audiovisual Products Regulation* in Article 3 likewise identifies content which audiovisual products, including finished audiovisual products, may not contain. Article 28 provides that finished audiovisual products must be submitted to the MOC for content review and approval. The approval documents issued by the MOC are needed to import the products. China notes that import entities must provide, as part of their applications, a report reviewing the content of the products to be imported. This is confirmed by a review application submitted by China that contains a "review opinion" provided by the only importing entity for finished audiovisual products, the CNPIEC.[526] The opinion states that after a preliminary review by the importing entity, the entity did not find any prohibited content. Nonetheless, China has also pointed out that in the case of finished audiovisual products to be imported, the final content review is carried out by the MOC, i.e., a Chinese government authority.[527] The MOC conducts its review based on "samples" of the products to be imported.[528]

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[524] China's response to question No. 182.

[525] We note in passing that this presents the issue whether the provisions in these measures which we have determined to be inconsistent with China's trading rights commitments can be considered to be incidental to any regulation of the relevant products. As indicated above, we will revert to this issue should we find that the provisions in question are consistent with Article XX(a).

[526] Exhibit CN-25.

[527] China's response to question No. 196.

[528] China's response to question No. 191.

7.732 Finally, the *Audiovisual Products Importation Rule* in Article 6 identifies content which audiovisual products, including finished audiovisual products, may not contain. Article 11 provides that audiovisual import entities must submit finished audiovisual products to be imported to the MOC for content review. Pursuant to Article 18, the MOC must either approve applications or reject them. It is, therefore, the MOC that performs the final content review in respect of finished audiovisual products to be imported.[529]

7.733 It is clear from the foregoing that none of the provisions which we have found to result in China acting inconsistently with its trading rights commitments under the Accession Protocol are provisions which prohibit certain content or require content review prior to importation. We observe in this respect that the United States has not questioned China's right to review the content of reading materials and finished audiovisual products that are to be imported into China.[530]

7.734 Having addressed the measures in respect of which China invokes Article XX(a), we next consider whether Article XX(a) is an applicable provision in the circumstances of the present case.

(b) Applicability of Article XX(a)

7.735 **China** recalls that the "without prejudice" clause of paragraph 5.1 of the Accession Protocol provides that the "right to regulate trade" must be exercised in a manner consistent with the WTO Agreement. According to China, the term "WTO Agreement" includes the WTO Agreement and all its Annexes. Hence, China argues, China has the right to take measures regulating trade that are authorized by any of the WTO agreements.

7.736 More specifically, China argues that, since its commitment in paragraph 5.1 concerns the right to import and export goods, China's right to regulate trade must be interpreted in conjunction with WTO agreements applicable to trade in goods, including the GATT 1994.[531] In China's view, it follows that China has the right to take measures pursuing policy objectives in a manner consistent with Article XX of the GATT 1994.

7.737 China submits that it therefore has the right, under paragraph 5.1, to impose restrictions and conditions on the grant of trading rights, including by limiting the right to import the products at issue in this dispute to certain selected entities, provided that it does so in a manner consistent with Article XX.

7.738 China also recalls its position that, like the commitment in paragraph 5.1, the other trading rights commitments at issue – i.e., those contained in paragraphs 83(d), 84(a) and 84(b) – are without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement. As a consequence, China considers that it can rely on Article XX to justify breaches not only of paragraph 5.1, but also of paragraphs 83(d), 84(a) and 84(b).

7.739 The **United States** considers that the relationship between Article XX(a) of the GATT 1994 and the Accession Protocol is a question of broad systemic import. The United States also considers, however, that it is not necessary to determine whether Article XX applies to China's commitments contained in the Accession Protocol.

7.740 The United States notes that the Appellate Body was faced with a similar situation in *US – Customs Bond Directive*. The United States points out that in that dispute, the Appellate Body was

[529] China's response to question No. 191.
[530] E.g., United States' comments on China's response to question No. 184.
[531] China points out that Annex 1A on "Multilateral Agreements on Trade in Goods" of the WTO Agreement includes the GATT 1994.

presented with an appeal concerning an affirmative defence under Article XX(d) of the GATT 1994 to justify a measure found to be inconsistent with the *Anti-Dumping Agreement*. The United States notes that that appeal raised the issue of the availability of such an Article XX defence. The United States explains that the Appellate Body elected to examine first, 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 defence.[532]

7.741 In respect of the measures at issue, the United States submits that they reside well outside of the parameters of Article XX(a), and that their application fails to meet the requirements contained in the chapeau of Article XX. In the United States' view, it is, therefore, not necessary to determine whether Article XX is available as an affirmative defence to China's commitments contained in the Accession Protocol.

7.742 The **Panel** begins by recalling that, in its view, the relevant obligations stipulated in paragraphs 5.1, 83(d) as well as 84(a) and (b) should all be understood as being without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement.

7.743 It is clear that the WTO Agreement includes the GATT 1994, and that the GATT 1994 includes Article XX(a). Nevertheless, China's invocation of Article XX(a) presents complex legal issues. We observe in this respect that Article XX contains the phrase "nothing in this Agreement", with the term "Agreement" referring to the GATT 1994, not other agreements like the Accession Protocol. The issue therefore arises whether Article XX can be directly invoked as a defence to a breach of China's trading rights commitments under the Accession Protocol, which appears to be China's position, or whether Article XX could be invoked only as a defence to a breach of a GATT 1994 obligation.

7.744 The United States invites the Panel to examine *arguendo* China's Article XX defence to a breach of its trading rights commitments and to determine on that basis whether China's defence would have merit before resolving the issue whether Article XX is available as a defence. As pointed out by the United States, the Appellate Body in the *US – Customs Bond Directive* case followed a similar approach. That case presented the issue of whether the United States could invoke Article XX(d) as a defence for a measure which had been found to be inconsistent with, *inter alia*, Article 18.1 of the *Anti-Dumping Agreement*. The Appellate Body found it appropriate to examine first whether the measure at issue met the requirements of Article XX(d). The Appellate Body indicated that, if necessary, it would return to the "systemic" issue whether Article XX(d) was available as a defence after having examined the merits of the defence.[533] It turned out, however, that the Appellate Body had no need to revert to the issue of the availability of the defence.[534]

7.745 We find it appropriate in this case to follow the approach of the Appellate Body in the *US – Customs Bond Directive* case. Thus, we will proceed on the assumption that Article XX(a) is available to China as a defence for the measures we have found to be inconsistent with its trading rights commitments under the Accession Protocol. Based on that assumption, we will examine whether the relevant measures satisfy the requirements of Article XX(a). Should we find that this is the case, we would revert to the issue of whether Article XX(a) can, in fact, be directly invoked as a defence to a breach of China's trading rights commitments under the Accession Protocol.

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[532] The United States refers to the Appellate Body Report on *US – Customs Bond Directive*, paras. 304-319.

[533] Appellate Body Report, *US – Customs Bond Directive*, para. 310.

[534] *Ibid*., para. 319. The Appellate Body upheld the panel's finding that the measure at issue did not meet the requirements of Article XX(d).

(c) Application of Article XX(a) to China's measures

7.746 The **Panel** commences its Article XX(a) analysis by recalling that according to the Appellate Body, examination of a measure under Article XX is two-tiered. A panel must first examine whether a measure falls under one of the exceptions listed in the various sub-paragraphs of Article XX. Subsequently, a panel must examine whether the measure in question satisfies the requirements of the chapeau of Article XX.[535] For an Article XX defence to succeed, both elements of the two-tiered test must be met.

7.747 It is up to the party invoking an Article XX defence to demonstrate that a measure qualifies, and is provisionally justified, under one of the sub-paragraphs of Article XX, and also to demonstrate that the measure complies with the requirements of the chapeau of Article XX.[536]

7.748 Therefore, China as the party invoking an exception under Article XX(a) is required to show, first, that the relevant measures fall within the scope of sub-paragraph (a) of Article XX and, secondly, that these measures satisfy the requirements of the chapeau of Article XX.

7.749 Consistent with the above, we now go on to assess whether China has met its burden of showing that its measures fall within the scope of sub-paragraph (a) of Article XX.

(i) Provisional justification of the measures at issue under sub-paragraph (a) of Article XX

7.750 The **Panel** begins its inquiry by considering the link China alleges to exist between import entities, the content review mechanism for imports of reading materials and finished audiovisual products, and the protection of public morals within China's territory.

Link between import entities, content review and the protection of public morals

7.751 **China** considers that reading materials and finished audiovisual products are so-called "cultural goods", i.e., goods with cultural content. China submits that they are products of a unique kind with a potentially serious negative impact on public morals. China explains that, as vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. China notes in this respect the UNESCO *Universal Declaration on Cultural Diversity*, which China says was adopted by all UNESCO Members, including the United States. In its Article 8, the *Declaration* states that cultural goods are "vectors of identity, values and meaning" and that they "must not be treated as mere commodities or consumer goods".[537] In China's view, it is clear, therefore that, depending on their content, cultural goods can have a major impact on public morals.

7.752 China points out that because of this impact of cultural goods, it put in place an appropriate content review mechanism so as to prevent the dissemination of cultural goods with a content that could have a negative impact on public morals in China. China notes that it implements a content review mechanism in respect of both products imported into China and domestically produced products. In respect of the imported products, China points out that their importation is prohibited if they have content that could have a negative impact on public morals in China. China further notes that the prohibition on content that could have a negative impact on public morals is enforced through dissuasive sanctions, including fines, the revocation of operating licences and criminal sanctions.

[535] Appellate Body Report on *Brazil – Retreaded Tyres*, para. 139.
[536] Appellate Body Report on *US – Gasoline*, DSR 1996:I, 3 at 21.
[537] UNESCO document CLT-2002/WS/09 (Exhibit CN-17).

7.753 Regarding the types of content which China thinks must be prohibited from cultural products that are distributed in China, China notes that it includes a wide range of content ranging from violence or pornography to other important values, including the protection of the Chinese culture and traditional values. China notes that its measures concerning reading materials and finished audiovisual products contain provisions which specifically define the types of content that relevant products may not contain. Specifically, and having regard to the relevant measures, China identifies Articles 26 and 27 of the *Publications Regulation*, Article 3 of the *2001 Audiovisual Products Regulation* and Article 6 of the *Audiovisual Products Importation Rule*.

7.754 China further argues that in the case of products to be imported it is critical that the content review be carried out at the border. China notes that it has therefore established a system for the selection of import entities directed at protecting public morals in China. According to China, its administrative authorities are not in a position, due to limited resources, to carry out content review all by themselves without creating undue delays. China maintains that import entities therefore need to be given a role in the content review. China contends that the contribution of the import entities to the content review is a substantial and essential condition for an effective and efficient content review. China considers that the importance of the input by the import entities in the content review process justifies the appropriate selection of those entities by the competent Chinese authorities, even if it may result in restrictions of the right to import. China argues that what is at stake is the effectiveness and efficiency of the content review.

7.755 China submits that, accordingly, the objective behind the Chinese regulations and rules challenged by the United States is to prevent the importation of reading materials and finished audiovisual products with a content that could have a negative impact on public morals in China. China notes that the measures at issue first define which type of content has a negative impact on public morals and must therefore not be allowed for importation into China and then establish a content review mechanism for imported products and a system for the selection of import entities that ensures an effective contribution of these entities to the content review.

7.756 The **United States** does not specifically argue that the measures at issue are not measures to protect public morals. The United States is challenging the means China has chosen to achieve its objective of protecting public morals. More particularly, the United States argues that it is not "necessary" within the meaning of Article XX(a) for importers to perform content review. According to the United States, content review is independent of importation and can be performed by individuals or entities unrelated to the importation process.

7.757 The **Panel** begins its analysis by addressing those of the relevant measures which China says identify prohibited content and require that the content of reading materials and finished audiovisual products must be reviewed before they are imported into China. They are the *Publications Regulation*, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*.

7.758 We note China's contention that the types of content which are prohibited under the aforementioned measures could have a negative impact on public morals in China, if brought into China as part of physical products.[538] To consider this contention, we first need to address the meaning of the concept of "public morals" as it appears in Article XX(a).

[538] We note China's reference to the UNESCO *Declaration on Cultural Diversity*. We observe in this respect that China has not invoked the *Declaration* as a defence to its breaches of trading rights commitments under the Accession Protocol. Rather, China has referred to the *Declaration* as support for the general proposition that the importation of products of the type at issue in this case could, depending on their content, have a negative impact on public morals in China. We have no difficulty accepting this general proposition, but

7.759 We note that the panel and Appellate Body in *US – Gambling* examined the meaning of the term "public morals" as it is used in Article XIV(a) of the GATS, which is the GATS provision corresponding to Article XX(a). The panel in *US – Gambling*, in an interpretation not questioned by the Appellate Body, found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".[539] The panel went on to note that "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[540] The panel went on to note that Members, in applying this and other similar societal concepts, "should be given some scope to define and apply for themselves the concepts of 'public morals' ... in their respective territories, according to their own systems and scales of values."[541] Since Article XX(a) uses the same concept as Article XIV(a), and since we see no reason to depart from the interpretation of "public morals" developed by the panel in *US – Gambling*, we adopt the same interpretation for purposes of our Article XX(a) analysis.

7.760 Turning to the types of content which are prohibited under the aforementioned measures, we note that, for reading materials, they are set forth in Articles 26 and 27 of the *Publications Regulation*. Pursuant to Article 26, no publication may contain content that:

> "(1) Defies the basic principles specified in the Constitution;
>
> (2) jeopardizes the solidarity, sovereignty and territorial integrity of the nation;
>
> (3) divulges national secrets, jeopardizes national security or injures the national glory and interests;
>
> (4) incites hatred or discrimination of the nationalities, undermines the solidarity of the nationalities or infringes upon customs and habits of the nationalities;
>
> (5) propagates evil cults or superstition;
>
> (6) disturbs public order or destroys social stability;
>
> (7) propagates obscenity, gambling or violence, or instigates crimes;
>
> (8) insults or defames others, or infringes upon legitimate interests of others;
>
> (9) jeopardizes social morality or fine cultural traditions of the nationalities;
>
> (10) otherwise prohibited by laws, administrative regulations and provisions of the State."

7.761 Article 27 of the *Publications Regulation* provides:

> "Publications catering to minors shall not contain any content enticing minors to imitate acts that violate public ethics or acts that are illegal or criminal, nor shall they contain horror and cruelty which harm the physical and mental health of minors."

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note, as indicated, that we need to focus more specifically on the types of content that is actually prohibited under China's relevant measures.

[539] Panel Report on *US – Gambling*, para. 6.465; Appellate Body Report on *US – Gambling*, para. 299.

[540] Panel Report on *US – Gambling*, para. 6.461.

[541] *Ibid*., para. 6.461.

7.762 In response to questions from the Panel as to whether all of the contents listed as prohibited could have a negative impact on public morals, China stated that, if disseminated within China, all of these types of prohibited content could have a negative impact on public morals in China.[542] China stated that all of the listed items reflect standards of right and wrong conduct specific to China. The United States does not specifically contest China's assertion that reading materials and finished audiovisual products containing the types of content prohibited by China could have a negative impact on public morals in China. Thus, our situation is different from that faced by the panel in *US – Gambling*, where Antigua and Barbuda disputed whether Internet gambling was actually contrary to public morals in the United States, given the view of Antigua and Barbuda that the United States was a significant consumer of gambling and betting services.[543]

7.763 In considering China's lists of prohibited content, we recall that the United States has not specifically contested that if content defined by China as prohibited were imported as part of a physical product, this could have a negative impact on public morals in China. We further recall that the content and scope of the concept of "public morals" can vary from Member to Member, as they are influenced by each Members' prevailing social, cultural, ethical and religious values. We note, finally, our ultimate conclusion on the "necessity" of the measures at issue to protect public morals in China.[544] In the light of these elements, we will proceed with our analysis on the assumption that each of the prohibited types of content listed in China's measures is such that, if it were brought into China as part of a physical product, it could have a negative impact on "public morals" in China within the meaning of Article XX(a) of the GATT 1994.

7.764 In addition to specifying the types of prohibited content, the measures in question also prescribe that the content of reading materials and finished audiovisual products to be imported into China must be reviewed prior to importation. To recall, for reading materials, Article 44 of the *Publications Regulation* provides that publication import entities are responsible for examining the content of the publications they wish to import. For finished audiovisual products, Article 28 of the *2001 Audiovisual Products Regulation* provides that import entities are to submit finished audiovisual products to be imported to the MOC for a review of their content. The *Audiovisual Products Importation Rule* contains a corresponding provision in its Article 11.

7.765 We also recall that in accordance with the *Publications Regulation*, import entities make final content review decisions for reading materials (subject to intervention by the GAPP in accordance with Article 44 and 45 of the *Publications Regulation*), whereas, in accordance with the *2001 Audiovisual Products Regulation*, the competent Chinese authority makes final content review decisions for finished audiovisual products.[545] China also pointed out, however, that for finished audiovisual products, the import entities selected by China conduct a preliminary content review, by submitting review reports to the authorities as part of their application for a final content review.[546] China further notes that as a result of their own evaluation of content, import entities may also refrain from submitting manifestly inappropriate content to the competent authorities. China contends that for these products, the import entities "greatly facilitate" the final content review decisions to be made by the competent authorities.[547]

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[542] China's responses to question Nos. 42 and 184.

[543] Panel Report on *US – Gambling*, para. 6.444.

[544] See *infra*, para 7.911.

[545] China's responses to question Nos. 185, 191 and 196.

[546] China has submitted an actual example of an application for content review concerning finished audiovisual products. It supports China's contention that review reports are to be submitted by applicants (Exhibit CN-25). China has also provided an example where an import entity's preliminary content review has led it not to submit an application (Exhibits CN-31 and CN-32).

[547] China's first written submission, para. 207.

7.766 It is clear to us that the above-mentioned Chinese requirements that the content of reading materials and finished audiovisual products must be examined prior to importation, and that such products cannot be imported if they contain prohibited content, are measures to protect public morals in China.

7.767 We further note that in the case of the *Publications Regulation* there is a very close link between import entities and the content review which is designed to protect public morals in China. This is because under that Regulation entities importing reading materials have final responsibility for content review. In the case of the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, the link to content review is somewhat less close. To recall, under these measures final responsibility for content review decisions lies with the competent authorities. Nevertheless, a link exists, for the record indicates that entities importing finished audiovisual products must not only submit applications for content review, but are required to provide review reports to the competent authorities. Their preliminary evaluation also results in manifestly inappropriate content not being submitted for review.

7.768 We shall examine further below whether, and if so, to what extent, the restrictions of the right to import contained in the *Publications Regulation*, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* contribute to the protection of public morals in China. At this point, we merely note China's contention that its restrictions of the right to import not only contribute to, but are essential for, achieving its objective of protecting public morals by preventing the importation into China of relevant products with inappropriate content.

7.769 We now turn to consider the remaining measures – the *Catalogue*, the *Foreign Investment Regulation*, the *Several Opinions* and the *Audiovisual (Sub-)Distribution Rule*. We recall that these measures do not contain any provisions prohibiting relevant products from carrying certain contents, nor do they require that the content of such products must be reviewed before they are imported into China.

7.770 We commence our analysis with the *Catalogue* and the *Foreign Investment Regulation*. In response to a question from the Panel, China said that while its system for selecting import entities undertaking content review in respect of relevant products is set out in other measures, measures such as the *Foreign Investment Regulation* and the *Catalogue* are not "isolated measures".[548] Referring to the *Catalogue*, China observes that it is a summary of foreign investment policy in various sectors, and that it therefore inevitably includes a provision excluding foreign-invested enterprises from engaging in the import of relevant products. China submits, however, that this exclusion is the result of its system of selecting import entities.[549]

7.771 We note that Article 1 of the *Foreign Investment Regulation* states that the Regulation has been drawn up to guide the orientation of foreign investment so that it fits with the national economic and social development plan of China, and to help protect the lawful rights and interests of investors. Regarding the *Catalogue*, we recall that Article 3 of the *Foreign Investment Regulation* states that it serves as the basis for the examination and approval of foreign-invested projects and policies applicable to foreign-invested enterprises. We also note that the *Catalogue* covers a wide variety of sectors, not just the cultural sector.

7.772 Thus, considered by themselves, the *Catalogue* and the *Foreign Investment Regulation* do not suggest that Articles X.2 and X.3, in conjunction with Articles 3 and 4, are connected to the content review mechanism for the relevant products. We agree with China, however, that these provisions

[548] China's response to question No. 182.
[549] *Ibid*.

must be considered in context, i.e., that they must be considered in the light of, and together with, other applicable rules and regulations.

7.773 In this regard, China has confirmed that as a result of other measures establishing, or referring to, the content review mechanism for the relevant products, which include the *Publications Regulation*, only wholly state-owned enterprises are permitted to import the relevant products.[550] This necessarily implies that foreign-invested enterprises in China cannot import relevant products. It is therefore possible, as argued by China, that Articles X.2 and X.3 of the *Catalogue* are intended to reflect this, by including the relevant industry in the prohibited category of foreign-invested projects. While it is conceivable that China would prohibit foreign investors from investing in import entities importing the relevant products for different reasons (e.g., to prevent foreign control), on balance, we find China's argument more plausible in the light of the information on the record.

7.774 We therefore consider that the mere fact that the *Catalogue* and the *Foreign Investment Regulation* are not explicitly linked to the content review mechanism for the relevant products does not demonstrate that Articles X.2 and X.3 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, make no contribution to the protection of public morals in China. Whether they do is an issue we shall examine in the next subsection.

7.775 Regarding the *Several Opinions*, we note that according to its preamble it has been issued in order to standardise the work of bringing foreign capital into the cultural sector, improve the quality and level of the utilization of foreign capital, protect the safety of the State's culture, and promote the healthy and orderly development of the cultural industry. Thus, there is no indication in the *Several Opinions* itself that it is linked to the content review mechanism for the relevant products.

7.776 It is conceivable that Article 4 of the *Several Opinions* prohibits foreign investors from setting up and operating import entities importing the relevant products for reasons that are unrelated to the fact that the content of these products is to be reviewed. On balance, however, we find it more plausible that Article 4 is intended to reflect the fact that other measures which establish, or refer to, the content review mechanism (e.g., the *Publications Regulation* or the *Imported Cultural Products Rule*) stipulate that only wholly state-owned enterprises are permitted to import the relevant products. Since the *Several Opinions* is about the introduction of foreign capital into the cultural industry, it does not seem unusual that it would also speak to whether foreign investors can invest in import entities importing the relevant products.

7.777 We therefore consider that the mere fact that the *Several Opinions* is not explicitly linked to the content review mechanism for the relevant products does not demonstrate that Article 4 makes no contribution to the protection of public morals in China. Whether it does is an issue we shall examine in the next subsection.

7.778 Turning, finally, to the *Audiovisual (Sub-)Distribution Rule*, we note that its Article 1 indicates that the Rule has been drawn up in order to expand Chinese-foreign cultural exchange and economic cooperation and reinforce the administration of Chinese-foreign contractual joint ventures for the sub-distribution of audiovisual products.[551] Article 1 further indicates that the Rule is based, *inter alia*, on the *2001 Audiovisual Products Regulation*. We recall that Article 28 of the *2001*

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[550] China's response to question No. 46(a). See, e.g., Article 42 of the *Publications Regulation*. For finished audiovisual products, this is confirmed by, e.g., Article 4 of the *Imported Cultural Products Rule*.

[551] China has provided a somewhat different translation of Article 1 which notably does not use the term "sub-distribution". According to China's translation, Article 1 states that the measure was "formulated … for the purpose of enlarging foreign cultural exchanges and economic cooperation as well as strengthening administration of Sino-foreign distribution contractual joint ventures of audiovisual products". Regarding the translation of the term *Fen Xiao*, see *infra*, para. 7.931.

Audiovisual Products Regulation imposes a content review requirement on imports of finished audiovisual products. Article 20 of the *Audiovisual (Sub-)Distribution Rule* provides that Chinese-foreign contractual joint ventures may not deal in audiovisual products whose import has not been approved by the MOC. Article 21 – the provision at issue – makes clear that Chinese-foreign contractual joint ventures may not themselves engage in the import of audiovisual products. Accordingly, the *Audiovisual (Sub-)Distribution Rule* does not itself indicate a link between Article 21 and the content review mechanism for finished audiovisual products, although Article 20 does make clear that imports of finished audiovisual products are subject to content review.

7.779 While it is conceivable that Article 21 prohibits Chinese-foreign contractual joint ventures from engaging in the import of finished audiovisual products for reasons that are unrelated to the fact that the content of these products is to be reviewed, we note China's argument that measures like the *Audiovisual (Sub-)Distribution Rule* are not isolated measures and are the result of its system of selecting importers with the content review mechanism in mind. In this regard, we recall that the *2001 Audiovisual Products Regulation* does not stipulate that only state-owned enterprises can be designated as import entities. However, there was apparently only one designated importing entity for finished audiovisual products – the wholly state-owned CNPIEC – when the *2001 Audiovisual Products Regulation* was promulgated, and no additional entity has been designated since.[552] We think it is possible that Article 21 is intended to reflect the fact that, for reasons related to the content review requirement, only a wholly state-owned enterprise was permitted to import finished audiovisual products. On balance, we find the latter view more plausible, in the light of the information on the record, than the aforementioned alternative view.

7.780 We therefore consider that the mere fact that the *Audiovisual (Sub-)Distribution Rule* is not explicitly linked to the content review mechanism for finished audiovisual products does not demonstrate that Article 21 makes no contribution to the protection of public morals in China. Whether it does is an issue we shall examine in the next subsection.

7.781 With the foregoing in mind, we now turn to examine whether China's restrictions of the right to import relevant products are "necessary" to protect public morals.

"Necessity" of the measures at issue to protect public morals

7.782 The **Panel** begins its "necessity" analysis by recalling relevant guidance from the Appellate Body. In *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word "necessary" is not limited to that which is 'indispensable'".[553] It further clarified that it is through "a process of weighing and balancing a series of factors" that it must be determined whether a measure is "necessary" within the meaning of Article XX.[554]

7.783 In *US – Gambling* – a case which concerned the equivalent of Article XX in the GATS, i.e., Article XIV of the GATS – the Appellate Body elaborated on the factors to be weighed and balanced:

> "The process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be 'weighed and balanced'. The Appellate Body has pointed to two factors that, in

[552] See Article 1 of the *Circular on Uniform Anti-Fake Logo for Audiovisual Products*. We note in this context that China indicated that its policy of not allowing the importation of cultural goods with content that could have a negative impact on public morals was already in effect during its accession negotations. See also Article 5 of the *Imported Cultural Products Rule*.

[553] Appellate Body Report on *Korea – Various Measures on Beef*, para. 161.

[554] *Ibid*., para. 164.

> most cases, will be relevant to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce."[555]

7.784 The Appellate Body also indicated, however, that possible alternatives to the challenged measures may also need to be considered:

> "A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available'."[556]

7.785 Regarding who has to demonstrate that the challenged measures is "necessary" or that a reasonably available alternative exists, the Appellate Body stated that:

> "[T]he responding party must show that its measure is 'necessary' to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.
>
> Rather, it is for a responding party to make a prima facie case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and balanced' in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'. If the panel concludes that the respondent has made a prima facie case that the challenged measure is 'necessary'—that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to"—then a panel should find that challenged measure 'necessary' within the terms of Article XIV(a) of the GATS."[557]

7.786 Finally, in a recent case, *Brazil – Retreaded Tyres*, the Appellate Body summed up the entire analysis in the following terms:

> "[I]n order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent

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[555] Appellate Body Report on *US – Gambling*, para. 306 (footnotes omitted).
[556] *Ibid*., para. 307.
[557] *Ibid*., paras. 309-310 (footnote omitted).

> contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake."[558]

7.787 As pointed out above, the Appellate Body in *US – Gambling* observed that for the purposes of determining whether a measure is "necessary", the contribution of that measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce are "two factors that, in most cases, will be relevant to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered".[559] In the case before us, we consider that both factors are relevant. Regarding the restrictive impact on international trade, we note that restrictions of the right to import may have an adverse impact on imports. For instance, if no enterprise or individual were granted the right to import a particular product, imports of the particular product would obviously be adversely affected.

7.788 We recall that we have agreed to proceed on the assumption that Article XX is available as a direct defence for measures that are inconsistent with China's trading rights commitments under the Accession Protocol. Therefore, and consistently with the statement by the Appellate Body in *US – Gambling*, we think that in the case before us, an additional factor should be taken into account. Specifically, we think that we should weigh not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In our view, if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, it makes sense to consider how much these measures restrict the right to import. This would appear to parallel a situation where a Member imposes a WTO-inconsistent ban on imports of products and where an Article XX defence requires examination of how much the ban restricts imports of those same products.[560] Accordingly, we find it appropriate to consider two different types of restrictive impact in this case.

7.789 A further preliminary observation is in order, in relation to the measures that are at issue in a "necessity" analysis. It is well-established that it is the WTO-inconsistent measure that a responding party seeks to justify which must be "necessary".[561] Therefore, in the case at hand, the measures, the necessity of which China must establish, are the provisions that restrict the right to import contrary to China's trading rights commitments under the Accession Protocol. The separate provisions prescribing that the competent Chinese authorities and/or import entities review the content of imported finished audiovisual products and reading materials, and that such products may not be imported if they carry prohibited content, are not at issue. We understand that both parties take the same view.[562]

7.790 China has stated that it is necessary for China to review the content of all imports of the aforementioned products in order to avoid the importation of products with content that could have a negative impact on public morals in China, and to achieve its high level of protection of public morals. As previously pointed out, the United States has not questioned China's right to perform content reviews in respect of imports of reading materials and finished audiovisual products. Nor has it questioned China's right to prohibit the importation of such products if they carry content prohibited in China. For the purposes of our "necessity" analysis, we will, therefore, proceed on the presumption that the provisions prescribing content reviews and prohibiting imports of products with inappropriate content are WTO-consistent.

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[558] Appellate Body Report on *Brazil – Retreaded Tyres*, para. 178.

[559] Appellate Body Report on *US - Gambling*, para. 306.

[560] The Panel in *Brazil – Retreaded Tyres* observed in this regard that the import ban before it was "by design as trade-restrictive as can be" (Panel Report on *Brazil – Retreaded Tyres*, para. 7.211).

[561] E.g., Appellate Body Report on *US – Gasoline*, DSR 1996:I, 3, at 20.

[562] Parties' responses to question No. 55; China's response to question No. 181.

7.791 In respect of the measures at issue, China argues that the various restrictions of the right to import are necessary to ensure that the content review can be performed in respect of relevant imported products in a manner which achieves the high level of protection China seeks to achieve. Thus, China's own argument suggests that, by themselves, the measures at issue – the provisions restricting the right to import relevant products – would not achieve the objective of protecting public morals. For this to be possible, the above-mentioned separate provisions prescribing the content review in respect of imports of the relevant products need, also, to be in place.

7.792 In response to a question from the Panel, both parties expressed the view that a measure can be characterized as "necessary" within the meaning of Article XX even if it does not achieve the desired objective all by itself.[563] We see no need to take a position on whether this would be correct in all circumstances. In the specific circumstances facing us, however, we are able to agree with the parties. More particularly, we consider that if China can demonstrate that, having adopted the other, unchallenged, provisions pursuant to which importers are to make final content review decisions or are to assist the competent Chinese authorities to make content review decisions, the various restrictions of the right to import are "necessary" to achieve its objective of protecting public morals in China, those restrictions would be provisionally justified under Article XX(a), unless there are WTO-consistent alternative measures that are reasonably available to China.

7.793 With the foregoing in mind, we now proceed to examine whether China has made a prima facie case that the measures at issue are "necessary" within the meaning of Article XX(a). If appropriate, we will subsequently examine whether reasonably available and WTO-consistent alternatives have been identified.

Analysis of the measures at issue

7.794 As indicated, **China** argues that the selection of import entities is "necessary" to protect public morals within China within the meaning of Article XX(a) of the GATT 1994. In relation to the importance of the value pursued by the measures at issue, China notes that public morality is a value of vital importance for China. According to China, there are few values of such importance. The preservation of public morals is a crucial policy issue in virtually all States and forms a central element of social cohesion and the ability of communities to live together.

7.795 China further points out that it pursues a high level of protection of public morals within its territory. China seeks to prevent the importation of reading materials or finished audiovisual products with content that could have a negative impact on public morals in China. China notes that this is illustrated by the dissuasive sanctions which may be imposed in case of infringements of relevant Chinese regulations governing the content review.

7.796 Regarding the contribution the measures at issue make to the achievement of China's objective, China contends that its mechanisms for selecting import entities not only contribute to, but are essential for, achieving the objective of avoiding the importation of reading materials and finished audiovisual products with inappropriate content into China. In China's view, the selection of import entities is a decisive element of an effective and efficient content review mechanism for imported products. China notes that it selects import entities based on essentially four criteria which contribute to the efficient implementation of the content review mechanism and to the fulfilment of its objective. They are that import entities must: (i) have an appropriate organizational structure, (ii) have a reliable, competent and capable personnel, (iii) be limited, overall, in their number, and (iv) have appropriate geographical coverage within China's customs territory.

[563] Parties' responses to question No. 200.

7.797 Regarding the first two selection criteria, China recalls that the content review mechanism is the expression of a public policy activity. According to China, it is, therefore, necessary that the administrative authority be certain that the selected entity to whom such a public activity has been attributed will act in accordance with all the requirements of Chinese laws and regulations that apply to such a public activity. In China's view, the organizational structure of the selected import entities must, therefore, be such that there is enough confidence on the part of the administrative authority that the content review will be conducted both efficiently and effectively.

7.798 China submits that content review is also a complex public policy activity. According to China, in order to implement the content review efficiently and up to the standard defined by China, it is important that the import entities correctly understand the meaning, purpose, scope and manner of implementing the content review in accordance with the requirements of the relevant laws and regulations and maintain sufficient and regular exchanges with the administrative authorities.

7.799 China further submits that, generally, most of the preparatory work necessary for the content review is carried out by the import entities, and that their work most of the time is just validated by the relevant administrative authority. According to China, this illustrates the perfect understanding by the import entities of the content review mechanism and its purpose and the capacity of these entities to carry out the content review in an effective and efficient manner.

7.800 China considers that carrying out the content review in an efficient and effective manner requires an appropriate internal structure. China notes the example of CNPIEC which has implemented a three-level review and decision-making procedure. According to China, the material capacity of the entities, i.e., whether the entities dispose of sufficient technical equipment and know-how in order to ensure an efficient and timely review of the contents (e.g. computers, software, display devices, etc.) is an additional element to take into consideration.

7.801 China further argues that it is also crucial that the professionals involved in the content review be specifically and appropriately qualified and have sufficient experience and training in, and knowledge of, the sector in question, especially in relation to content review matters. China notes in this respect that content review is a complex procedure in which every product must be reviewed in its entirety.[564] In China's view, it is equally important that these professionals be familiar with Chinese values and public morals, and capable of efficiently communicating with, and understanding, the administrative authorities. China contends that the professionals' linguistic capacities are also relevant. China notes that those engaged in the content review should generally master a wide range of foreign languages in order to ensure appropriate understanding of the imported contents and their proper alignment with the review principles.

7.802 Regarding the criterion that the number of import entities should be limited, China points out that the rules and regulations at issue provide for the limitation of the total number of entities approved for engaging in the importation of cultural goods.[565] China submits that limiting the number of entities authorized to engage in the importation of cultural goods is an important factor contributing to the prevention of any breaking of the rules relating to prohibited content and to circulation within China of content that has a negative impact on the public morals.

7.803 China argues that limiting the number of importation entities enables the administrative authorities to have efficient control over whether those entities comply with the rules and procedures on content review. In China's view, it is obvious that the workload for the administrative authorities would be much heavier if they had to review the reports submitted by a large number of entities and to

[564] China notes that the CNPIEC, for example, employs more than 70 highly qualified and trained censors.

[565] China cites as an example Article 42 of the *Publications Regulation*.

carry out annual inspections of that large number of entities. China further argues that limiting the number of entities also allows for enhanced and more effective cooperation between these entities and the relevant State authorities. This is essential in order to ensure the consistency of the content review operated on the cultural goods imported into the territory of China.[566]

7.804 As indicated, according to China, another criterion for selecting import entities is the import entities' geographical presence within China, and whether this corresponds to the development prescribed by the State's plans. China explains that this concerns, in particular whether the entities, through branches, have premises in a large number of customs areas, so that no entry gate into the Chinese market is overlooked. According to China, the objective is to have a small number of companies with extensive geographical coverage. China considers that in order to meet the requirement of prohibiting cultural goods with inappropriate content it is essential that entities participating in the content review be located close to the entry points of the goods into the Chinese territory. China argues that this also serves the purpose of preventing any risk of dissemination of unauthorized and inappropriate contents within China.

7.805 Regarding the impact of the measures at issue on trade, China submits that its system for the selection of import entities has a limited impact. According to China, the fact that the import entities correctly understand the meaning, scope and manner of implementing the content review in accordance with the requirements of the relevant regulations allows them to carry out the content review in a smooth manner. This avoids unacceptable delays which might have been caused by multiple exchanges between the administrative authority and the import entities.

7.806 China argues that unnecessary trade-distorting effects can also be avoided because import entities are selected on the basis of their organizational structure and the qualifications of their personnel. China notes that the CNPIEC, for example, implements internal processes ensuring that it can finish the review of a publication within 30 minutes after receiving it, including during weekends and national holidays. In China's view, the fact that there is a limited number of selected import entities with premises at the border and in a large number of customs areas similarly minimize customs congestion or the need for transportation within China.

7.807 China further submits that the overall increase of titles imported into China indicates that the selection system does not have a negative impact on trade. China points out that statistical data show, for example, that while 586 newspaper titles where imported in China in 2002, 767 different newspapers were imported in 2006. For periodicals, China says, 36,032 titles were imported in 2002 and 45,178 in 2006. For audiovisual products, China notes that 11,464 titles were imported in 2002 and 31,123 in 2006.[567]

7.808 The **United States** points out at the outset that it is not challenging China's right to determine its desired level of protection. The United States is challenging the means China has chosen to achieve those ends. The United States is of the view that the means China has selected are not "necessary". More particularly, the United States considers that China has failed to demonstrate that the measures at issue are "necessary" within the meaning of Article XX(a).

7.809 The United States contends that China has to establish a nexus between prohibiting all foreign importers and all privately owned Chinese importers from importing the products at issue and achieving its content review goals. The United States argues in this respect that while China asserts that its selected importers play a critical role in content review, it has never explained why the entities

[566] China notes that the GAPP and the MOC regularly hold meetings with the import entities' review staff in order to provide information and guidance for the content review.

[567] China refers to statistical information contained in Exhibits CN-33, CN-34, CN-35, CN-36 and CN-37.

involved in content review need to monopolize the importation process. According to the United States, content review is independent of importation and can be performed by individuals or entities unrelated to the importation process at any time before, during or after that process. In the United States' view, there is no nexus between the challenged measures and the protection of public morals. The United States submits, therefore, that China's measures denying trading rights lie far too distant from the pole of indispensability to qualify as "necessary" within the meaning of Article XX.

7.810 More specifically, the United States argues that China's own system de-links content review from importation. The United States points out in this regard that the Chinese Government itself reviews the content of all foreign films before any such film is permitted to be imported into China. Also, importers are not integral to the content review process for all relevant products. Furthermore, the United States notes that for, e.g., audiovisual products and films for theatrical release, the Chinese Government is the only entity performing the content review. According to the United States, this demonstrates that it is not necessary for importers to perform content review in order to achieve China's objective.

7.811 The United States also does not believe that it is necessary to reserve importation to wholly state-owned enterprises, since, as indicated, China's own agencies are capable of handling content review and state-owned enterprises are not needed to play the role of forced middleman. In the United States' view, China is, therefore, able to maintain its level of protection even when state-owned enterprises are not serving as intermediaries between producers and the Chinese Government.

7.812 Regarding the number of content review entities the United States does not consider that it needs to be drastically limited, as China suggests. The United States submits that China's own system for content review confirms this. The United States points out, for example, that in 2007 there were 806 domestic book and electronic publication publishers in China conducting "in-house" content review, compared with only 42 state-owned publication import entities. The United States considers, therefore, that China's assertion that it cannot support an increased number of importers participating in content review is not credible.

7.813 The United States further argues that the Appellate Body has not found a measure to be necessary where there is a reasonably available WTO-consistent alternative. As indicated further below, the United States asserts in this regard that China has numerous alternatives to achieve its content review objectives that do not restrict the right to import.

7.814 The **Panel** notes that some of the specific provisions it needs to examine present certain similarities. For the purposes of its analysis, the Panel will group similar provisions and examine them together. The first group of provisions which the Panel will address (hereafter referred to as the "criteria" provision) comprises two conditions stipulated in Article 42 of the *Publications Regulation*. The second group of similar provisions (hereafter the "discretion" provisions) comprises: (i) Article 41 of the *Publications Regulation*, (ii) Article 27 of the *2001 Audiovisual Products Regulation* and (iii) Article 8 of the *Audiovisual Products Importation Rule*. The last group (hereafter the "exclusion" provisions) comprises: (i) a further condition set out in Article 42 of the *Publications Regulation*, (ii) Articles X.2 and X.3 of the *Catalogue* and Articles 3 and 4 of the *Foreign Investment Regulation*, (iii) Article 4 of the *Several Opinions;* and (iv) Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

7.815 In respect of the first factor to be considered as part of our "necessity" analysis – the importance of the particular interests or values furthered by the provisions at issue – there is no need to analyse each of the above-mentioned groups separately. We thus address this factor at the outset.

7.816 We note in this regard China's statement that public morality is a value of vital importance for China. According to China, the preservation of public morals is a crucial policy objective in virtually

all States and forms "a central element of social cohesion and the capacity of communities to live together".[568] The United States has not indicated any disagreement with China's assessment of the importance of public morals as a value or interest pursued by Members.

7.817 In our view, it is undoubtedly the case that the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy. We do not consider it simply accident that the exception relating to "public morals" is the first exception identified in the ten sub-paragraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest.

7.818 Consistently with the importance of the value or interest furthered by its measures, China has stated that it pursues a high level of protection of public morals within its territory. China has stated that, through the measures at issue, it seeks to prevent the importation of reading materials and finished audiovisual products with content that could have a negative impact on public morals within its territory. According to China, its high level of protection is illustrated by the fact that its prohibition on the importation of reading materials and finished audiovisual products with prohibited content is complemented by dissuasive sanctions (e.g., fines, revocation of operating licences or, in serious cases, criminal sanctions). China indicated that such sanctions may be imposed in case the applicable rules on content review are not correctly followed.

7.819 We note that it is up to each Member to determine what level of protection is appropriate in a given situation.[569] We have previously indicated that several of the measures at issue contain provisions which prohibit relevant products (reading materials and finished audiovisual products) from carrying certain content, and which require that the content of such products must be reviewed before they can be imported into China. In our view, these provisions are consistent with China's contention that it seeks to achieve a high level of protection of public morals in respect of the relevant products. Therefore, in reviewing the necessity of the provisions at issue, we will bear in mind the high level of protection of public morals China has determined to be appropriate for its territory in respect of the relevant products.

7.820 With these considerations in mind, we now turn to examine the "criteria" provisions.

"Criteria" provisions

7.821 We note that the relevant provision – Article 42 of the *Publications Regulation* – sets forth different types of approval criteria to be met by publication import entities. Specifically, the criteria in question are that publication import entities need to have a suitable organization and qualified personnel, and that applications to establish publication import entities need to meet the State plan for the number, structure and distribution of import entities. We will address the two criteria in turn.

Suitable organization and qualified personnel

7.822 Article 42 of the *Publications Regulation* requires that publication import entities must have a suitable organization and personnel which satisfies qualification requirements determined by the State. We have determined that this condition in Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 of the Accession Protocol as well as paragraphs 83(d) and 84(a) of the Working Party Report and, hence, paragraph 1.2 of the Accession Protocol. We

[568] China's first written submission, para. 186.

[569] Appellate Body Reports on *Brazil – Retreaded Tyres*, para. 210; *EC – Asbestos*, para. 168; *Korea – Various Measures on Beef*, para. 176.

noted that enterprises in China that do not satisfy this condition cannot obtain the right to import the relevant products.

7.823 We begin our analysis by considering the contribution this condition makes to the realization of the objective pursued by it, i.e., the protection of public morals in China. As an initial matter, we note that we agree with China that content review is a public policy function. We therefore also agree that if the responsibility for the conduct of content review is conferred on importers of the relevant products, as is the case under the *Publications Regulation*[570], China needs to have adequate confidence that the importers that will carry out the content review are capable of doing so in a way that ensures that no products with prohibited content are imported into China.

7.824 Regarding, more specifically, the condition that publication import entities need to have a suitable organization, we understand that this means, e.g., an organizationally separate review structure, a hierarchical system to allow for multi-level reviews in non-routine cases[571], a clear allocation of responsibilities for final content review decisions, and adequate material resources to support the review function. Thus understood, it seems to us that having a suitable organization is likely to contribute materially to the protection of public morals in China, in that it would help minimize review errors and create the right incentives (e.g., so as to avoid potential conflicts of interest).

7.825 The other condition in Article 42 is that publication import entities have personnel that satisfy qualification requirements established by the State.[572] Relevant qualifications appear to include the ability to read and understand the language of the content to be imported as well as a thorough understanding of, and familiarity with, the applicable legal review standards and their interpretation and application. In our view, there is no question that requiring adequately qualified review personnel contributes materially to the protection of public morals in China. Without such personnel, there would be a substantial risk that import entities would not carry out content review properly.

7.826 The next factor to be analysed is the restrictive impact of the condition in question. Regarding the restrictive impact on imports, we agree with China that the fact of having a suitable organization and qualified personnel would allow publication import entities to conduct content review in a prompt and efficient manner that would minimize any delays in importing that are caused by the need to conduct such a review. This is particularly so in the case of publications that appear daily, such as newspapers. We further note China's argument that the number of titles of newspapers and publications imported into China has gone up between 2002 and 2006. In our view, this does not necessarily indicate that the condition in question has not had any trade-restrictive effects. The statistics do not indicate what might have been if the condition had not been imposed, although they do seem to confirm that the condition is compatible with an increase in imports.

7.827 Regarding the restrictive impact on those wishing to engage in importing, we observe that the condition in question restricts the right to import of enterprises in China that do not satisfy the condition. Significantly, however, it does not *a priori* exclude particular types of enterprise in China from the right to engage in importing.

7.828 Having addressed the relevant factors separately, it remains for us to weigh and balance them with a view to coming to a conclusion whether, overall, the condition that publication import entities have a suitable organization and qualified personnel is "necessary" within the meaning of Article XX(a). Specifically, we must weigh the fact that the condition in question makes a material

[570] See Article 44 of the *Publications Regulation*.

[571] Evidence submitted by China indicates that a three-level review system is required of publication import entities (Exhibit CN-22).

[572] We note that relevant requirements have not been submitted to the Panel.

contribution to the protection of public morals against the fact that the condition does not *a priori* exclude particular types of enterprise in China from the right to engage in importing and is likely to minimize unnecessary delays in importing. At the same time, we also need to take account of the fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. Weighing these factors, we reach the conclusion that, in the absence of reasonably available alternatives, the condition in question is "necessary" to protect public morals in China.

State plan for the number, structure and distribution of import entities

7.829 There is, as indicated, another provision setting forth an approval criterion which we which we need to consider. Article 42 requires that the GAPP may only approve publication import entities if they are in conformity with the State plan for the number, structure and distribution [geographical coverage] of publication import entities. We have determined that this requirement in Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 of the Accession Protocol as well as paragraphs 83(d) and 84(a) of the Working Party Report and, hence, paragraph 1.2 of the Accession Protocol. We noted that enterprises in China that do not fit in with the State plan cannot obtain the right to import the relevant products.

7.830 We first consider whether this requirement makes a contribution to the realization of the objective pursued by China, i.e., the protection of public morals in China. We recall that under the *Publications Regulation*, the publication import entity is responsible for the conduct of content review.

7.831 We understand China to contend that the requirement that approvals must be granted in accordance with its State plans for the number, structure and distribution of import entities is designed to ensure essentially two things: first, that only a limited number of import entities are approved, and, secondly, that each approved import entity has extensive geographical presence (distribution), through branches, in a large number of customs areas, and with branches located close to the entry points of imports into China.

7.832 With these introductory remarks in mind, we turn to consider the contribution made by the State plan requirement to the protection of public morals in China. Since in the case of the *Publications Regulation* the publication import entities are responsible for content review, we can see that limiting the number of import entities can make a material contribution. It would appear that with a limited number of publication import entities, it is easier for the GAPP to interact with these entities with a view to ensuring, and enhancing, the consistency of the review work of these entities. Similarly, a limited number of entities allows the GAPP to devote more time to conduct careful ex post controls of compliance with applicable content review requirements, e.g., through the annual inspections.

7.833 We are not persuaded that a wide geographical distribution of the branches of import entities in itself makes a significant contribution to the protection of public morals.[573] However, there appears to be a close link between the desired wide geographical distribution of the branches and the desired limitation on the number of import entities. Absent a sufficiently wide distribution of branches, the limitation on the number of import entities could result in delayed importation or more costly

[573] China's response to question No. 43. It is worth noting that the CNPIEC, for instance, operates a system of centralized content review by the parent company. The local branches do not appear to be involved in the substantive review (Exhibit CN-26, p. 5).

importation, in that it might otherwise not be possible to use convenient points of entry.[574] We therefore think that the number and distribution elements can and should be viewed as complementary and as forming a single whole.

7.834 We next turn to analyse the restrictive impact of the requirement in question. Regarding the restrictive impact on imports, we note China's argument that even though China limits the number of import entities pursuant to the State plan, it approves only entities with branches in a large number of customs areas and in proximity to the border. According to China, this guarantees that there are no unnecessary delays in importing due to customs congestion or due to the need for long distance transport within China. We note that evidence submitted by China indicates that the CNPIEC, which imports books, newspapers, periodicals and electronic publications and has 22 branches in China, tries to make sure that any imported publications arrive at the nearest point of entry and that they are delivered through the local branches.[575] We also recall that statistical information submitted by China shows that the number of book, newspaper and periodical titles has increased between 2002 and 2006, although the number for electronic publications has decreased during the same period. The statistics do not demonstrate that the limited number of importers, which limits the choice of business partners that foreign producers can use, has not had any trade-restrictive effects. Nevertheless, in the light of the geographical distribution criterion, it would seem that limiting the number of import entities does not necessarily have a major adverse impact on imports of relevant products.

7.835 Regarding the restrictive impact on those wishing to engage in importing, we note that the requirement in question restricts the right to import of enterprises in China that do not fit in with the State plan. The geographical distribution criterion is likely to be more difficult for enterprises to satisfy than, e.g., the previously discussed requirement to have an appropriate organization and qualified personnel. Nevertheless, as explained, the requirements do not *a priori* exclude particular types of enterprise in China from establishing an import entity.

7.836 Based on the above examination of the relevant factors, we can now come to a conclusion whether, overall, the relevant requirement concerning conformity with the State plan for the number, structure and distribution of such entities is "necessary" within the meaning of Article XX(a). In weighing and balancing the relevant factors, we take account, first of all, of the fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. We must take account, in addition, of the fact that the requirement of conformity with the State plan is apt to make a material contribution to the protection of public morals; that it is unclear to what extent, if any, it limits overall imports of relevant products, but that it is nonetheless likely to minimize unnecessary delays in importing; and that it does not *a priori* exclude particular types of enterprise in China from establishing an import entity. Weighing these factors, we conclude that, in the absence of reasonably available alternatives, the State plan requirement in Article 42 of the *Publications Regulation* can be characterized as "necessary" to protect public morals in China.

"Discretion" provisions

7.837 We now address the second group of relevant provisions, the "discretion" provisions. The first of these provisions is Article 41 of the *Publications Regulation*, which stipulates that no entity or individual shall engage in the business of importing newspapers or periodicals without being designated. China has confirmed, however, that the GAPP can only designate publication import entities for newspapers or periodicals that have been approved by the GAPP under Article 42. We have determined that in respect of foreign-invested enterprises in China Article 41 results in China

[574] In response to question No. 43, China remarked that a wide geographical coverage helps ensure that content review minimizes adverse effects on imports.

[575] Exhibit CN-26.

acting inconsistently with paragraph 84(b) (discretion) of the Working Party Report and, hence, paragraph 1.2 of the Accession Protocol.

7.838 The second relevant provision is Article 27 of the *2001 Audiovisual Products Regulation*, which provides that entities or individuals which have not been designated by the MOC may not engage in the import of finished audiovisual products, and that the import of these products must be handled by designated finished audiovisual product import entities. We have determined that in respect of foreign-invested enterprises in China Article 27 results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

7.839 The remaining provision is Article 8 of the *Audiovisual Products Importation Rule*. It mirrors the provisions of Article 27 of the *2001 Audiovisual Products Regulation*.[576] As a consequence, it results in the same inconsistencies as Article 27.

7.840 We first examine whether the above-mentioned designation requirements make a contribution to the realization of the objective pursued by China, i.e., the protection of public morals in China. We recall at the outset that designations under the above-mentioned requirements occur exclusively at the initiative of the relevant administrative authority and that there is no application process. The relevant authority enjoys discretion as to which entity to designate.

7.841 In response to questions from the Panel, China has provided an explanation of why it uses different processes for the selection of import entities for different products. China recalled that in the books and electronic publications sectors, it uses an approval system, whereas in the periodicals, newspaper and finished audiovisual products sectors, it uses a designation system. According to China, compared with books and electronic publications, the content review of newspapers and periodicals requires a higher quality of content review personnel and a more stringent organization to ensure greater efficiency and to avoid unnecessary delays to normal trade flows. In relation to the content review of finished audiovisual products, China contends that it requires more technical and facility support than is required for other products.[577]

7.842 Regarding Article 41 of the *Publications Regulation*, we are not convinced, based on China's explanation, that the designation requirement applicable in the newspaper and periodicals sectors makes an independent contribution to the protection of public morals in China. As stated by China, the designation requirement is imposed to ensure that newspapers and periodicals are reviewed efficiently and with a view to avoiding unnecessary delays, which is important notably in the case of publications that appear daily. This efficiency aspect appears to relate to the effect on trade of the content review carried out by publication import entities, not to how effective their content review is in protecting public morals.

7.843 Turning to the other designation requirements at issue, i.e., those set forth in Article 27 of the *2001 Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule*, we note that they are different, in that they do not complement an approval system, but are used in lieu of an approval system.[578] We note that China has indicated that for both types of selection processes, the principles guiding the selection of import entities are fundamentally the same. China recalled that they include that import entities would only be selected if they have a suitable organization and qualified personnel, and that the overall number of import entities would remain limited.[579]

[576] China's response to question No. 182
[577] China's responses to question Nos. 40 and 172.
[578] China's response to question No. 25(b).
[579] China's first written submission, paras. 155-156.

7.844 It is clear that giving the MOC the discretion to designate finished audiovisual product import entities allows the MOC to select import entities in accordance with the aforementioned guiding principles. To recall, in the case of finished audiovisual products, the MOC makes final content review decisions, while the designated finished audiovisual product import entities carry out a preliminary review. We can see that as a result of designating entities with a suitable organization and qualified personnel, the MOC might receive helpful review reports, and the entities concerned might submit fewer products for review, because they would filter out those that are not suitable for importation. This might allow the MOC to be more effective in reviewing the content of finished audiovisual products to be imported, as a consequence of a more efficient use of its resources. In this way, the designation requirement would appear to make an indirect, albeit not insignificant, contribution to the protection of public morals in China. We are not persuaded, however, that restricting the right to import finished audiovisual products in a discretionary way makes a greater contribution than would be the case under an approval system similar to the one applied by China for books and electronic publications.

7.845 The next factor to be addressed is the restrictive impact of the "discretion" provisions. We begin with the restrictive impact on imports. Regarding Article 41 of the *Publications Regulation*, we accept that the discretion to designate import entities that meet particularly strict organizational and personnel requirements allows China to select entities that can carry out content review in a prompt and efficient manner and that can keep to a minimum any delays in importing which are caused by the need to conduct such a review. Regarding Article 27 of the *2001 Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule*, we similarly accept that the discretion to designate import entities that have sufficient technical and facility support gives China the possibility to select entities which can keep to a minimum any delays in importing associated with content review.

7.846 China has also indicated, however, that the designation system would result in a limited number of import entities. We recall in this respect that statistical information submitted by China shows that the number of newspaper, periodicals and audiovisual product titles has increased between 2002 and 2006. This seems to indicate that the designation system is compatible with an increase in imports. However, it does not necessarily indicate that the fact that the designation system results in a limited number of importers, and thus in a limited choice of business partners for foreign producers, has not had any trade-restrictive effects.

7.847 Regarding the restrictive impact on those wishing to engage in importing, we observe that the designation requirements in question restrict the right to import of foreign-invested enterprises in China that are not designated as import entities. We recall in this regard China's statement that these requirements would result in a limited number of import entities. Also, we recall that there is no process for submitting applications and the competent authorities enjoy discretion as to whom to designate. In contrast, under the approval requirement set out, e.g., in Articles 41 and 42 of the Publication Regulation, applications can be submitted and the criteria that must be satisfied are specified. In this sense, the designation requirements in question would appear to interfere more with the right to trade than the approval requirement set out, e.g., in Articles 41 and 42 of the *Publications Regulation*. Indeed, we think it can be plausibly assumed that most enterprises seeking to obtain the right to trade would prefer the approval requirement to the designation requirements.

7.848 Based on the above examination of the relevant factors, we must now determine whether, overall, the designation requirements are "necessary" within the meaning of Article XX(a). In weighing and balancing the relevant factors, we must take account, first of all, of the fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. In respect of Article 41 of the *Publications Regulation*, we must take account, in addition, of the fact that it is not apparent to us that the designation requirement contained in Article 41 makes an independent contribution to the

protection of public morals in China; that it is unclear to what extent, if any, it limits overall imports of relevant products, but that it allows China to select entities that do not cause unnecessary delays in importing; and that it interferes more with the right to trade than would an approval requirement like the one that China already applies, pursuant to Article 42 of the *Publications Regulation*, to entities wishing to import newspapers or periodicals. Considering that the requirement in question does not appear to make an independent contribution to protecting public morals in China and that it has a significant restrictive impact on those wishing to engage in importing – more so than would an approval requirement – it cannot, in our view, be characterized as a "necessary" restriction of the right to trade, even though the protection of public morals is a highly important interest and its restrictive impact on trade may seem limited. We therefore conclude that China has not demonstrated that the designation requirement in Article 41 of the *Publications Regulation* is "necessary" to protect public morals in China.

7.849 In respect of Article 27 of the *2001 Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule*, other than the importance of the interest and China's level of protection, the factors to be weighed are the fact that the designation requirements contained in these provisions make an indirect, albeit not insignificant, contribution to the protection of public morals in China, although that contribution appears to be no more significant than would be the case under an approval requirement like the one that China already applies, e.g., for books and electronic publications; that it is unclear to what extent, if any, they limit overall imports of relevant products, but that they allow China to select entities that do not cause unnecessary delays in importing; and that they are more restrictive of the right to trade than would be an approval requirement. When weighing the fact that the designation requirements make an indirect contribution to the protection of public morals (which an approval requirement would appear equally capable of making) against the fact that they have a more significant restrictive impact on those wishing to engage in importing than would an approval requirement, it is difficult to see how these designation requirements could be characterized as "necessary" restrictions of the right to trade, even accepting that the protection of public morals is a highly important interest and that their restrictive impact on trade may seem limited. We therefore conclude that China has not demonstrated that the designation requirements in Article 27 of the *2001 Audiovisual Products Regulation* and Article 8 of the *Audiovisual Products Importation Rule* are "necessary" to protect public morals in China.

"Exclusion" provisions

7.850 The final group of provisions we need to examine encompasses various "exclusion" provisions. They include Article 42 of the *Publications Regulation*, and specifically the condition that publication import entities must be wholly state-owned enterprises. We have determined that by imposing this condition, Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2. The condition excludes enterprises in China other than wholly state-owned ones, including foreign-invested enterprises, from being granted the right to import relevant products.[580]

7.851 In addition, the group of "exclusion" provisions is made up of Articles X.2 and X.3 of the *Catalogue* and Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; and Article 21 of the *Audiovisual (Sub-)Distribution Rule*. We have discussed these provisions earlier in our Article XX analysis. We have determined that these additional provisions result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2, in that they exclude foreign-invested enterprises from being granted the right to import relevant products.

[580] We include the state ownership condition among the "exclusion" provisions rather than the "criteria" provisions because unlike the "criteria" provisions the condition in question a priori excludes certain types of enterprise from the right to engage in importing.

State ownership condition

7.852 We commence our analysis with Article 42 of the *Publications Regulation*. We first consider whether the state ownership condition makes a contribution to the realization of the objective pursued by China, i.e., the protection of public morals in China.

7.853 We recall that under the *Publications Regulation* the publication import entity is responsible for the conduct of content review. In response to questions from the Panel, China stated that the reason behind the state ownership condition is that the cost incurred by publication import entities as a result of their obligation to conduct content review is substantial.[581] China has indicated that the content review costs consist of the labour and training cost, the cost of material resources and the losses incurred in case publications ordered by customers fail to pass the content review and the customers must be compensated. China also recalls that content review is a public policy function. Therefore, China maintains, the Government cannot require privately owned enterprises in China to bear the substantial cost. China suggests that the situation is different for wholly state-owned enterprises, inasmuch as in the case of these enterprises the State owns all equity. China asserts, in addition, that wholly state-owned enterprises are currently considered to be the only entities that fulfil the above-discussed technical and organizational requirements set out in Article 42.[582]

7.854 In considering China's arguments, we note that China does not contend that publication import entities need to be wholly state-owned because they perform a public policy function. Rather, China contends that they need to be wholly state-owned because content review is costly.[583] In China's view, privately-owned enterprises cannot be expected to pay for performing a public interest function. Accordingly, what we need to examine is the latter contention. We nonetheless note that, in our understanding, the state-owned publication import entities are profit-making enterprises.[584] As a result, they would seem to face essentially the same incentive structure as privately owned enterprises would if they were allowed to be importers. In other words, it is not apparent that wholly state-owned enterprises would be inherently more careful in conducting content review than privately owned ones. We also recall that China enforces the prohibition of importing inappropriate content through external "dissuasive sanctions".[585] In the light of these elements, there does not appear to be any reason to think that privately owned enterprises would be less likely to comply with the content review requirements than wholly state-owned ones. As noted, however, China has in any event not advanced any such arguments.

7.855 Returning to China's argument about the cost of content review, we note that we have asked China to provide an estimate of the cost involved for import entities. China replied that it was unable to do so.[586] Nevertheless, evidence submitted by China indicates that the CNPIEC, a wholly state-owned publication import entity, spends RMB 3 million per year for its review staff, as labour and training costs. It seems that the CNPIEC incurred an additional cost of RMB 4 million in 2006 as a consequence of "the seizure of publication by the screen of content review".[587] While these are substantial amounts, they must be compared with the size of CNPIEC's operations and its revenues. The evidence in question does not provide information on CNPIEC's revenues or its profitability. It

[581] China's responses to question Nos. 46(a), 185 and 188(b).
[582] China's second written submission, para. 104.
[583] *Ibid*.
[584] In response to question No. 195, China indicated that "the importer enjoys the financial benefit of distributing publications that pass the content review" and that it can, therefore, be expected to bear the cost of content review.
[585] China's first written submission, para. 141; China's response to question No. 188(a).
[586] China's response to question No. 185.
[587] Exhibit CN-26, p. 6.

nonetheless indicates that in 2006 CNPIEC imported books, newspapers, periodicals, electronic publications and audiovisual products worth more than USD 127 million.[588]

7.856 Based on the – very limited – evidence before us, we are not convinced that the cost associated with content review is so high that it would dissuade all privately owned enterprises in China from seeking to enter the business of importing publications.[589] In other words, China in our view has not demonstrated that it would be unreasonable, or futile, to try to impose the cost of content review on such enterprises.[590] In fact, as already pointed out, even wholly state-owned enterprises apparently need to finance the cost, and any losses, associated with content review through their business activities.[591] Even assuming that wholly state-owned enterprises had access to capital on more favourable terms than privately owned ones, or content themselves with lower profits, the evidence before us still does not indicate that there would be no privately owned enterprises that would be interested in entering the business of importing publications.

7.857 Therefore, China has not persuaded us that requiring publication import entities to be wholly state-owned contributes to the protection of public morals in China because they are the only enterprises in China that are able, or should be expected, to bear the cost associated with content review.

7.858 We note that China advances an additional argument in support of the state ownership condition – that only wholly state-owned enterprises are currently capable of satisfying the condition that publication import entities need to have a suitable organization and qualified personnel. China appears to suggest that this is because of the cost involved in satisfying the condition.[592] As seen above, the evidence before us shows that the CNPIEC spends a substantial amount of money to pay for, and train, its review staff. As we have also pointed out, however, based on the evidence before us, we are not convinced that the cost associated with the need to have qualified personnel and a suitable organization is so high as to make it impossible, or not worthwhile, to fulfil this condition. We further note that publication import entities and Chinese publishing entities employ staff capable of understanding and applying content review standards. We are therefore not convinced that privately owned enterprises would be unable to attract qualified personnel, or that they would be unable to obtain the organizational know-how needed to conduct content review properly.

7.859 Therefore, we are unable to accept China's additional argument that requiring publication import entities to be wholly state-owned contributes to the protection of public morals in China because, for the time being, they are the only enterprises in China that are able to satisfy the condition that publication import entities have a suitable organization and qualified personnel.

7.860 Regarding the first factor, we thus conclude that the arguments and evidence put forward by China do not support the view that the state-ownership requirement makes a material contribution to the protection of public morals in China.

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[588] Exhibit CN-26, p. 2

[589] Privately-owned enterprises could be dissuaded, for instance, by the prospect of insufficient profits due to the cost associated with content review or the risk of losses linked to content review.

[590] We note that privately-owned enterprises need to comply with numerous regulatory requirements that are imposed for public policy reasons (e.g., environmental protection, workplace safety, etc.) and that impose costs on these enterprises. Similarly, privately-owned enterprises need to pay corporate taxes to the government. This indicates that the mere fact that certain costs, or taxes, are imposed on enterprises for public policy reasons does not imply that only wholly state-owned enterprises are able, or should be expected, to bear these costs.

[591] China's response to question No. 195.

[592] China's response to question No. 46(b).

7.861 We next turn to analyse the restrictive impact of the state-ownership requirement. Regarding the restrictive impact on imports, we note China's argument that the number of titles of newspapers and publications imported into China has gone up between 2002 and 2006. In our view, this does not necessarily indicate that the requirement in question has not had any trade-restrictive effects. The statistics do not indicate what might have been had no state-ownership requirement been imposed, although they do seem to confirm that the requirement is compatible with an increase in imports. China further contends, although without elaboration, that the fact that only wholly state-owned entities may import reading materials does not, in itself, adversely affect imports.[593] To us, it is not self-evident, however, that denying foreign producers of reading materials the opportunity to enter the Chinese market through privately owned importers of their choice, including ones in which they might have invested themselves, has no impact on imports.

7.862 Regarding the restrictive impact on those wishing to engage in importing, we observe that the state-ownership requirement completely denies the right to import to enterprises in China that are not wholly state-owned, including foreign-invested enterprises. In other words, it *a priori* excludes such enterprises from the right to engage in importing the relevant products.

7.863 Based on the above examination of the relevant factors, we can now come to a conclusion whether, overall, the requirement that publication import entities must be wholly state-owned enterprises is "necessary" within the meaning of Article XX(a). In weighing and balancing the relevant factors, we note, first of all, that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. This said, as explained above, we have not been persuaded that the requirement in question makes a material contribution to the protection of public morals. Also, while it is unclear from the evidence on record to what extent, if any, the requirement in question limits imports of relevant products, it is clear that it completely excludes particular types of enterprise in China from the right to engage in importing. Weighing these factors, we reach the conclusion that China has not demonstrated that the requirement in question is "necessary" to protect public morals in China.

Exclusions relating to foreign-invested enterprises

7.864 We now turn to consider the above-mentioned provisions of the *Catalogue*, the *Several Opinions* and the *Audiovisual (Sub-)Distribution Rule*, which exclude foreign-invested enterprises. We begin our analysis by considering whether these provisions make a contribution to the protection of public morals in China.

7.865 As we have explained earlier, we find it plausible that these provisions are intended to reflect the fact that other measures stipulate that only wholly state-owned enterprises are permitted to import the relevant products. As we have also explained, however, China has not convinced us that requiring publication import entities to be wholly state-owned contributes to the protection of public morals in China because they are the only enterprises in China that are able, or should be expected, to bear the cost associated with content review. The same holds true for electronic publication import entities and finished audiovisual product import entities.[594] By necessary implication, then, we are also not persuaded that Articles X.2 and X.3 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; or Article 21 of the *Audiovisual (Sub-)Distribution Rule* contribute to the protection of public morals in China by excluding foreign-invested enterprises from being approved or designated import entities.

[593] China's response to question No. 186.

[594] In fact, China's argument is even less convincing for these types of entities since they do not make final content review decisions.

7.866 The next factor to be addressed is the restrictive impact of the provisions in question. Regarding the restrictive impact on imports, we note China's argument that the number of titles of newspapers, publications and audiovisual products imported into China has gone up between 2002 and 2006. In our view, this does not necessarily indicate that the "exclusion" provisions do not have any trade-restrictive effects. Although the statistics seem to confirm that imports have increased despite these exclusions, they do not indicate what might have been if the relevant exclusions had not been imposed. For example, it is not evident to us that denying foreign producers of relevant products the opportunity to use importers of their choice, such as foreign-invested enterprises in China (including ones in which they might have invested themselves), or to act as their own importers, has no impact on imports.

7.867 Regarding the restrictive impact on those wishing to engage in importing, we observe that the "exclusion" provisions completely deny the right to import to foreign-invested enterprises in China. In other words, they *a priori* exclude such enterprises from the right to engage in importing relevant products.

7.868 Based on the above examination of the relevant factors, we must now come to a conclusion whether, overall, Articles X.2 and X.3 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; and Article 21 of the *Audiovisual (Sub-)Distribution Rule* are "necessary" within the meaning of Article XX(a). In weighing and balancing the relevant factors, we first recall the fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory. We must take account, in addition, of the fact that we are not persuaded that these requirements, which exclude foreign-invested enterprises, contribute to the protection of public morals; that it is unclear to what extent, if any, they limit overall imports of relevant products; and that they completely exclude particular types of enterprise in China from the right to engage in importing. Considering that it is not apparent to us that the requirements in question make a contribution to protecting public morals and that they completely deny the right to import to relevant enterprises in China, they cannot, in our view, be characterized as "necessary" restrictions of the right to trade, even though the protection of public morals is a highly important interest and their restrictive impact on trade may seem limited. We therefore conclude that China has not demonstrated that Articles X.2 and X.3 of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; or Article 21 of the *Audiovisual (Sub-)Distribution Rule* are "necessary" to protect public morals in China.

Analysis of alternatives proposed by the United States

7.869 The **Panel** has found above that, absent reasonably available alternatives, Article 42 of the *Publications Regulation* is "necessary", in part, within the meaning of Article XX(a). More specifically, the Panel has found that two of the approval criteria set forth in Article 42 – the condition concerning suitable organization and qualified personnel as well as the condition concerning the State plan for the number, structure and distribution of import entities – can be characterized as "necessary". The Panel recalls in this respect the Appellate Body's statement that if a panel reaches the preliminary conclusion that a challenged measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. The Appellate Body also stated that this comparison should be carried out in the light of the importance of the interests or values at stake.

7.870 Relevant Appellate Body jurisprudence on Article XIV(a) of the GATS further indicates that it is up to the complaining party to raise WTO-consistent alternatives. Specifically, the Appellate Body observed that:

> "If … the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' within the terms of Article XIV(a) of the GATS."[595]

7.871 In *Brazil – Retreaded Tyres*, the Appellate Body further stated that:

> "If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, 'reasonably available'. As the Appellate Body indicated in *US – Gambling*, '[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.' If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not 'reasonably available', taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary."[596]

7.872 With the Appellate Body's guidance in mind, we now proceed to examine the United States' contention that there are WTO-consistent alternatives reasonably available to China.

7.873 The **United States** argues that China has numerous WTO-consistent alternatives to achieve its content review objectives that do not restrict the right to import. The United States submits that content review can be conducted before, during or after importation by any number of entities, with no need to give China's state-owned enterprises a monopoly on importing. The United States points out that China's "in-house" content review regime for domestic producers offers a fully WTO-consistent alternative to China's measures. In the United States' view, the existence of this regime by itself demonstrates that China's measures are not necessary.

7.874 The United States considers that foreign-invested and privately held enterprises could, themselves, conduct the content review of the products they import, by training or hiring content review experts. The United States notes that such enterprises could follow the approach currently taken by the CNPIEC and conduct the content review prior to engaging in the importation process. The United States considers that the importing enterprise could likewise perform that review during the time that importation is under way or once the importation is complete, but before the good is released into commerce into China.

7.875 Alternatively, the United States proposes that the Chinese Government could conduct the review of products imported by foreign-invested and privately held importers. Or, the United States submits, foreign-invested and privately held importers in China could hire domestic Chinese entities with the appropriate expertise to perform the necessary review. Such entities could, in the United States' view, conduct the content review before, during or after importation. The United States

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[595] Appellate Body Report on *US – Gambling*, para. 311.
[596] Appellate Body Report on *Brazil – Retreaded Tyres*, para. 156 (footnotes omitted).

observes that in all cases, content review would occur before the product enters the stream of commerce in China.

7.876 **China** responds that what the United States has proposed are no more than mere suggestions or speculations rather than "reasonably available" alternative measures. In China's view, no WTO-consistent alternatives are reasonably available because there is no evidence that such alternatives would allow China to guarantee the level of protection it seeks. China argues that the level of protection of public morals China seeks to enforce cannot accommodate dissociation between the importation business and the performance of the content review. China contends that having different entities to conduct importation and content review would have a significant negative effect on the efficiency of both the content review and the importation, resulting in unacceptable delays in the importation process.

7.877 China further argues that the content review must be carried out at the importation stage, before any cultural product is imported into China's territory. China considers that any proposed alternative under which the content review would be carried out after importation cannot meet the level of protection required to prevent any dissemination of imported cultural goods with prohibited content.

7.878 Regarding the proposal that foreign-invested and privately held enterprises in China could conduct the content review, China argues that following the United States' proposal would mean that an unlimited number of foreign-invested entities could hire or develop different levels of expertise depending on the type of cultural product imported. China submits, however, that the right to import cannot be granted to each applicant, as it would be impossible for the Chinese Government to review and control the capacity of each importer registered in China to conduct the content review. China considers that making an unlimited number of entities subject to such review and control would lead to an unbearable administrative burden and costs for the Chinese authorities. China further notes that there would be considerable concern that the content review would not be performed in a harmonized manner that would allow China to guarantee an adequate level of protection.

7.879 With regard to the proposal that Chinese companies could be hired to perform the content review, China argues that this does not appear to be a practicable solution. China considers that having a different entity to conduct the importation and the content review respectively would result in undue delays in trade and/or lowering the efficiency and effectiveness of the content review. China recalls that conducting the content review is associated with significant responsibility and severe punishment in case of violation. China observes in this respect that it is not aware of any entity capable of conducting the content review which would be willing to be hired to perform content review on behalf of other entities.

7.880 Furthermore, China submits that foreign individuals and foreign enterprises (exporters or publishers) not in China could not carry out the content review. China argues that the burden of examining and supervising the huge number of foreign individuals and entities would cause unacceptable costs and substantial technical difficulties. China further points out that its laws and regulations do not have the required extraterritorial jurisdiction to enforce compliance with the content review requirements in a way which can be examined by the Chinese authorities. China notes that because foreign entities are not registered in China according to China's laws and regulations, they cannot be held liable for any failure to prevent cultural goods with prohibited content to be imported into China. In addition, China submits that foreign entities may not fully understand the concept of public morals as understood by China since the content of this concept is specific to each WTO Member.

7.881 In China's view, in addition to being impracticable, the alternatives proposed by the United States would present an increased risk of the content review not being performed in a manner

allowing the achievement of the high level of protection sought by China, i.e., a complete ban on any prohibited content. For China, it follows that the United States' proposals are merely theoretical and cannot, therefore, be viewed as "reasonably available" alternatives to the current Chinese measures.

7.882 The **United States** disagrees that content review cannot be disassociated from importation, arguing that China's own system de-links these unrelated activities. The United States points out that the CNPIEC, which is among the largest Chinese wholly state-owned importers of reading materials in China, reviews the content of reading materials independently from, and in advance of, importation. The United States further argues that the GAPP reviews the catalogues of reading materials submitted by importers prior to importation and may prevent the importation of any products with prohibited content. The United States also points out that the Chinese Government itself reviews the content of all foreign films before any such film is permitted to be imported into China. In the United States' view, this effectively demonstrates that achieving China's desired level of enforcement – i.e., preventing the dissemination of products with prohibited content into China – does not require content review to occur in association with importation activities. The United States also contends that the Chinese Government, not the state-owned importer, undertakes final content review for audiovisual products, and that for reading materials, the state-owned importers take part in the content review process, but the Chinese Government plays the central role.

7.883 The United States further argues that China's concerns regarding cost of content review are addressed under the US proposals. The United States submits that two of the US proposals – either having the foreign importers and privately held importers in China conduct content review after obtaining the necessary expertise, or having these importers hire domestic entities with the appropriate expertise to conduct content review – would require minimal additional costs. These proposals essentially involve substituting foreign importers and privately held importers in China into the roles currently played by the state-owned importers. The United States considers that its third proposal – having the Chinese Government conduct all content review – would also require minimal additional costs, as much of the content review of imported products is already performed by the Chinese Government, and the Chinese Government is already bearing the costs of these activities. The United States submits that, if necessary, China could also take advantage of provisions already in its law that authorize charging fees for the review of content.[597]

7.884 The United States also rejects China's arguments regarding alleged problems associated with the examination and supervision of reviewers. In the United States' view, the content review system applicable to domestic products demonstrates China's ability and willingness to oversee hundreds of domestic content review entities. The United States notes that, e.g. in 2007, there were 363 domestic audiovisual publishers licensed in China and authorized to conduct content review of their products "in-house".[598] Similarly, according to the United States, in 2007, there were 806 domestic book and electronic publication publishers in China conducting "in-house" review.[599] The United States further argues that a system in which government officials review the content of products imported by foreign importers and privately held importers would impose no additional structural burden, because these reviewers are already in place and are being examined and supervised in the context of the content review of imported products.

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[597] The United States refers to Article 44 of the *Publications Regulation*.

[598] The United States refers to "Bulletin of Statistics", General Administration of Press and Publication webpage, available at: http://www.gapp.gov.cn/cms/cms/website/zhrmghgxwcbzsww/layout3/xxml33.jsp?channelId=1392&siteId=21&infoId=459130.

[599] The United States refers to "Bulletin of Statistics", General Administration of Press and Publication webpage, available at: http://www.gapp.gov.cn/cms/cms/website/zhrmghgxwcbzsww/layout3/xxml33.jsp?channelId=1392&siteId=21&infoId=459130.

7.885 Finally, the United States considers that China's objections regarding its alleged inability to assert jurisdiction under the US proposals are also unavailing. The United States notes that under the US proposals in which the Chinese Government or enterprises in China are conducting content review, China's ability to assert jurisdiction is clear. Regarding China's assertion that no entity would be willing to conduct content review on behalf of other entities because the responsibility and penalties involved are too great, the United States submits that this ignores China's own arguments that state-owned enterprises are the only entities capable of reviewing products manufactured by other producers.

7.886 The **Panel** notes that the United States has proposed several alternatives that it considers would be reasonably available to China. There is no need to examine each of the alternatives put forward by the United States, provided that the Panel is satisfied that at least one of them constitutes a genuine alternative and is reasonably available, taking into account the interest being pursued and China's desired level of protection.

7.887 We begin our analysis with the US proposal that the Chinese Government could conduct the review of relevant products imported into China. We understand that under this proposal the Chinese Government could make final content review decisions before they are cleared through customs, which China says is important to prevent prohibited content from being disseminated in China.[600] We also understand that this proposal would involve no restriction of the right to import, and thus there would be no need for selecting importers, in that importers would neither make preliminary nor final content review decisions.

7.888 We first consider the contribution made by the US proposal to the realization of the objective pursued by China, i.e., the protection of public morals in China. More specifically, we consider whether a requirement that relevant products must be submitted to the Chinese Government for content review before they may be imported into China would make an equivalent contribution to the one made by the relevant provisions. In this respect, it is clear to us that such a requirement would make a material contribution to the protection of public morals in China. By requiring that products to be imported must be submitted to the Chinese Government for review, and specifically to qualified governmental content reviewers, China could have adequate confidence that the content review is carried out in accordance with the applicable rules. The Government could also easily ensure the consistent application of the rules on content review. Thus, if the Chinese Government had sole responsibility for content review, this would, in our view, ensure that no products with prohibited content are imported into China. It is therefore not apparent that this particular US proposal would not allow China to achieve its desired level of protection of public morals. In other words, we are not convinced that the US proposal does not constitute a "genuine alternative", in the sense that it is an alternative which China could not reasonably be expected to employ, taking into account China's desired level of protection.

7.889 Another factor we must consider is the restrictive impact of the US proposal. We begin by considering the restrictive impact on imports. In response to a question from the Panel, China stated that requiring the government to be solely responsible for conducting the content review may adversely affect the efficiency of the content review and trade flows. China points in this respect to the large quantities of reading materials imported into China, the time constraints for newspapers and periodicals and the numerous customs entry points through which reading materials are being imported.[601]

7.890 In considering China's response, we note, first of all, that China appears to assume that the Chinese Government would conduct the content review in one central location. It is arguable,

[600] China's responses to question Nos. 188(a) and 189.
[601] China's response to question No. 195.

however, that the Government could also maintain offices with qualified content reviewers in a large number of customs areas and close to the entry points. In this way, it could achieve a geographical coverage comparable to that which China currently seeks to achieve through its State plans for the number and distribution of publication import entities. In the absence of any indication to the contrary, we see no reason to reject this possibility from the outset.

7.891 Furthermore, even if there were important reasons for the content review of relevant products to be done in one central location, it is not clear to us that implementing the US proposal would inevitably result in additional delays. Time-sensitive publications to be imported, such as newspapers and periodicals, could be submitted electronically to the Government for content review. We recognize that we are concerned with imports of hard copies and that, theoretically, the electronic version submitted for content review could differ from the hard copy to be imported. China has explained, however, that publication import entities conduct content review "based upon samples and other information" of the books, newspapers and periodicals to be imported and that their content is "double checked" when they reach customs.[602] In the light of this, we do not see why the content of time-sensitive publications could not, likewise, be "double checked" when they reach customs, including by comparing the hard copies with the electronic copies submitted to China's Government for content review. We are therefore not persuaded that if content review were conducted in one central location this would inevitably result in additional delays. It should, moreover, be noted that unlike the provisions at issue, the US proposal would not result in any restriction of the right to import. It would thus not produce any of the adverse effects on imports which the restriction of the right to trade would produce.

7.892 In respect of electronic publications and audiovisual products, China has explained that under its current system samples are brought into China under temporary importation procedures. The samples are submitted to the competent authorities for content review. The authorities then either approve importation of the product or not. Importers are to present the approval documents to the customs authorities at the time of importation.[603] It does not appear to us that the US proposal, if implemented, would result in more serious delays than China's current measures.

7.893 Regarding the restrictive impact of the US proposal on those wishing to engage in importing, we have already stated that the proposal would involve no restriction of the right to import relevant products. The US proposal would therefore have no restrictive impact on those wishing to engage in importing the relevant products.

7.894 Having made an initial assessment of the US proposal in its own right, we must now compare it with the "criteria" provision which we have found to be "necessary" in part. Specifically, we found that two approval criteria set forth in Article 42 of the *Publications Regulation* to be prima facie "necessary" (the organization and personnel criterion and the State plan criterion). We first recall our view that the US proposal would allow China to achieve its desired high level of protection of public morals. Furthermore, as explained, making the Chinese Government solely responsible for the review of the content of the relevant products would, in our view, make a material contribution to the protection of public morals in China. We have previously determined that the relevant two approval criteria likewise make, or are apt to make, a material contribution to the realization of the same objective. It is clear, therefore, that implementing the US proposal would make a contribution that is at least equivalent to that of the provision at issue.

7.895 With regard to the restrictive impact on imports, we are not persuaded based on the information before us that implementing the US proposal would necessarily produce more delays in the importation of reading materials than application of the two approval criteria at issue. In relation

[602] China's response to question No. 191.
[603] *Ibid.*

to the two criteria, we recall that it is unclear to what extent, if any, their application limits overall imports of relevant products by restricting the right to import to certain importers. The US proposal would not result in any restriction of the right to import and thus would not produce any adverse trade effects resulting therefrom.

7.896 As far as the restrictive impact on those wishing to engage in importing is concerned, we have pointed out that the US proposal would have no restrictive impact on those wishing to engage in importing the relevant products. The two approval criteria provisions do not result in *a priori* exclusions, but nonetheless have a restrictive impact on certain enterprises who would wish to engage in importing.

7.897 It can thus be said that the US proposal would be significantly less restrictive than the two approval criteria in terms of its impact on those wishing to engage in importing. In terms of its impact on imports, the information on the record does not suggest to us that the US proposal is likely to have a more serious adverse effect than the criteria at issue.

7.898 It emerges from the above considerations that implementing the US proposal would make a contribution that is at least equivalent to that of the relevant two approval criteria. At the same time, the US proposal would have a significantly less restrictive impact on importers – in fact, it would have no such impact – without there being any indication that it would necessarily have a more restrictive impact on imports of relevant products than the approval criteria at issue.

7.899 This result of our comparison of the US proposal with the two approval criteria set forth in Article 42 must be considered in the light of the importance of the interest at stake. We therefore recall once more that the protection of public morals is a highly important governmental interest. Even taking account of the importance of public morals as a governmental interest, however, we note that the result of our comparison is quite clear. The situation facing us is not one where the proposed alternative has a less restrictive impact but also makes a less significant contribution to the realization of the relevant objective. In such a hypothetical situation, consideration of the importance of the interest at stake could incline us toward the view that the proposed alternative would not be adequate. The situation facing us in the present case is one where the proposed alternative makes an equivalent or better contribution to the realization of the objective of protecting public morals and does not just have a marginally less restrictive impact, but a significantly less restrictive impact, specifically on those who wish to engage in importing. In this situation, the mere fact that public morals are a highly important governmental interest is not sufficient, in our view, to justify the two approval criteria at issue.

7.900 In the light of this, we consider that the US proposal that the Chinese Government be given the sole responsibility for the conduct of the content review is an alternative which would support the conclusion that the approval criteria at issue are not, in fact, "necessary" within the meaning of Article XX(a), provided this alternative is "reasonably available" to China. Before reaching a final conclusion, therefore, we must examine whether this condition is met.

7.901 In examining whether the alternative proposed by the United States is "reasonably available" to China, we first note that there is no concern that the Chinese Government might not be capable of taking the alternative measure, such that the measure would merely be a theoretical possibility. As China itself has confirmed, the Chinese Government already makes the final content review decision in respect of electronic publications, audiovisual products and films for theatrical release.[604] China has not asserted that its Government would lack the capacity to make content review decisions with regard to books, newspapers or periodicals. In fact, the *Publications Regulation* already provides that

[604] China's responses to question Nos. 191 and 196.

China's Government can conduct a review of books, newspapers or periodicals at its own initiative or at the request of a publication import entity.[605]

7.902 China appears to consider that implementing the US proposal would impose an undue burden on it. China has asserted that its administrative authorities are not in a position, due to limited resources, to carry out a comprehensive and thorough content review by themselves without creating undue delays. China has pointed out that the content review of books, newspapers or periodicals to be imported would demand substantial resources considering the large quantities of imports involved and the time-sensitive nature of reading materials like newspapers and periodicals.[606]

7.903 We recognize that implementing the US proposal might make it necessary for China to allocate additional human and financial resources to the authorities tasked with performing content review. At least this would seem a possible consequence for the content review of books, newspapers or periodicals for which publication import entities are currently making final content review decisions.

7.904 It is worth recalling in this context that only wholly state-owned enterprises are currently allowed to import relevant products. China argues in this respect that these enterprises can be required to bear the cost of performing the content review because the State owns all equity. China states that it is not in a position to require private investors to bear this cost.[607] Thus, it is currently the Chinese Government which has to finance the content review activities of the import entities that make preliminary or final content review decisions. To that extent, it is not apparent to us that the cost to the Chinese Government would be any higher if the US proposal were implemented. To recall, the main difference would be that content review would be conducted, not by incorporated wholly state-owned enterprises, but by non-incorporated offices comprising the Government of China.

7.905 In any event, we note that China has not provided any data or estimate that would suggest that the cost to the Chinese Government would be unreasonably high or even prohibitive. Moreover, when we asked China whether it could charge fees for the content review for all relevant products if the Chinese Government were to perform the content review, China merely stated that allowing the Government to perform the content review was not only a matter of money.[608] This response appears to suggest that China could, in principle, charge fees whenever it reviews the content of a product to be imported. In fact, as also pointed out by the United States, Article 44 of the *Publications Regulation* already provides that when a publication import entity requests the competent authority to review the content of a product to be imported because the entity is unable to determine whether the content is prohibited or not, the competent authority may charge fees in accordance with standards approved by China's State Council.

7.906 Based on the foregoing, we consider that China has not demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or otherwise. As explained, it would appear that China could in any event lessen any burden by charging appropriate fees.

7.907 Accordingly, we consider that China has not demonstrated that the alternative proposed by the United States is not "reasonably available" to it. We also note in this connection that China has not argued that the alternative proposed by the United States would be WTO-inconsistent. We see no reason to believe that the alternative in question would be inherently WTO-inconsistent or that it could not be implemented by China in a WTO-consistent manner.

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[605] China's response to question No. 196.
[606] China's response to question No. 185.
[607] China's responses to question Nos. 46(a) and 188(b).
[608] China's response to question No. 195.

7.908 We can now come to an overall conclusion regarding the alternative proposed by the United States under which the Chinese Government would be given the sole responsibility for the conduct of the content review. We conclude that China has not demonstrated that, the proposed alternative notwithstanding, the relevant two approval criteria set forth in Article 42 are "necessary" because the proposed alternative is not a genuine alternative or is not "reasonably available".

7.909 Having thus found that there exists at least one alternative in relation to which China has not demonstrated the "necessity" of the approval criteria at issue, we need not, and therefore do not, proceed to an analysis of the other alternatives proposed by the United States. We merely note that the United States has also proposed an alternative which would not require the Chinese Government to conduct the content review. Under that alternative, approved Chinese entities with the necessary expertise could perform the content review, at the request of importers of relevant products and before the products are allowed to be imported into China. Such domestic entities could be state- or privately-owned. China has said that it is not aware of any Chinese entity which would be willing to be hired to perform content reviews at the request of importers. China recalls in this respect that it enforces its content review standards through external dissuasive sanctions. China has not explained, however, why such entities could not charge fees for their services that would adequately compensate for the risk of being sanctioned and for other potential liabilities they might face.

Conclusion

7.910 As we have now completed all of the analytical steps involved in a "necessity" analysis, we are in a position to conclude this part of our examination of China's Article XX(a) defence.

7.911 We have found that none of the provisions of China's measures which we have determined to be inconsistent with China's trading rights commitments under the Accession Protocol is "necessary" within the meaning of Article XX(a). In respect of these provisions, China has either not made a prima facie case that they are "necessary", or China has not demonstrated that an alternative put forward by the United States is not a genuine alternative or is not reasonably available to China, in the light of the interest being pursued and China's desired level of protection.

(ii) Compliance with the requirements of the chapeau of Article XX

7.912 The **Panel** recalls its conclusion above that China has not established that the measures at issue are "necessary" within the meaning of Article XX(a) to protect public morals. In the light of this conclusion, there is no need to go on to examine whether the relevant measures satisfy the requirements of the chapeau of Article XX, as China claims. Even if these measures satisfied the requirements of the chapeau, they would not be justified under Article XX. As a result, the Panel refrains from making additional findings based on the provisions of the chapeau of Article XX.

(d) Conclusion

7.913 Having regard to the Panel's finding that none of the relevant measures has been demonstrated to be "necessary" within the meaning of Article XX(a) to protect public morals, the **Panel** comes to the overall conclusion that these measures are not justified under the provisions of Article XX(a).

7.914 In view of our conclusion that China has in any event not established that the measures at issue satisfy the requirements of Article XX(a), we need not, and hence do not, revert to the issue whether Article XX(a) is in fact applicable as a direct defence to breaches of China's trading rights commitments. We thus take no position on this issue.

3. Overall conclusions

7.915 The **Panel** recalls that for the purposes of its analysis of whether the relevant Chinese restrictions of the right to trade are covered by China's "right to regulate trade" in a WTO-consistent manner, the Panel has assumed that these restrictions of the right to trade are incidental to regulation of the relevant products. Since we have found that the relevant restrictions have not been established to be consistent with Article XX(a), and, hence, the WTO Agreement, we need not go on to examine whether the restrictions in question are, in fact, incidental to regulation of the relevant products. It is clear already at this stage in the analysis that China has not established its asserted defence.

7.916 The Panel further recalls that, in view of China's defence based on its right to regulate trade and Article XX(a), the Panel has described as tentative its previous findings that the measures governing reading materials and finished audiovisual products are inconsistent with China's trading rights commitments under the Accession Protocol. As the Panel has not been persuaded of the merits of China's defence, the Panel can now confirm its earlier conclusions.

7.917 Thus, the Panel's earlier findings of inconsistency in respect of the measures governing reading materials and finished audiovisual products should be considered to constitute final conclusions in the same way as the Panel's findings of inconsistency in respect of the *Film Regulation* and the *Film Enterprise Rule*, as well as the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* (insofar as they concern audiovisual products intended for publication). The Panel recalls that a detailed summary of the conclusions of the Panel – which are now final conclusions in their entirety – is provided above, at paragraph 7.706, and so there is no need to set out these conclusions again.

D. CLAIMS UNDER THE GATS

7.918 The Panel notes that the United States has made claims under the General Agreement on Trade in Services (GATS) with respect to the distribution of reading materials, audiovisual home entertainment (AVHE) products and sound recordings. Its claims focus on violations of China's national treatment commitments (Article XVII), but extend also to violations of China's market access commitments (Article XVI). The claims concern exclusively the distribution within China by foreign-invested enterprises present in China – that is, they concern supply of distribution services through "commercial presence" in China of these entities.

7.919 China's GATS commitments on national treatment and market access, which were negotiated with other WTO Members prior to its accession in December 2001, are inscribed in its Schedule and attached to the GATS.

7.920 The Panel notes that WTO Members, including China, employ a uniform format for their services schedules. Each schedule consists of four columns. The heading of each column reads: (i) sectors or sub-sectors; (ii) limitations on market access; (iii) limitations on national treatment; and (iv) additional commitments. In the second and third columns, inscriptions are made for each of the four modes of supply: cross-border, consumption abroad, commercial presence, and presence of natural persons, and may be taken in three forms: "Unbound", "None" and specified limitations, to indicate no, full and partial commitments. As part of the schedule format, there is a separate section at the beginning of a schedule where a Member may inscribe market access and national treatment limitations that apply to all scheduled sectors, unless otherwise specified. Inscriptions in this section are called "horizontal commitments".

7.921 This schedule structure gives each WTO Member flexibility in defining the precise scope of its commitments. Having chosen on which service sectors it wishes to commit, a Member may specify the exact extent to which these commitments are to apply by indicating full market access and

national treatment, or partial or no commitment with respect to the four modes of supply. As stated, this case involves only the supply of distribution services through "commercial presence", also known as "mode 3". In the case of making partial commitment, a Member may inscribe limitations in one of the two columns: either under "limitations on market access" or under "limitations on national treatment". If a limitation affects *both* market access and national treatment then, by a convention set out in Article XX:2 of the GATS (avoiding the need to repeat an inscription), it is to be inscribed *only* in the market access column.

7.922 We recognize that GATS schedules are an integral part of the GATS[609], and are thus legally part of the WTO Agreement. Consistent with Article 3.2 of the DSU, we interpret commitments in schedules according to the "customary rules of interpretation of public international law" which include Articles 31 and 32 of the Vienna Convention. For services commitments, this has been confirmed by the Appellate Body in *US – Gambling*, which stated that

> "[T]he task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. … we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention."[610]

7.923 Apart from the WTO Agreement and its constituent parts, various instruments have been recognized in previous dispute settlement cases as having potential value in assisting the interpretation of GATS schedules. These instruments include the 1991 United Nations Provisional Central Product Classification (hereafter "CPC") and the GATT Secretariat document "Services Sectoral Classification List" (MTN.GNS/W/120, hereafter "W/120"), both of which deal with the classification of services. The Appellate Body has identified document W/120 and the 1993 Guidelines for the Scheduling of Specific Commitments under the GATS (hereafter the "1993 Scheduling Guidelines"), which are not binding on WTO Members, as supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.[611]

7.924 We turn now to a detailed examination of the US claims with respect to the distribution of reading materials, AVHE products and sound recordings.

1. Distribution of reading materials: claims under Article XVII of the GATS

7.925 The United States requests the Panel to find that specified Chinese measures affecting the distribution of "reading materials" (which it defines as consisting of books, newspapers, periodicals and electronic publications) are inconsistent with China's national treatment commitments under Article XVII of the GATS. According to the United States, these measures impose on foreign-invested enterprises that are service suppliers in China:

(a) A prohibition on the *distribution* of imported reading materials;

(b) A prohibition on the so-called *master distribution* of reading materials (except electronic publications);

(c) A prohibition on the so-called *master wholesale and wholesale* of electronic publications; and

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[609] Article XX:3 of the GATS provides: "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

[610] Appellate Body Report on *US – Gambling*, para. 160.

[611] Appellate Body Report on *US – Gambling*, para. 196.

(d) *Discriminatory requirements* for the so-called sub-distribution of domestically published reading materials (except electronic publications).

7.926 The United States claims that these measures affect the supply through commercial presence of "Wholesale Trade Services", as well as "Retailing Services" with respect to master distribution, listed in Sector 4 of China's Services Schedule.

7.927 For the purposes of these US claims, the parties agree that the term "electronic publications" refers to products as defined in relevant Chinese legislation.[612] This definition covers edited photo, text, audio and video information saved as digital codes on media such as CDs, DVDs, and IC cards, but does not include what the United States refers to as AVHE products and sound recordings.

7.928 As indicated in Section II, a number of translation issues have arisen during the course of the proceedings. Some of these relate to the GATS claims on the distribution of reading materials. In particular, the parties disagree on the translation of the terms *Fa Xing*, *Zong Fa Xing*, and *Zong Pi Fa* in the relevant Chinese measures. China argues that each of these terms reflects a unique Chinese concept and cannot be translated into English. The United States holds that the terms should be translated, respectively, as "distribution", "master distribution " and "master wholesale ".

7.929 The Panel notes that the independent translator has provided views, at our request, on the translation of the terms at issue. With respect to *Fa Xing*, the independent translator indicates that there "would not seem to be any reason why 'distribution' should not be deemed an acceptable translation", "nor would there seem to be any compelling reason for leaving the term in Chinese". In the case of *Zong Pi Fa*, the independent translator notes that "there would seem to be no cogent reason not to translate" this term. The translator agrees with the use of "wholesale" but, instead of "master wholesale", considers that "wide-ranging wholesale" or "large-scale wholesale" would be the best translation. With regard to *Zong Fa Xing*, the independent translator notes that the expression is composed of word elements found in the other two terms, namely *Fa Xing* and *Zong Pi Fa*. Accordingly, the translator sees "large-scale distribution" as the best translation for *Zong Fa Xing*.

7.930 The Panel sees no reason to disagree overall with the translations provided by the independent translator in these matters. As regards the terms *Zong Fa Xing* and *Zong Pi Fa*, however, we note that the independent translator chooses the terms "large-scale distribution" and "large-scale wholesale" over the terms suggested by the United States, namely "master distribution" and "master wholesale". Despite this indication by the independent translator, we prefer to use the terms suggested by the United States. Our considerations for doing so are several. First, the difference in wording between the versions of the United States and the independent translator's translations ("master" vs. "large-scale") is minor, and so has little substantive effect on the Panel's analysis of the relevant claims. Second, what matters for our legal analysis is whether the activities involved qualify as wholesale or retail services as claimed, not how they are named. Third, we note further that the issue of the "scale" was not a concept raised or argued by the parties. These considerations lead us to prefer, in English, to qualify the distribution and wholesale activities at issue by use of the term "master", rather than "large-scale". We shall also use, when necessary, the phonetic symbols of the original Chinese terms.

7.931 In addition, the parties also disagree on the translation of the term *Fen Xiao* in the relevant Chinese measures. While the United States submits that it should be translated as "sub-distribution", China argues that "distribution" is a more accurate translation. We note that the independent translator indicates that the term *Fen Xiao* could be translated as either "distribution" or "retail sale". We also note in the relevant Chinese measures that *Fen Xiao* is encompassed by *Fa Xing* and defined as consisting of wholesale and retail. The parties do not dispute this. Again, what matters for our legal analysis are the service activities involved, not so much how they are named. In addressing the

[612] *1997 Electronic Publications Regulation*, Article 2 (Exhibit US-15).

measures which use the term *Fen Xiao*, we therefore will specify the relevant activity or activities (e.g. "wholesale", "retail", or "wholesale and retail") in our assessment. We shall also use, when necessary, the phonetic symbols of the original Chinese terms. With respect to the titles of certain measures which contain the term *Fen Xiao*, we will use, for the sake of convenience, the term "(sub-)distribution".

7.932 We now turn to our assessment of the US claims under the GATS with respect to reading materials. The first three of these claims concern *prohibitions* on the supply of the service by foreign-invested enterprises. We will examine these claims first, and will then consider the US claim concerning discriminatory requirements imposed on foreign-invested enterprises.

(a) Prohibitions on foreign-invested enterprises

7.933 With respect to the distribution of reading materials, the United States makes three claims concerning the prohibitions on the supply of this type of services by foreign-invested enterprises, each concerning a specific category of distribution services and reading materials. We deal with these in turn.

(i) Prohibition on the wholesale of imported reading materials

7.934 The **United States** notes that Article 3 of the *Imported Publications Subscription Rule* distinguishes between two categories of distribution of imported reading materials: the "limited distribution category" and the "non-limited distribution category". The United States also notes that Article 3 requires all imported newspapers and periodicals, as well as imported books and electronic publications in the "limited distribution category" to be distributed "under subscription to subscribers", and imported books and electronic publications in the "non-limited distribution category" to be distributed "by sales through the market".

7.935 The United States notes that pursuant to Article 4 of the *Imported Publications Subscription Rule*, only certain GAPP-designated publication importers are permitted to distribute imported newspapers and periodicals as well as imported books and electronic publications in the "limited distribution category". The United States argues that as Article 42 of the *Publications Regulation* provides that only wholly Chinese state-owned enterprises are permitted to import reading materials, the effect of Article 4 of the *Imported Publications 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. The United States further argues that as it excludes foreign-invested enterprises from distributing (including wholesaling and retailing) these imported reading materials in China, Article 4 of the *Imported Publications Subscription Rule* affects wholesale trade services in a manner inconsistent with Article XVII of the GATS.

7.936 With respect to imported books and electronic publications in the "non-limited distribution category", the United States notes that Article 39 of the *Publications Regulation* states that GAPP is responsible for promulgating measures governing foreign-invested enterprises engaging in the distribution of books, newspapers, and periodicals. The United States notes that Article 16 of the *Publications Market Rule* specifies that the *Publications (Sub-)Distribution Rule* governs foreign-invested enterprises seeking to engage in the distribution of books, newspapers and periodicals. The United States also notes that Article 2 of the *Publications (Sub-)Distribution Rule* limits foreign-invested enterprises to the distribution of books, newspapers and periodicals published in China. The United States contends that as China has promulgated no additional measures granting foreign-invested enterprises the right to engage in the distribution of reading materials, the *Publications (Sub-)Distribution Rule*, particularly Article 2, prohibits foreign-invested enterprises from engaging in the wholesaling of imported books and electronic publications in the "non-limited distribution

category" by limiting the distribution activities of foreign-invested enterprises exclusively to the distribution of books, newspapers and periodicals that are published in China.

7.937 The United States submits that China has inscribed no conditions or qualifications on its national treatment commitments with respect to the wholesaling of reading materials, through commercial presence, in its GATS Schedule. The terms, limitations, conditions, and qualifications scheduled in China's horizontal commitments do not, according to the United States, cover Chinese measures that prohibit foreign-invested enterprises from engaging in wholesaling of imported reading materials.

7.938 The United States also submits that the measures at issue affect the wholesaling of reading materials through commercial presence within the meaning of Article XVII of the GATS because they directly regulate the wholesale distribution of reading materials in China.

7.939 The United States argues that because these measures distinguish between foreign-invested wholesalers and wholly Chinese-owned wholesalers solely based on origin, foreign-invested wholesalers and wholly Chinese-owned wholesalers are "like service suppliers" for the purpose of Article XVII of the GATS.

7.940 The United States further argues that foreign-invested wholesalers receive less favourable treatment than that accorded to domestic wholesalers, since foreign-invested wholesalers do not have the right to wholesale imported reading materials. The United States maintains that since this prohibition is not justified by any of the terms, limitations, conditions or qualifications on market access or national treatment inscribed by China in its Services Schedule, the measures that maintain this prohibition are therefore inconsistent with China's obligations under Article XVII of the GATS.

7.941 **China** does not present specific argumentation rebutting the US claim.

7.942 In the absence of specific arguments by China rebutting the US claim, the **Panel** needs to consider only whether the United States has made a prima facie case of the inconsistency of the measures at issue with Article XVII of the GATS. For this purpose, we will examine first whether China has made commitments on national treatment under the GATS with respect to the wholesale of imported reading materials supplied through commercial presence. We will then assess whether the measures identified by the United States are inconsistent with any such commitments.

Whether China has undertaken national treatment commitments with respect to the wholesale of imported reading materials through commercial presence (mode 3)

7.943 We begin by looking at the national treatment provision in Article XVII of the GATS, which states:

> "1. In the *sectors inscribed in its Schedule*, and subject to any *conditions and qualifications* set out therein, each Member shall accord to services and *service suppliers of any other Member*, in respect of all measures *affecting* the supply of services, treatment no less favourable than that it accords to its own *like* services and service suppliers."
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own *like* services and service suppliers.

> 3. Formally identical or formally different treatment shall be considered to be *less favourable* if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." (emphasis added)

7.944 The wording of Article XVII indicates that we need to determine: whether the services at issue, i.e. the wholesale services supplied through commercial presence, are inscribed in China's Schedule; the extent of China's national treatment commitments, including any conditions or qualifications, with respect to these services entered in its Schedule; whether the measures at issue affect the supply of these services; and whether these measures accord less favourable treatment to service suppliers of other Members, in comparison with like domestic suppliers.

7.945 We first determine whether China has in fact "inscribed in its Schedule" the wholesale services supplied through commercial presence. The relevant part of China's Services Schedule, relating to commitments currently in force, reads as follows:

Sector or sub-sector	**Limitations on Market Access**	**Limitations on National treatment**	**Additional Commitments**
4. DISTRIBUTION SERVICES (as defined in Annex 2) ... B. **Wholesale Trade Services** (excluding salt, tobacco)	... (3) None, within three years after accession, except for chemical fertilizers, processed oil and crude oil within five years after accession	... (3) None	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 subordinate services as defined in Annex 2. Foreign service suppliers are permitted to provide the full range of related subordinate services, including after sales services, as defined in Annex 2, for the products they distribute.

(Footnote omitted, emphasis added, the notation "(3)" indicates that the commitment relates to commercial presence)

7.946 Examining the initial, sectoral column of China's Schedule, we note that it contains a section entitled "4. Distribution Services", under which is inscribed a section entitled "B. Wholesale Trade Services (excluding salt and tobacco)". This entry indicates that China has indeed undertaken specific

commitments covering wholesale services, subject to any "conditions and qualifications" that may be set out in its Schedule.

7.947 We must now determine whether the commitment listed in China's Schedule as "Wholesale Trade Services" covers the wholesale services at issue in this claim. We note that "Wholesale Trade Services" appears in China's Schedule as part of Sector 4 "Distribution Services". Under the heading of Sector 4 is a reference to Annex 2 of China's Schedule which defines "Distribution Services". Annex 2 states that distribution services "are generally covered by CPC 61, 62, 63, and 8929". We note that the CPC is frequently referenced by Members in drawing up their Schedules. The CPC categories which China refers to cover the whole range of services involving the distribution of goods, including CPC 62262 on "wholesale trade services of books, magazines, newspapers and stationary".

7.948 Reinforcing this specific mention of CPC sectors covering the distribution of goods, Annex 2 also specifies that "the principal services" in each subsector of distribution services – including wholesaling – is "reselling merchandise". Wholesaling in Annex 2 is defined further as "the sale of goods/merchandise to retailers to industrial, commercial, institutional, or other professional business users, or to other wholesalers and related subordinated services." We note as well that China's commitments on wholesaling are intended to cover the wholesale of *all* goods, and therefore reading materials, regardless of whether they are of imported or domestic origin, since the exceptions listed include only "salt and tobacco". We note finally that China does not contest the US assertion that its entry under Sector 4.B. "Wholesale Trade Services" covers the services at issue in this claim. We conclude therefore that China's Schedule covers the wholesale of reading materials, including all imported reading materials.

7.949 Having determined that the services identified by the United States – wholesale of imported reading materials supplied through commercial presence – are within a sector that is covered by China's commitments, we proceed to the next step. That is to determine whether, under the terms of Article XVII, China has inscribed any "conditions and qualifications" to its national treatment commitments with respect to the services identified by the US in this claim.

7.950 As noted above, a Member may limit the extent to which it grants market access or national treatment for the services listed in its Schedule, by inscribing the "conditions and qualifications" (which we refer to more simply as "limitations") mentioned in Article XVII either under "limitations on market access" or under "limitations on national treatment". A Member's obligations on market access and/or national treatment are determined with reference to any such limitations inscribed in its schedule. Therefore, to determine the extent of China's national treatment commitments with respect to the services at issue, we need to examine China's Schedule to see whether, with respect to supply through commercial presence, there are any limitations inscribed (a) beside "Wholesale Trade Services", in the national treatment column or (b) in the national treatment column of the horizontal section of China's Schedule, as those limitations inscribed in the horizontal section apply to *all* the sectors in the Schedule unless otherwise specified. In both cases, we must also examine the *market access* column, as whenever a limitation affects both market access and national treatment, it is to be inscribed only in the market access column, in accordance with Article XX:2 of the GATS.

7.951 We now examine China's Schedule to determine the extent of commitments with respect to the service and mode of supply at issue. We start with the column entitled "Limitations on national treatment" and examine the entries with respect to wholesale trade services supplied through mode 3 (commercial presence). We note that China has inscribed "None", meaning "no limitations" on national treatment. We then look at the "Limitations on market access" column of China's Schedule with respect to the same service and mode of supply. Here, China has entered a series of limitations with respect to certain products. Each of these limitations, however, expressly specifies a date of expiry within, at most, five years from the date of China's accession to the WTO. As China entered the WTO on 11 December 2001, all limitations on market access limitations thus expired by

11 December 2006. The only entry in the column on "Limitations on market access" in China's Schedule for the service sector and mode of supply at issue that currently remains in force is therefore "None" – that is, "no limitations" on market access. Apart from what may be contained in its "horizontal" section, which we examine next, China's Schedule therefore indicates that at present, for the supply of wholesale trade services through commercial presence for reading materials, China has undertaken full market access and national treatment commitments.

7.952 We proceed to examine the "horizontal" section of China's Schedule. The relevant part, relating to limitations with respect to the supply of services through commercial presence, reads as follows:

Sector or sub-sector	**Limitations on Market Access**	**Limitations on National treatment**
I. HORIZONTAL COMMITMENTS ALL SECTORS INCLUDED IN THIS SCHEDULE	... (3) In 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 ventures. [1] 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. The establishment of branches by foreign enterprises is unbound, unless otherwise indicated in specific sub-sectors, as the laws and regulations on branches of foreign enterprises are under formulation. Representative offices of foreign enterprises are permitted to be established in China, but they shall not engage in any profit-making activities except for the representative offices under CPC 861, 862, 863, 865 in the sectoral specific commitments. The conditions of ownership, operation and scope of activities, as set out in the respective contractual or shareholder agreement or in a licence establishing or authorizing the operation or supply of services by an existing foreign service supplier, will not be made more restrictive than they exist as of the date of China's accession to the WTO. The land in the People's Republic of China is State-owned. Use of land by enterprises and individuals is subject to the following maximum term limitations: (a) 70 years for residential purposes; (b) 50 years for industrial purposes; (c) 50 years for the purpose of education, science, culture, public health and physical education; (d) 40 years for commercial, tourist and recreational purposes; (e) 50 years for comprehensive utilization or other purposes. ...	... (3) Unbound for all the existing subsidies to domestic services suppliers in the sectors of audio-visual, aviation and medical services.

[1] The terms of the contract, concluded in accordance with China's laws, regulations and other measures, establishing a "contractual joint venture" govern matters such as the manner of operation and management of the joint venture as well as the investment or other contributions of the joint venture parties. Equity participation

by all parties to the contractual joint venture is not required, but is determined pursuant to the joint venture contract.

7.953 Under the heading "All Sectors Included in this Schedule", China has inscribed several limitations on the supply of services through commercial presence, relating to national treatment and market access. In the "Limitations on national treatment" column, China has entered a single limitation, relating to subsidies to domestic suppliers in audiovisual, aviation and medical services, but not, however, with respect to wholesale trade services. In the "Limitations on market access" column, China has inscribed several limitations that are applicable to the supply of wholesale trade services. Apart from that relating to land use, these market access limitations are expressed as giving formally different treatment to foreign service suppliers, and thus under Article XX:2 also constitute limitations on national treatment in terms of Article XVII of the GATS.

7.954 In sum, with respect to wholesale trade services supplied through commercial presence, China has listed no limitations in the national treatment column of its Schedule. This national treatment commitment is only subject to the limitations listed in the market access column of China's Schedule, which were examined earlier. These limitations, contained in the horizontal part of China's Schedule, cover the legal forms and manner of doing business of a foreign wholesaler. They do not however restrict the types of materials that the foreign wholesaler is entitled to distribute. China has thus undertaken a national treatment commitment with respect to the wholesale of reading materials, including imported reading materials.

7.955 Having determined the scope and extent of China's national treatment commitments, we are now in a position to examine whether China, with respect to the measures challenged by the United States, "accord[s] to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and services suppliers", in terms of Article XVII:1 of the GATS.

Whether the measures at issue are inconsistent with China's national treatment commitments under Article XVII of the GATS

7.956 The **Panel** now examines whether the measures claimed by the United States to prohibit the wholesale of imported reading materials by foreign-invested enterprises are inconsistent with China's national treatment commitments under Article XVII of the GATS. For this purpose, in accordance with Article XVII, we next need to determine whether the measures at issue affect the relevant services and whether these measures accord less favourable treatment to service suppliers of other Members, in comparison to like domestic suppliers.

7.957 We note that the US claim concerns two types of imported reading materials, each distributed through its own channel. First, a subscription channel covers reading materials subject to subscription, including all imported newspapers and periodicals, as well as imported books and electronic publications in the "limited distribution category". Second, a "market sale" channel covers reading materials subject to sales through the market, namely imported books and electronic publications in the "non-limited distribution category". We will group the measures at issue under two headings, depending on which distribution channel they concern.

Measures prohibiting foreign-invested enterprises from wholesaling imported reading materials that are required to be distributed through subscription (*imported newspapers and periodicals, and certain imported books and electronic publications*)

7.958 The United States claims that China prohibits foreign-invested enterprises from wholesaling all imported newspapers and periodicals, and imported books and electronic publications in the "limited distribution category", pursuant to Article 42 of the *Publications Regulation* and Article 4 of

the *Imported Publications Subscription Rule*. The United States maintains that Article 42 of the *Publications Regulation* provides that only Chinese wholly state-owned enterprises are permitted to import reading materials of any kind, and that Article 4 of the *Imported Publications Subscription Rule* then grants an approved sub-set of these wholly state-owned enterprises the exclusive right to distribute these particular reading materials through subscription. The United States notes that China has defined "distribution" to include wholesale and retail services. The United States thus asserts that foreign-invested enterprises are prohibited from engaging in the wholesale distribution of the imported reading materials subject to subscription and receive less favourable treatment than that accorded to like domestic wholesalers.

7.959 The Panel notes that Article 3 of the *Imported Publications Subscription Rule* defines the reading materials which are subject to subscription:

> "The state manages the distribution of imported publications by categories. In regard to imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, they shall be distributed under subscription to subscribers, and supplied by categories."

7.960 Article 4 of the *Imported Publications Subscription Rule* provides that subscriptions for reading materials in the limited distribution category must be handled by a "publication import entity":

> "Subscriptions placed by subscribers for imported books and electronic publications in the limited distribution category shall be handled by publication import entities designated by the Administration of Press and Publication in compliance with their approved scope of business."

7.961 Finally, Article 42 of the *Publications Regulation* provides that a "publication import entity" must be a wholly state-owned enterprise:

> "In order to establish a publication import entity, the applicant shall meet the following conditions:
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> ...
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> (2) be a wholly state-owned enterprise and have a sponsoring entity under a superior agency recognized by the publication administration under the State Council."

7.962 Reading these measures together, the Panel observes, consistently with the US view, that: (i) subscription is the only distribution channel available to imported newspapers and periodicals and imported books and electronic publications in the limited distribution category; (ii) foreign-invested enterprises in China are excluded from distributing these imported reading materials because only designated publication import entities which are wholly Chinese state-owned are permitted to handle the subscription. We note that China does not contest this interpretation.

7.963 Since the service activity referred to in these measures is subscription, we must first determine whether China's commitments on "Wholesale Trade Services" (Sector 4.B.) cover this activity in order to determine the consistency of these measures with Article XVII of the GATS. We then need to determine whether these measures affect the supply of the services at issue in a manner which accords "less favourable treatment" with respect to like service suppliers of other Members.

7.964 Turning to China's Schedule, we recall our finding in paragraph 7.946 that China has listed in its Schedule wholesale trade services. Annex 2 of China's Schedule defines distribution and its

component services, indicating that the core characteristic of distribution services (including wholesaling) is "reselling merchandise". Wholesaling is specifically defined in Annex 2 as "the sale of goods/merchandise to retailers to *industrial, commercial, institutional, or other professional business users*, or to other wholesalers and related subordinated services" (emphasis added).[613] In examining the language of the definition, we would understand the term "professional business users" to refer to either entities or individuals. We also note that Annex 2 defines retail services as "the sale of goods/merchandise for personal or household consumption either from a fixed location (e.g. store, kiosk, etc) or away from a fixed location and related subordinated services". It appears that wholesale as defined in Annex 2 covers not only the sale to institutional users, but also the sale to individuals who are professional business users.

7.965 We further note that the term "subscription" mentioned in the *Imported Publications Subscription Rule* refers to the subscription placed by subscribers with publication import entities for imported publications to satisfy the reading needs of entities or individuals. This shows that subscribers can be entities or individuals and that the subscription is made through publication import entities. However, the measure does not specifically define the term "subscription". We note that the dictionary meaning of "subscription", in the context of book trade, refers to "a method of bringing out a book, by which the publisher or author undertakes to supply copies of the book at a certain rate to those who agree to take copies before publication".[614] This definition shows that subscription is a common form of selling publications, i.e. selling based on a specific order. Since the measure at issue does not specifically define the term "subscription", it appears that the common meaning of this term is applicable here.

7.966 We note the explanation given by the GAPP official with respect to the *Imported Publications Subscription Rule*, in evidence submitted by the United States.[615] According to the GAPP official, subscription is a way to distribute those imported publications that are not allowed to enter the retail market, including imported newspapers and periodicals and imported books and electronic publications in the limited distribution category. The GAPP official further explained that this subscription system:

> "[I]s to ensure that the distribution and sales of imported publications, after they are imported [into China], are all controlled by the state-owned Publication Import Operation Entities, and thus to prevent other companies, domestic or foreign, from meddling in this business." [616]

7.967 This statement supports the understanding that under the measure at issue, the designated publication import entities sell publications they import to those particular consumers, i.e. subscribers, who have made a specific order. This service activity at issue, i.e. subscription, thus involves reselling and consumers therein can be either entities or individuals. We also note that China does not contest the evidence advanced by the United States under this claim.

7.968 Therefore, to the extent that subscribers are entities, i.e. commercial, industrial or institutional users, or other professional business users, including individuals whose purchase of reading materials

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[613] We note that the definition of "wholesaling" in Annex 2 of China's Schedule appears to be inadvertently missing a comma after the word "retailers". The definition should read: "… retailers, to industrial …" and not "... retailers to industrial ...". Since the definition of retailing services limits this activity to the sale of goods/merchandise "for personal or household consumption" the omission of a comma after "retailers" in the phrase "retailers to industrial, commercial or professional business users" would lead to an absurd result. China acknowledges in its response to Panel question No. 101 that a wholesaler may sell directly to certain end-users.

[614] *Oxford English DictionaryOnline*, available at http://dictionary.oed.com./entrance.dtl

[615] Answers to the Media Inquiry by the Person in Charge of the GAPP Over the Implementation of *Imported Publications Subscription Rule* (Exhibit US-31).

[616] *Ibid*.

is not for personal or household consumption, the distribution of reading materials through this "subscription" model falls within the meaning of wholesale trade services, since in terms of China's definition in Annex 2, it involves "reselling" of merchandise to "*industrial, commercial, institutional, or other professional business* users". In this respect, we recall the principle enunciated by the Appellate Body in *US – Gambling*, whereby a commitment in a service sector applies to all services within that sector, including subsectors, unless otherwise specified.[617]

7.969 We therefore conclude that China's commitment on "Wholesale Trade Services" (Sector 4.B in China's Schedule) covers the subscription activity referred to in the *Imported Publications Subscription Rule*, to the extent that subscribers are "industrial, commercial, institutional, or other professional business users".

7.970 With respect to whether the measures at issue "affecting" the supply of the services at issue, we recall that the Appellate Body in *EC – Bananas III* opined:

> "[T]he term of 'affecting' reflects the intent of the drafters to give a broad reach of the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'."[618]

7.971 We note that it is not in dispute that the measures at issue regulate or govern the distribution of imported reading materials. Since the term "affecting" is wider in scope than "regulating" or "governing", we therefore consider that these measures are "affecting" the supply of reading materials distribution services for the purpose of Article XVII.

7.972 We next examine the US argument that these measures accord to foreign-invested wholesalers treatment less favourable than that accorded to domestic wholesalers in the sense of Article XVII. For this purpose, we need to determine whether, under these measures, foreign-invested enterprises prohibited from engaging in the wholesale the imported reading materials at issue are "like" Chinese enterprises permitted to engage in the supply of this service.

7.973 Our first step must be to determine whether foreign-invested enterprises prohibited under the measures at issue from establishing as wholesalers are "service suppliers of another Member" within the meaning of Article XVII. Applying the relevant definitions set out in Article XXVIII of the GATS, we observe that a service supplier of another Member, supplying a service through commercial presence, can be any entity "owned" or "controlled" by persons of another Member.[619]

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[617] Appellate Body Report on *US – Gambling*, para. 180.

[618] Appellate Body Report on *EC – Bananas III*, para. 220.

[619] Article XXVIII(g) of the GATS 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). 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 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)". Article XXVIII(l) of the GATS provides: "'juridical person' means any legal entity duly constituted or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association." Article XXVIII(n) further provides that 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 is such persons have the power to name a majority of its directors or otherwise to legally direct its actions; (iii) 'affiliated' with another person when it

We note that China has indicated in the horizontal commitments of its Services Schedule that, with respect to the supply of a service through commercial presence, there are three permissible forms of foreign-invested enterprises in China: wholly foreign-owned enterprises, equity joint ventures and contractual joint ventures. In light of the relevant definitions of the GATS, and in the absence of any contrary evidence before us, we can conclude that there are, or can be, foreign-invested enterprises in China that are owned or controlled by persons of another Member, and thus qualify as "service suppliers of another Member".

7.974 We also note that Article XVII of the GATS applies to "all measures affecting the supply of services", which include those measures affecting the establishment of commercial presence by "service suppliers of another Member". Article XXVIII (d) of the GATS defines "commercial presence" as "any type of business or professional establishment, including through: (i) the *constitution*, acquisition or maintenance of a juridical person, or (ii) the *creation* or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service." (emphasis added) Therefore for the purpose of Article XVII, and depending on the measures at issue, the term "service suppliers of another Member" supplying a service through commercial presence includes entities that have established a commercial presence in the host Member and/or entities that seek to establish in the host Member.

7.975 We note that the measures at issue (examined in detail below) are alleged by the United States to prohibit foreign-invested enterprises from engaging in the wholesale of imported reading materials while permitting wholly Chinese-owned enterprises to engage in the supply of this service, subject to approval. The measures at issue distinguish between suppliers that may be permitted to engage in the wholesale of imported reading materials and suppliers that are prohibited from engaging in this service, based exclusively on the suppliers' origin. When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels.[620] We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".

7.976 Therefore, to the extent that, under the measure at issue, a difference of treatment between foreign-invested enterprises that would, if not prohibited, engage in the wholesale of imported reading materials and wholly Chinese-owned enterprises that are permitted to supply this service is based exclusively on the origin of service suppliers, the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. In our view, there is no doubt that under the measure at issue, there will, or can, be foreign-invested enterprises prohibited from engaging in the wholesale of imported reading materials that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measures at issue. We thus consider that, for the measure at issue, the "like" service suppliers requirement in Article XVII is met.

7.977 As observed above, under Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation*, only wholly Chinese-owned enterprises are permitted to

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controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person".

[620] E.g, Panel Report on *Canada – Wheat Exports and Grain Imports*, paras 6.164-6.167, and Panel Report on *Argentina – Hides and Leather*, paras. 11.168-11.169. Although these cases concern trade in goods, we consider that the same reasoning applies here.

distribute those imported reading materials that are required to be distributed through subscription. As a result, foreign-invested enterprises are prohibited from wholesaling these reading materials. We must now examine whether the formal prohibition on the supply of certain services by a foreign service supplier that a like domestic supplier may undertake, constitutes "no less favourable" treatment in terms of Article XVII.

7.978 This treatment is to be assessed in terms of the "conditions of competition" between like services and services suppliers, as specified in Article XVII:3 of the GATS:

> "Formally identical or formally different treatment shall be considered to be less favourable if it modified the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

7.979 In our view, a measure that prohibits foreign service suppliers from supplying a range of services that may, subject to satisfying certain conditions, be supplied by the like domestic supplier cannot constitute treatment "no less favourable", since it deprives the foreign service supplier of *any* opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue.

7.980 We recall that China's national treatment commitments on wholesaling through commercial presence are only subject to the limitations listed in the market access column of its Schedule. We note that nothing in China's Schedule appears to justify a measure prohibiting foreign-invested enterprises, including those that qualify as service suppliers of other Members, from engaging in the wholesale of imported reading materials.

7.981 The Panel concludes therefore that Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation* are together inconsistent with China's national treatment commitments under Article XVII of the GATS.

> Measures prohibiting foreign-invested enterprises from wholesaling imported reading materials <u>that are distributed by "sales through the market"</u> *(certain imported books and electronic publications)*

7.982 The Panel turns now to the US claim with respect to imported books and electronic publications in the "non-limited distribution category". These reading materials are to be distributed by "sales through the market", pursuant to Article 3 of the *Imported Publications Subscription Rule*.

7.983 The United States claims that China also prohibits foreign-invested enterprises from wholesaling imported reading materials that are distributed by sales through the market and thus treats foreign-invested wholesalers less favourably than wholly Chinese-owned wholesalers. According to the United States, since the *Publications (Sub-)Distribution Rule* is the only measure that governs foreign-invested enterprises seeking to engage in the distribution of books, newspapers and periodicals in China pursuant to Article 39 of the *Publications Regulation* and Article 16 of the *Publications Market Rule*, the *Publications (Sub-)Distribution Rule*, particularly Article 2, prohibits foreign-invested enterprises from engaging in the wholesaling of any imported books, newspapers and periodicals by limiting the distribution activities of foreign-invested enterprises exclusively to the distribution of books, newspapers and periodicals that are published in China.

7.984 We begin our assessment by observing that Article 2 of the *Publications (Sub-)Distribution Rule* states:

> "This Rule is applicable to foreign-invested enterprises inside China engaged in the distribution of books, newspapers and periodicals.
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> Books, newspapers and periodicals as mentioned in this Rule refer to books, newspapers and periodicals published by a publishing entity approved by the publishing administration under the State Council.
>
> Distribution as mentioned in this Rule refers to the wholesale and retail of books, newspapers and periodicals."

7.985 We note that, contrary to what the United States claims, Article 2 of the *Publications (Sub-)Distribution Rule* does not itself prohibit foreign-invested enterprises from engaging in wholesaling of any imported books, newspapers and periodicals. Rather, Article 2 establishes the scope of the *Publications (Sub-)Distribution Rule*. It makes clear that the *Rule* applies to foreign-invested enterprises engaging in the distribution of books, newspapers and periodicals published in China. It says nothing about whether foreign-invested enterprises may engage in the wholesaling of imported books, newspapers and periodicals. Therefore, we consider that Article 2 cannot, by itself, give rise to an inconsistency with WTO obligations.

7.986 We note that in accordance with Article 39 of the *Publications Regulation*, the establishment of foreign-invested enterprises engaging in the distribution of books, newspapers and periodicals is permitted. This provision further states:

> "The specific measures and procedures for implementation shall be stipulated by the publication administration under the State Council jointly with its department in charge of foreign and economic cooperation in compliance with relevant provisions."

7.987 We further note that the Article 16 of the *Publications Market Rule*, which was drawn up on the basis of the *Publications Regulation*, provides:

> "To set up a book, newspaper and periodical distribution enterprise, a Chinese-foreign equity joint venture, contractual joint venture, or a foreign capital enterprise shall follow the *Publication (Sub-)Distribution Rule* jointly drawn up by the GAPP and the Ministry of Foreign Trade and Economic Cooperation".

7.988 The *Publications (Sub-)Distribution Rule* was issued based on, *inter alia*, the *Publications Market Rule*. The requirements with respect to the establishment of foreign-invested enterprises engaging in the wholesale and retail of reading materials are respectively contained in Articles 7 and 8 of the *Publications (Sub-)Distribution Rule*.

7.989 We observe the US assertion that no Chinese measures other than the *Publications (Sub-)Distribution Rule* authorize foreign-invested enterprises to engage in the distribution of reading materials. We also note that China does not contest the US assertion and that the evidence on record does not suggest otherwise.

7.990 The *Publications (Sub-)Distribution Rule* therefore appears to be the sole regulation governing the establishment of foreign-invested enterprises engaging in the distribution of reading materials. Since its application is limited to books, newspapers and periodicals published in China, there is no possibility, in view of Article 16 of the *Publications Market Rule*, for foreign-invested wholesalers to engage in the wholesaling of any imported books, newspapers and periodicals. We note that China does not contest this observation. We also note that in answer to a Panel question,

China confirms that, by virtue of Article 2 of the *Publications (Sub-)Distribution Rule*, foreign-invested enterprises are prevented from wholesaling imported reading materials.[621]

7.991 We note that the United States submits in its first written submission that the distribution of all imported reading materials is closed to foreign-invested enterprises but open to like wholly Chinese-owned competitors. We also note that China does not contest the latter US assertion.

7.992 We note further that Article 8 of the *Publications Market Rule* sets out the requirements with respect to the establishment of a wholesaler of reading materials. Article 16 of the same measure, cited above, suggests that these requirements only apply to the establishment of a wholly Chinese-owned wholesaler. Article 2 of this measure indicates that the publications that wholly Chinese-owned enterprises may wholesale include books, newspapers, periodicals and electronic publications, regardless of whether these publications are domestically published or imported. It follows that the *Publications Market Rule* permits wholly Chinese-owned enterprises to wholesale imported reading materials.

7.993 Consequently, for the category of imported reading materials that is not required to be distributed through subscription, the *Publications (Sub-)Distribution Rule*, specifically Article 2, in conjunction with Article 16 of the *Publications Market Rule*, has the effect of prohibiting foreign-invested enterprises from supplying wholesaling services for a category of products that wholly Chinese-owned enterprises are permitted to supply.

7.994 As noted above, China's national treatment commitment with respect to wholesale trade services implies a commitment to *all* services comprised in that sector, including the wholesale of imported reading materials, with the sole exception of the wholesale of salt and tobacco. As well, foreign-invested enterprises in China qualify as "service suppliers of another Member" as long as the entity is owned or controlled by persons of another Member. Also, as noted above, when origin is the only factor on which a measure bases a difference of treatment between domestic and foreign service suppliers, the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign service suppliers that under the measure are the same in all material respects except for origin. In our view, there is no doubt that under the measure at issue, there will, or can, be foreign-invested enterprises prohibited from engaging in the wholesale of imported reading materials that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measure at issue. We thus consider that, for the measure at issue, the "like" service suppliers requirement in Article XVII is met.

7.995 For the measures at issue, it is not in dispute that they regulate or govern the distribution of imported reading materials. We therefore consider that these measures are "affecting" the supply of the services at issue for the purpose of Article XVII.

7.996 Since the measures at issue have the effect of prohibiting foreign service suppliers from wholesaling imported reading materials, while like Chinese suppliers are permitted to do so, these measures clearly modifies the conditions of competition to the detriment of the foreign service supplier and thus constitutes "less favourable treatment" in terms of Article XVII.

7.997 We thus conclude that the *Publications (Sub-)Distribution Rule*, specifically Article 2, in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS

[621] China's response to question No. 78.

Conclusion

7.998 The Panel finds that Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation* are together inconsistent with China's national treatment commitments under Article XVII of the GATS as they prohibit foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported reading materials subject to subscription, while like domestic service suppliers are not similarly prohibited.

7.999 The Panel also finds that the *Publications (Sub-)Distribution Rule*, specifically Article 2, in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS as it prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported reading materials subject to sales through the market, while like domestic service suppliers are not similarly prohibited.

(ii) Prohibition on the "master distribution" (Zong Fa Xing) of books, newspapers and periodicals

7.1000 The **United States** submits that China prohibits foreign-invested enterprises from engaging in the master distribution of books, newspapers and periodicals through three measures, namely the *Catalogue*, the *Foreign Investment Regulation* and the *Several Opinions*. The United States alleges that these measures are discriminatory and inconsistent with China's national treatment commitments on wholesale trade services and retailing services supplied through commercial presence in its Schedule.

7.1001 **China** rejects the claim on wholesaling, contending that *Zong Fa Xing* (expressed as "master distribution" by the United States) of reading materials is not committed under wholesale trade services (Sector 4.B.) of China's Schedule. While acknowledging that the operation of one type of *Zong Fa Xing* entity corresponds to retailing, China does not respond to the US claim on the inconsistency of the measures at issue with China's GATS commitments with respect to retail services.

7.1002 The **Panel** will examine in turn the US claim with respect to wholesale trade services and retail services.

Claim with respect to wholesale trade services

7.1003 In addressing the claim with respect to wholesale trade services, we will examine first whether China's commitments on wholesale trade services cover the master distribution of books, newspapers and periodical. We will then assess whether the measures at issue are inconsistent with China's national treatment obligations under Article XVII of the GATS.

Whether China's commitments on wholesale trade services cover the master distribution of books, newspapers and periodicals

7.1004 The **United States** claims that the master distribution of books, newspapers and periodicals is covered by China's specific commitments with respect to wholesale trade services. According to the United States, master distribution is a form of distribution as defined in Annex 2 of China's Schedule. The United States notes that when master distribution is operated by entities other than publishers, it involves reselling reading materials purchased from publishers. The United States submits that the activity of master distribution also encompasses retailing as admitted by China. The United States argues that if indeed it were China's intention to exclude master distribution from its distribution

services commitments in Sector 4 of its Services Schedule, it should have done so with a limitation to that effect.

7.1005 The United States submits that master distribution involves services that qualify as wholesaling as defined in Annex 2 of China's Schedule, namely the sale of reading materials to industrial, commercial, institutional and other professional business users.

7.1006 The United States further submits that several Chinese legal instruments and other sources confirm that master distribution is known as "first-level wholesale". The United States notes that this is the right to organize the distribution of a particular reading material, including the right to designate which "second-level wholesalers" may distribute the publication in a certain region in China. According to the United States, the *Master Distribution Rule* and the *Books Market Opinions* are two of the measures that define master distribution as "first-level wholesale", and provide that master distribution involves the responsibility for the distribution of a particular title or class of books.

7.1007 **China** argues that there are two different distribution channels for reading materials in China: *Zong Fa Xing* (referred to by the United States as "master distribution") and *Fen Xiao* (referred to by the United States as "sub-distribution") which both are "autonomous", "top to bottom" channels. China further argues that its legislation clearly distinguishes the two separate distribution channels, and the products subject to one channel are not distributed in the other. According to China, while *Fen Xiao* corresponds to traditional distribution activities, *Zong Fa Xing* is a separate and unique concept, corresponding to a separate activity subject to a distinct discipline. China points out that the distinction of the two distribution channels already existed in 1999 when China concluded its GATS accession negotiations.

7.1008 China contends that only wholesale and retail, the two aspects of *Fen Xiao*, are specified in China's GATS commitments and that it never intended to include *Zong Fa Xing*. According to China, if its commitments included *Zong Fa Xing*, it would have specified it explicitly in Annex 2 of its Services Schedule. In its answer to a Panel question, China further argues that Sector 4 of its Schedule, which is defined in Annex 2 thereof, is not intended to cover all distribution services and that *Zong Fa Xing* does not fall within the scope of Annex 2 of its Schedule, but would appear to fall under Sector 4.E., entitled "Other", of document W/120.[622]

7.1009 More specifically, China submits that *Zong Fa Xing* does not correspond to wholesaling as defined in Annex 2 of its Services Schedule. According to China, *Zong Fa Xing* can be operated by two types of operators, either by the publisher for its own publications, or by a *Zong Fa Xing* entity commissioned by the publisher. China states that in both cases, *Zong Fa Xing* is operated by a single exclusive distributor, which directly sells reading materials to end consumers without relying on intermediaries. "Distribution Trade Services", of which wholesaling is a sub-sector, is defined in Annex 2 of China's Schedule as "being characterized as reselling merchandise accompanied by a variety of related subordinated services". China contends that since distribution services as defined in Annex 2 of China's Schedule, including wholesaling, do not cover the initial sale from the producer to the first intermediary of the distribution channel, distribution must involve the resale of goods. According to China, in cases where the publisher operates *Zong Fa Xing* and sells its own publications directly to the end-consumer, the activity involved is not a distribution service as defined in Annex 2 of China's Schedule because it does not involve reselling; in cases where *Zong Fa Xing* is operated by a *Zong Fa Xing* entity, the operation corresponds to retailing services, since the entity purchases publications from the publisher and then resell them to end-consumers without relying on any intermediary. Therefore, *Zong Fa Xing* is not covered by China's commitments on wholesale trade services under Sector 4.B of its Schedule.

[622] China's response to question No. 98.

7.1010 With respect to the two legal instruments referred to by the United States, which describe master distribution as "first-level wholesale", China argues that this concept is not applicable after the adoption in 1999 of the *Interim Provisions on the Administration of the Publications Market*.

7.1011 The **Panel** recalls at the outset that the parties do not agree on the translation of the Chinese term *Zong Fa Xing*, referring to the service activity subject to the claim. The parties do not however dispute its function as defined in Chinese legislation. In fact, both parties refer to Article 2 of the *Publications Market Rule* when defining the term. In our view, the translation of *Zong Fa Xing* is not a key issue under this claim, since the parties agree that the term refers to the exclusive sale of publications by a *Zong Fa Xing* entity in accordance with the *Publications Market Rule*. As noted at the beginning of this section, we prefer to use "master distribution" to refer to the service activity at issue. We shall also use the phonetic symbol of the original Chinese term when necessary. We note that the main issue under the claim is whether the master distribution of books, newspapers and periodicals is covered by China's GATS commitments on wholesale trade services under Sector 4.B of its Schedule.

7.1012 We have already determined in paragraph 7.948 that the *wholesaling* of books, newspapers and periodicals is covered by China's commitments under "Wholesale Trade Services" (Sector 4.B). We now need to determine whether the master distribution of such materials falls within the scope of wholesaling as defined in Annex 2 of China's Schedule.

7.1013 We begin by noting that our interpretation of China's commitment on wholesale trade services must begin with the ordinary meaning of the words, in their context, contained in that commitment, in accordance with Article 31 of the Vienna Convention. A first observation is that the term master distribution, or *Zong Fa Xing*, does not appear anywhere in China's Schedule. Accordingly, any distinction drawn in Chinese law between master distribution and other forms of distribution cannot, contrary to what China argues, be determinative for the interpretation of the scope of China's GATS commitment. The interpretation of China's commitments must be based on the meaning of the words contained in those commitments.

7.1014 With respect to the wording of China's commitments on distribution services, China argues that if it had meant to make a commitment with respect to master distribution it would have inscribed words to this effect in Annex 2 of its Schedule. We cannot agree with this view. A description of a service sector in a GATS schedule does not need to enumerate every activity that is included within the scope of that service, and is not meant to do so. Article XXVIII(e) of the GATS defines "sector" generally as "the whole of that service sector, including all of its subsectors". A service sector or subsector in a GATS schedule thus includes not only every service activity specifically named within it, but also any service activity that falls within the scope of the definition of that sector or subsector referred to in the schedule.

7.1015 Therefore, in our view, the fact that China's Schedule does not mention the term master distribution does not automatically mean that the activities described by that term are not covered by its Schedule. In order to determine whether master distribution is the subject of commitments in China's Schedule, we need to examine the main elements of China's wholesale trade services commitment, and then determine whether these elements include the activities comprised in the term "master distribution".

7.1016 We begin by revisiting Annex 2 of China's Schedule, which defines "distribution services" under Sector 4. Annex 2 provides:

> "The principal services rendered in each subsector can be characterized as *reselling merchandise*, accompanied by a variety of related subordinated services, including inventory management; assembly, sorting and grading of bulk lots; breaking bulk lots

> and redistributing into smaller lots; delivery services; refrigeration, storage, warehousing and garage services; sales promotion, marketing and advertising, installation and after sales services including maintenance and repair and training services." (emphasis added)

7.1017 Annex 2 points to the core characteristic of "distribution services" as defined by China in its Schedule – reselling merchandise. In addition to characterizing distribution services (which include wholesale trade services), the definition provides a lengthy and open list of "subordinated" service activities, which in isolation do not constitute "reselling merchandise" but may represent activities that are commercially significant for a distributor to undertake in connection with "reselling merchandise". This open list of subordinated services is similar to the list of services contained in the CPC Headnote for Section 6 discussed by the Appellate Body in *EC – Bananas III.* In that case, the Appellate Body emphasized the importance of services auxiliary to wholesaling, supporting our view that the range of wholesale trade services inscribed in China's Schedule is broad. The Appellate Body said:

> "[T]he CPC Headnote characterizes the '*principal* services' rendered by wholesalers as 'reselling merchandise'. This means that 'reselling merchandise' is not necessarily the *only* service provided by wholesalers. The CPC Headnote also refers to 'a variety of related, subordinated services' that may accompany the 'principal service' of 'reselling merchandise'. It is difficult to conceive how a wholesaler could engage in the 'principal service' of "reselling" a product if it could not also purchase or, in some cases, import the product. Obviously, a wholesaler must obtain the goods by some means in order to resell them. ..." [623]

7.1018 Having examined the notion of "distribution services" in Annex 2 of China's Schedule, we continue our interpretation of the Annex by examining the definition of "wholesaling". Wholesaling is defined in Annex 2 as "the sale of goods/merchandise to retailers to *industrial, commercial, institutional, or other professional business users*, or to other wholesalers and related subordinated services". (emphasis added) Retailing services, by comparison, are defined as "the sale of goods/merchandise for *personal or household consumption* either from a fixed location (e.g., store, kiosk, etc.) or away from a fixed location and related subordinated services". (emphasis added)

7.1019 Based on the language in Annex 2, we conclude that the definition of "wholesaling" applicable to China's Schedule involves "reselling merchandise", but does not require that a wholesaler sell to an intermediary. Instead, a wholesaler may sell directly to "industrial, commercial, institutional, or other professional business users", as well as, in the terms of Annex 2, to other wholesalers and to retailers.

7.1020 With this understanding of the definition of wholesaling in China's Schedule, the Panel is now in a position to examine the types of activities comprised in master distribution, and to determine thereby whether these activities are included within China's commitments on wholesale trade services.

7.1021 At the outset, both parties take the view that master distribution by a *publisher* is not at issue in the claim with respect to wholesaling. The arguments of the parties focus on master distribution involving a "master distribution entity" that purchases material from a publisher for resale.

7.1022 In attempting to show the nature of "master distribution", the United States points to the *Master Distribution Rule* and the *Books Market Opinions*, both issued by the GAPP, China's competent authority responsible for publication and distribution of reading materials. They are designed to provide administrative guidance on the distribution of books, and both describe master

[623] Appellate Body Report on *EC – Bananas III*, para. 226.

distribution as "first-level wholesale". The *Master Distribution Rule* is binding on administrative agencies.

7.1023 China explains that the concept of "first-level wholesale" is not applicable after the adoption in 1999 of the *Interim Provisions on the Administration of the Publications Market*. However, China provides no evidence to support this assertion. Nor does China present to the Panel the text of this regulation to show that the concept of "first-level wholesale" was abolished. In particular, China does not demonstrate that the measures cited by the United States have been formally repealed or have no legal effect. We therefore proceed on the basis that these two measures remain in force, and that their description of master distribution should be taken into account.

7.1024 We note that Article 2 of the *Master Distribution Rule* provides that

> "[T]he master distribution of books (namely, 'master wholesale' or 'master sales on commission') refers to such distribution matters: once the printing and production of a book are completed, the general responsibility in respect of the distribution of that book is unified to be assumed by an individual publishing or distributing entity, the latter accordingly *organizes the first-level wholesale*."

7.1025 This provision suggests that there is a distribution process for the books subject to master distribution. In this process, once a book is produced, first, all the copies move from the publisher to a "master distribution" entity, and then the latter distribute the book further downstream. We note that China confirms that a "master distribution" entity is not an agent of the publisher, but an exclusive seller.[624] This implies that a "master distribution" entity purchases books from a publisher for resale. The notion of "first-level wholesale" implies that there exists, at least, a second-level wholesale. Otherwise there would be no need for this notion. When a master distribution entity sells books to other wholesalers, its activity appears to constitute first-level wholesale and the wholesale by other wholesalers appears to be second-level wholesale. The activity of the master distribution entity thus involves reselling and it falls within the definition of "wholesale" contained in Annex 2 of China's Schedule.

7.1026 Further, in its reply to a question from the Panel, China accepts that a master distribution entity can sell publications to industrial, commercial, institutional, or other professional business users, as long as they are end users.[625] We therefore find that, when operated by entities other than publishers, master distribution may involve services that qualify as wholesaling as defined in Annex 2 of China's Schedule – namely the sale of reading materials to industrial, commercial, institutional and other professional business users.

7.1027 Based on the considerations above, the Panel concludes that, when operated by entities other than publishers, the principal characteristics of master distribution may involve wholesaling within the meaning of Annex 2 of China's Schedule, because for publications subject to master distribution, the master distribution entity purchases them from publishers and then may sell them either directly to industrial, commercial, institutional, or other professional business users, or to other wholesalers or retailers.

7.1028 Having established that the master distribution of books, newspapers and periodicals is covered by China's GATS commitments on wholesale trade services, we must now determine whether the measures at issue are inconsistent with China's national treatment commitments in this sector as claimed by the United States.

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[624] China's response to question No. 93.
[625] China's response to question No. 101.

Whether the measures at issue are inconsistent with China's national treatment commitments under Article XVII of the GATS

7.1029 The **United States** alleges that China prohibits foreign-invested enterprises from engaging in the master distribution of books, newspapers and periodicals in three measures: the *Catalogue*, the *Foreign Investment Regulation* and the *Several Opinions*. The *Catalogue*, which is incorporated by reference into the *Foreign Investment Regulation*, explicitly states that there can be no foreign investment in the master distribution of books, newspapers and periodicals. Article 4 of the *Several Opinions* prohibits foreign-invested enterprises from engaging in the master distribution of reading materials.

7.1030 The United States submits that these three measures affect the wholesaling of reading materials supplied through commercial presence within the meaning of Article XVII because they directly regulate the wholesale distribution of reading materials in China. The United States further argues that because these measures distinguish between foreign-invested and wholly Chinese-owned service suppliers solely based on origin, the foreign-invested suppliers and wholly Chinese-owned suppliers are "like" suppliers for the purpose of Article XVII of the GATS.

7.1031 The United States finally argues that by prohibiting foreign-invested wholesalers of reading material from engaging in these services through commercial presence, China has radically modified the conditions of competition in favour of wholly Chinese-owned reading material wholesalers. Consequently, the measures are inconsistent with Article XVII of GATS.

7.1032 **China** does not provide a specific rebuttal to the US arguments.

7.1033 The **Panel** notes that, having already examined and established China's commitments with respect to the master distribution of books, newspapers and periodicals, we must now determine whether the United States has demonstrated that the measures it challenges – the *Catalogue*, the *Foreign Investment Regulation*, and the *Several Opinions* – are inconsistent with Article XVII of the GATS.

7.1034 As noted above in paragragh 7.198, although China has asked the Panel not to examine the *Several Opinions*, we have determined that it is a "measure" taken by another Member which can be the subject of dispute settlement and we will therefore proceed with an analysis of the US claim with respect to that measure as well as the *Catalogue* and the *Foreign Investment Regulation* which China does not argue the Panel should refrain from examining.

7.1035 We begin by looking at the terms of the *Foreign Investment Regulation.* Article 3 of this measure provides that the *Catalogue* is the basis for the examination and approval of foreign-invested projects and policies applicable to foreign-invested enterprises, and Article 4 requires that the encouraged, restricted and prohibited foreign-invested projects be listed in the *Catalogue*. Article 3 states in relevant part:

> "The *Catalogue* of Industries for Guiding Foreign Investment and the *Catalogue* of Priority Industries Available for Foreign Investment in the Mid-West Region are the basis for the examination and approval of foreign-invested projects and foreign-invested enterprises policies."

7.1036 Article 4 categorizes foreign-invested projects as follows:

> "Foreign-invested projects are divided into four categories: those encouraged, permitted, restricted, and prohibited.

> The encouraged, restricted and prohibited categories of foreign-invested projects are listed in the *Catalogue* of Industries for Guiding Foreign Investment."

7.1037 We note that the *Foreign Investment Regulation* does not expressly prohibit foreign investment in the master distribution of books, newspapers, and periodicals. As indicated in this measure, its purpose is to guide the orientation of foreign investment in China.[626] While it sets out those areas where foreign investment is encouraged, restricted, or prohibited,[627] those areas are generic, only representing the orientation. It incorporates by reference, however, the *Catalogue*. In the *Catalogue*, the specific industries or activities where foreign investment is prohibited are listed, including the master distribution of books, newspapers and periodicals.

7.1038 Turning to the *Catalogue*, we note that it consists of three sub-*Catalogue*s: a *Catalogue* of industries encouraged for foreign investment; a *Catalogue* of industries with restricted foreign investment; and a *Catalogue* of prohibited foreign investment industries. Under the heading "*Catalogue* of Prohibited Foreign Investment Industries", Article X:2 refers to "Publication, master distribution, and import operations of books, newspapers and periodicals".

7.1039 When read together, we find that Article X:2 of the *Catalogue* of Prohibited Foreign Investment Industries, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, prohibits foreign investment in the master distribution of books, newspapers and periodicals.

7.1040 Finally, turning to the *Several Opinions*, we note that Article 4 provides that:

> "Foreign investors are prohibited from engaging in the publication, master distribution and import of books, newspapers and periodicals, ..."

7.1041 It is evident that Article 4 of the *Several Opinions* on its face prohibits foreign investment in the master distribution of books, newspapers and periodicals.

7.1042 This prohibition is admitted by China which, in answer to a Panel question, accepts that foreign-owned companies are prevented from applying for a licence for master distribution.[628] In accordance with Article 2 of the *Foreign Investment Regulation*, foreign investment refers to the establishment of Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, and foreign-capital enterprises and other forms of foreign-invested enterprise.[629] Therefore, the prohibition on foreign investment in master distribution prevents foreign-invested enterprises from engaging in the supply of master distribution services in China.

7.1043 Since these measures directly regulate the wholesale of reading materials, they affect the supply of the relevant services through commercial presence within the meaning of Article XVII.

7.1044 According to the United States, wholly Chinese-owned enterprises are permitted to engage in the master distribution of reading materials. We note that China does not contest the US assertion. We also note that there is nothing on the record to suggest that wholly Chinese-owned enterprises are subject to any restrictions. As noted above, there are, or can be, foreign-invested enterprises in China that are owned or controlled by persons of another Member, and thus qualify as "service suppliers of another Member". Recalling the requirements of Article XVII of the GATS, we now examine

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[626] Articles 1 and 3 of the *Foreign Investment Regulation* (Exhibit US-9).

[627] Articles 5, 6 and 7 of the *Foreign Investment Regulation* (Exhibit US-9).

[628] China's response to question No. 100.

[629] Article 2 of the *Foreign Investment Regulation* states that the Regulation applies to "investment projects in China which establish Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, and foreign-capital enterprises and other forms of foreign-invested enterprise projects" (Exhibit US-9).

whether the foreign-invested enterprises prohibited from supplying "master distribution" services in China are "like" wholly Chinese-owned enterprises to which no such prohibition applies.

7.1045 We note that the prohibition on foreign investment in master distribution contained in the measures at issue is solely based on the origin of the investor. In other words, the distinction between those who are permitted to supply the "master distribution" services and those who are prohibited from engaging in the service is made based exclusively on the origin of the service supplier. No criterion other than the origin of the service supplier is indicated in the measures. As noted above, to the extent that, under the measure at issue, a difference of treatment between foreign-invested enterprises that would, if not prohibited, engage in the master distribution of reading materials and wholly Chinese-owned enterprises that are permitted to supply this service is based exclusively on the origin of service suppliers, the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. In our view, there is no doubt that there will, or can, be foreign-invested enterprises prohibited from engaging in the master distribution of reading materials that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measures at issue. We thus consider that, for the measures at issue, the "like" service suppliers requirement in Article XVII is met.

7.1046 The Panel must now examine whether, by reason of the prohibition, "less favourable" treatment is accorded to the foreign service supplier.

7.1047 As noted above, the measures at issue prohibit foreign-invested enterprises, including those that qualify as service suppliers of other Members, from engaging in the master distribution of reading materials while like wholly Chinese-owned enterprises are not similarly prohibited. As a result of this prohibition, service suppliers of other Members have no access whatsoever to the Chinese market for "master distribution". The Chinese measures thus deprive service suppliers of other Members of *any* opportunity to compete with like Chinese service suppliers in supplying master distribution services. As noted above, we consider that the removal of *any* opportunity to compete is an extreme form of "less favourable" treatment within the meaning of Article XVII.

Conclusion

7.1048 We recall our previous findings that the "master distribution" of books, newspapers and periodicals is covered by China's commitments on wholesale trade services, and that China has undertaken national treatment commitments on these services supplied through commercial presence. We recall further our finding that none of the limitations on national treatment that China has inscribed in its Schedule can justify the prohibition on the "master distribution" of books, newspapers and periodicals by foreign-invested enterprises in China in respect of wholesale. We note that this prohibition is contained in Article X:2 of the *Catalogue* of Prohibited Foreign Investment Industries of the *Catalogue* which is incorporated by reference in the *Foreign Investment Regulation*, and Article 4 of the *Several Opinions*. The Panel therefore finds that in the cases where master distribution involves wholesale, Article X:2 of the *Catalogue* of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is inconsistent with China's national treatment obligations under Article XVII of the GATS. The Panel also finds that Article 4 of the *Several Opinions* is inconsistent with Article XVII.

Claim with respect to retail services

7.1049 The **Panel** notes that the United States also claims an inconsistency of the measures at issue with China's national treatment commitments for Retailing Services (Sector 4.C), supplied through commercial presence, within the meaning of Article XVII of the GATS. While the panel request is

not limited to Sector 4.B (Wholesale Trade Services), but covers all of China's commitments under Sector 4, including retailing, the claim with respect to retailing was brought up only in the United States' second written submission.

7.1050 We note in this respect the Appellate Body's view, expressed in *EC – Bananas III*, that nothing in the DSU or GATT practice suggests that all claims be set out in a complaining party's first written submission.[630] Thus, a complaining party may, in principle, set out a claim for the first time in its second written submission. We recall that the second substantive meeting took place some four weeks after the parties had presented their second written submissions. Therefore, when the United States included in its second written submission the claim with respect to the inconsistency of the measures at issue with China's national treatment commitments for Retailing Services (Sector 4.C), there was still the possibility for China, the defending party, to provide a rebuttal to the US claim. We note that China has chosen not to do so.

7.1051 We note that the United States has put forward this claim based on a statement by China to the Panel. In its first written submission, China explains:

> "In cases where an entrusted *Publication Zong Fa Xing entity* operates *Zong Fa Xing* of reading materials, it will itself sell the reading materials to the end-consumer without relying on further intermediaries. Such an operation of *Zong Fa Xing*, in fact corresponds to retailing services, which have been defined in Annex 2 of China's Schedule to the GATS as '[...]*the sale of goods/merchandise for personal or household consumption either from a fixed location (e.g. store, kiosk, etc.) or away from affixed location and related subordinated services*.'"[631] (emphasis added)

7.1052 Moreover, in response to a question from the Panel, China confirmed that publications subject to *Zong Fa Xing* can be sold through the *Zong Fa Xing* entity's own retail shops.[632] In doing so, China refers to Article 2 of the *Publications Market Rule*, noting that "*Zong Fa Xing* is an exclusive sale".[633]

7.1053 In considering the US claim concerning retailing, we observe that the United States asserts as a fact that master distribution may also involve retail services. China has admitted this fact in the context of the present panel proceedings. As indicated above, China did so in a formal written submission to the Panel and subsequently confirmed its statement in a written response to a question from the Panel. We consider that in these particular circumstances the United States need not adduce further evidence to make out a prima facie case that master distribution can also involve retail services.

7.1054 We note that China has made market access and national treatment commitments on retail services (Sector 4.C.) in its Services Schedule. The relevant part of China's Schedule, relating to commitments currently in force on the supply of retail services through commercial presence, reads as follows:

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[630] The Appellate Body in *EC – Bananas III* stated: "There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB." (Appellate Body Report on *EC – Bananas III*, para. 145.)

[631] China's first written submission, para. 283.

[632] China's response to question No. 104.

[633] *Ibid*.

Sector or sub-sector	Limitations on Market Access	Limitations on National treatment	Additional Commitments
4. DISTRIBUTION SERVICES (as defined in Annex 2) ... **C. Retailing Services** (excluding tobacco)	... (3) Foreign service suppliers may supply services only in forms of joint ventures in five Special Economic Zones (Shenzhen, Zhuhai, Shantou, Xiamen and Hainan) and six cities (Beijing, Shanghai, Tianjin, Guangzhou, Dalian and Qingdao). In Beijing and Shanghai, a total of no more than four joint venture retailing enterprises are permitted respectively. In each of the other cities, no more than two joint venture retailing enterprises will be permitted. Two joint venture retailing enterprises among the four to be established in Beijing may set up their branches in the same city (i.e. Beijing). ... None, within three years after accession, except for: retailing of chemical fertilizers, within five years after accession; and- those chain stores which sell products of different types and brands from multiple suppliers with more than 30 outlets. For such chains stores with more than 30 outlets, foreign majority ownership will not be permitted if those chain stores distribute any of the following products: motor vehicles (for a period of five years after accession at which time the equity limitation will have been eliminated), and products listed above and in	... (3) None	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 subordinate services as defined in Annex 2. Foreign service suppliers are permitted to provide the full range of related subordinate services, including after sales services, as defined in Annex 2, for the products they distribute.

Sector or sub-sector	Limitations on Market Access	Limitations on National treatment	Additional Commitments
	Annex 2a of the Protocol of China's WTO Accession. The foreign chain store operators will have the freedom of choice of any partner, legally established in China according to China's laws and regulations.		

7.1055 As we have done in the context of our analysis in paragraphs 7.946 to 7.948 with respect to China's commitments on wholesaling, we observe that China's commitments on retail services are intended to cover the retail of all goods (except tobacco which China specifically excluded), and therefore including reading materials. Accordingly, to the extent that the master distribution of books, newspapers and periodicals involves retail services, it is covered by China's commitments on retail services contained in Sector 4.C. of its Schedule.

7.1056 We now apply the approach used in paragraphs 7.950 to 7.954 to determine the extent of China's national treatment commitments on retail services. We note that China has inscribed no limitation (i.e. "none") in the national treatment column for retail services. China's national treatment commitments on retail services are therefore only subject to relevant limitations listed in the market access column of its Schedule, in both Sector 4.C. and the horizontal section. We further note that none of these limitations could justify a total prohibition on the supply of retail services of reading materials by foreign service suppliers through commercial presence.

7.1057 We recall our previous findings: the measures at issue, namely the *Catalogue*, the *Foreign Investment Regulation* and the *Several Opinions* are measures affecting the supply of services within the meaning of Article XVII of the GATS; under these measures, foreign-invested enterprises (including service suppliers of other Members) prohibited from engaging in the services at issue and wholly Chinese-owned enterprises supplying such services are like service suppliers under Article XVII of the GATS; and the prohibition on foreign-invested enterprises from supplying master distribution services constitutes "less favourable treatment" within the meaning of Article XVII.

7.1058 We also recall our previous findings that the prohibition on the "master distribution" of books, newspapers and periodicals by foreign-invested enterprises in China is contained in Article X:2 of the *Catalogue* of Prohibited Foreign Investment Industries of the *Catalogue* which is incorporated by reference in the *Foreign Investment Regulation*, and in Article 4 of the *Several Opinions*. The Panel therefore finds that in the cases where master distribution involves retail services, Article X:2 of the *Catalogue* of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is inconsistent with China's national treatment commitments under Article XVII of the GATS. The Panel also finds that Article 4 of the *Several Opinions* is inconsistent with Article XVII.

(iii) Prohibition on the "master wholesale" (Zong Pi Fa) and wholesale of electronic publications

7.1059 The **United States** claims that China prohibits foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications in a manner inconsistent with Article XVII of the GATS. Under this claim, the United States first challenges the *1997 Electronic Publications Regulation*. The United States submits that Article 62 of the *1997 Electronic Publications Regulation* prohibits foreign-invested enterprises from engaging in the master wholesale

and wholesale of any electronic publications. According to the United States, this is inconsistent with China's national treatment commitments with respect to wholesaling through commercial presence as inscribed in its Schedule.

7.1060 **China** argues that *Zong Pi Fa* ("master wholesale" as expressed by the United States) is obsolete since the *1997 Electronic Publications Regulation* was repealed on 15 April 2008 by a new legislation, the *2008 Electronic Publications Regulation*. According to China, the latter does not refer to *Zong Pi Fa*. China takes the view that the US claim with respect to *Zong Pi Fa* of electronic publications is irrelevant, since this form of distribution for electronic publications no longer exists.

7.1061 In the same way, China argues that the US claim with respect to the wholesale of electronic publications is irrelevant. China concedes that the *1997 Electronic Publications Regulation* prohibits foreign-invested enterprises from engaging in the wholesale of electronic publications. China however submits that the current measures, the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule,* which govern the wholesale of electronic publications, do not maintain such a prohibition. According to China, this is confirmed by the *Response of GAPP on Electronic Publications* in 2005 and two GAPP Approval Decisions taken respectively in 2006 and 2007, which authorize foreign-invested enterprises to engage in the wholesale of electronic publications.

7.1062 The **United States** rejects China's arguments. It contends that the *2008 Electronic Publications Regulation* cited by China does not in fact replace the provisions relevant for this dispute that are found in the *1997 Electronic Publications Regulation.* According to the United States, the prohibition on the master wholesale and wholesale of electronic publications by foreign-invested enterprises is unchanged, because the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule* do not provide the right for foreign-invested enterprises to engage in the master wholesale and wholesale of electronic publications.

7.1063 The United States therefore maintains its request for a finding from the Panel on the consistency of the *1997 Electronic Publications Regulation* with Article XVII of the GATS. In addition, the United States seeks a finding from the Panel on the consistency of the *Publications (Sub-)Distribution Rule* with Article XVII.

7.1064 Before examining the US claim, the **Panel** needs to address one preliminary matter which concerns whether there is a need to make a finding on the *1997 Electronic Publications Regulation*, as it has been repealed.

Preliminary matter

7.1065 We recall our previous finding in Section VII.C.1(b)(vi) that despite China's assertion that the *1997 Electronic Publications Regulation* no longer has legal effect, a ruling by the Panel on the US claims could assist in securing a positive solution to the dispute. We therefore now proceed to examine the US claim, determining: (i) whether China has undertaken national treatment commitments with respect to the master wholesale and wholesale of electronic publications through commercial presence; and (ii) whether the measures at issue are inconsistent with China's national treatment commitments under Article XVII of the GATS.

Whether China's commitments on wholesale trade services cover master wholesale and wholesale of electronic publications

7.1066 As noted at the beginning of this Section, the parties disagree on the translation of the Chinese term *Zong Pi Fa*. As in our observations on the term *Zong Fa Xing*, we do not consider that the precise translation of the term *Zong Pi Fa* is a significant issue in this claim, and we will use "master wholesale" to refer this service activity. We shall also use, where appropriate, the phonetic symbols

of the original Chinese terms. The issue before us is whether master wholesale and wholesale of electronic publications are covered by China's GATS commitments on "Wholesale Trade Services" (Sector 4.B. in China's Schedule) as alleged by the United States.

7.1067 The Panel has already found that China's GATS commitments cover the wholesale of electronic publications through commercial presence. The issue now is whether master wholesale is an activity that is within the definition of the "Wholesale Trade Services" specified in China's Schedule.

7.1068 The Panel notes China's statement that *Zong Pi Fa* (master wholesale) was synonymous with *Zong Fa Xing* (master distribution), but was exclusively used in the context of electronic publications.[634] The United States does not contest this statement and we have no reason to disagree. Thus, we understand that the activities involved in master wholesale (*Zong Pi Fa*) are of the same nature as the activities involved in master distribution (*Zong Fa Xing*). As noted above, when operated by entities other than publishers, the principal characteristics of master distribution may involve wholesale within the meaning of Annex 2 of China's Schedule, because for reading materials subject to master distribution, the master distribution entity may purchase them from publishers and then may sell these reading materials either directly to industrial, commercial, institutional, or other professional business users, or to other wholesalers or retailers. We therefore have found that master distribution is covered by China's commitments on "Wholesale Trade Services" (Sector 4.B. in China's Schedule). For the same reasons, we find that the master wholesale of electronic publications is also covered by those commitments.

Whether the measures at issue are inconsistent with China's national treatment commitments under Article XVII of the GATS

7.1069 Having established that China has undertaken commitments with respect to the master wholesale and wholesale of electronic publications, the Panel now proceeds to examine whether the measures challenged under this claim are inconsistent with Article XVII of the GATS.

1997 Electronic Publications Regulation

7.1070 We note that the *1997 Electronic Publications Regulation* was aimed at regulating the production, publication, reproduction, import and distribution of electronic publications in China.[635] It is therefore a measure affecting the supply of wholesale trade services of electronic publications for the purpose of Article XVII. Chapter 6 of the *1997 Electronic Publications Regulation* sets out rules governing the distribution of electronic publications, which include, *inter alia*, master wholesale and wholesale. Under this chapter, Article 62 provides:

> "The establishment of an electronic publication distribution entity shall meet the following conditions:
>
> A. The distribution entity shall have a name and articles of association;
>
> B. It shall have a prescribed scope of business;
>
> C. It shall have necessary capital and equipment;
>
> D. It shall have a fixed place business; and

[634] China's first written submission, para. 259.
[635] *1997 Electronic Publications Regulation*, Article 2. (Exhibit US-15)

> E. It shall have technical and managerial personnel familiar with electronic publications.
>
> ...
>
> Wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual ventures may not engage in master wholesale or wholesale of electronic publications"

7.1071 According to the United States, foreign-invested enterprises are prohibited from engaging in the master wholesale and wholesale of electronic publications while wholly Chinese-owned enterprises are permitted to supply these services. China has never contested the US contention. We note that there is nothing on the record to suggest that wholly Chinese-owned enterprises are subject to any restrictions. Article 62 of the *1997 Electronic Publications Regulation* appears to confirm this observation. This provision explicitly prevents wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual ventures, i.e. the three permissible forms of foreign-invested enterprises in China, from engaging in the master wholesale and wholesale of electronic publications. It follows that the conditions for establishment set out in the same provision only apply to wholly Chinese-owned enterprises.

7.1072 As noted above, there are, or can be, foreign-invested enterprises that are owned or controlled by persons of another Member, and thus qualify as "service suppliers of another Member". The prohibition contained in Article 62 of the *1997 Electronic Publications Regulation* is based solely on the origin of service suppliers, and wholly Chinese-owned enterprises are not subject to this restriction. To the extent that, under the measure at issue, a difference of treatment between foreign-invested enterprises that would, if not prohibited, engage in the master wholesale and wholesale of electronic publications and wholly Chinese-owned enterprises that are permitted to supply these services is based exclusively on the origin of service suppliers, the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure at issue are the same in all material respects except for origin. In our view, there is no doubt that there will, or can, be foreign-invested enterprises prohibited from engaging in the master wholesale and wholesale of electronic publications that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply these services, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measure at issue. We thus consider that, for the measure at issue, the "like" service suppliers requirement in Article XVII is met.

7.1073 Similarly to our earlier observations, the prohibition imposed on foreign-invested wholesalers, which includes service suppliers of other Members, deprives the latter of any opportunity to compete with like Chinese wholesalers in the master wholesale and wholesale of electronic publications. The prohibition thus has radically modified conditions of competition in favour of like wholly Chinese-owned wholesalers. We consider that the measure which explicitly maintains this prohibition, namely Article 62 of the *1997 Electronic Publications Regulation*, accords to foreign-invested wholesalers less favourable treatment within the meaning of Article XVII of the GATS.

7.1074 As noted above, China's national treatment commitments on wholesale trade services through commercial presence are only subject to the limitations listed in the market access column of its Schedule. We note that nothing in China's Schedule could justify a measure that prohibits foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications. The Panel therefore finds that Article 62 of the *1997 Electronic Publications Regulation* is inconsistent with Article XVII of the GATS.

Publications (Sub-)Distribution Rule

7.1075 In its second written submission, the **United States** requests the Panel to find that the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS because it prohibits foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications. This claim is based on China's argumentation in responding to the first set of Panel questions. The United States indicates that the *Publications (Sub-)Distribution Rule* is identified in the panel request and is included in the Panel's terms of reference.

7.1076 **China** argues that the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule* are the measures currently governing the wholesaling of electronic publications by foreign-invested enterprises, and that they do not prohibit foreign-invested enterprises from engaging in the wholesale of electronic publications.[636] According to China, this was confirmed by the *Response of GAPP on Electronic Publications in 2005* and the two GAPP Approval Decisions.[637]

7.1077 The **United States** rejects China's argument, contending that the *Publications (Sub-)Distribution Rule* prevents foreign-invested enterprises from engaging in the master wholesale and wholesale of electronic publications because it does not provide for such right to foreign-invested enterprises. The United States indicates that the two GAPP Approval Decisions cited by China apply only to the wholesaling of domestically published electronic publications, and fail to provide for the wholesaling of imported electronic publications or for the master wholesale of electronic publications. According to the United States, the *Response of GAPP on Electronic Publications* in 2005 only addresses sub-distribution and not master wholesale of electronic publications regardless of whether they are imported or domestically produced.

7.1078 The **Panel** begins by observing that the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule* are identified as specific measures at issue in the panel request with respect the US claim regarding the distribution of reading materials and thus are within the Panel's terms of reference. We next examine the relevant provisions in the two measures which are cited by China as the measures currently governing the wholesaling of electronic publications by foreign-invested enterprises.

7.1079 We note that the *Publications Market Rule* indeed applies to the wholesale of electronic publications. Article 2 of the *Publications Market Rule* provides that the measure applies to the distribution activities of publications which consists of newspapers, periodicals, books and electronic publications. Articles 8 and 9 of this measure set out the conditions and procedures for the establishment of an enterprises engaging in the wholesale of publications. We however recall our previous observation in paragraph 7.992 that it does not contain detailed rules on the establishment of foreign-invested enterprises engaging in the distribution of reading materials. Article 16 of the *Publications Market Rule* states:

> "To set up a book, newspaper and periodical sub-distribution (*Fen Xiao*) enterprise, a Chinese-foreign equity joint venture, contractual joint venture, or a foreign capital enterprise shall follow the *Publication (Sub-)Distribution Rule* jointly drawn up by the GAPP and the Ministry of Foreign Trade and Economic Cooperation".

7.1080 While the *Publications (Sub-)Distribution Rule* states that it applies to the distribution activities of books, newspapers and periodicals by foreign-invested enterprises in China, it provides that these activities consists of wholesale and retail and that "books, newspapers and periodicals" refer

[636] China's response to question No. 91.
[637] *Ibid.*

to books, newspapers and periodicals published in China.[638] Electronic publications are not mentioned in the *Publications (Sub-)Distribution Rule* as such. The Panel notes however that, in response to a question from the Panel, China states that since 2004 the distribution of electronic publications by foreign-invested enterprises is no longer governed by the *1997 Electronic Publications Regulation*, but by the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule*. China submits that this is confirmed by the *Response of GAPP on Electronic Publications* in 2005 and two GAPP Approval Decisions taken respectively in 2006 and 2007.[639]

7.1081 We note that the *Response of GAPP on Electronic Publications* was addressed to the Shanghai Municipal Bureau of Press and Publication, the press and publication administration in the municipality of Shanghai which has the authority to examine and approve the application for the establishment of foreign-invested enterprises engaging in the distribution of publications in Shanghai.[640] The *Response of GAPP on Electronic Publications* explicitly states that foreign-invested enterprises are permitted to engage in the distribution (*Fen Xiao*) of electronic publications and that the local administration shall apply the *Publications (Sub-)Distribution Rule* in examining applications for establishment. The *Response of GAPP on Electronic Publications* states:

> "Foreign invested enterprises can engage in distribution (*Fen Xiao*) of electronic publications but shall first obtain administrative licence in accordance with relevant laws and regulations.
>
> ... For specific conditions, procedures and time, please refer to the *Publications (Sub-)Distribution Rule*."

7.1082 We also note that the two GAPP Approval Decisions, respectively addressed to the Shanghai Municipal Bureau of Press and Publication and the Beijing Municipal Bureau of Press and Publication, authorize the establishment of Chinese-Foreign joint ventures that would engage, *inter alia*, in the wholesale of domestically published electronic publications. The two GAPP Decisions both require that the municipal press and publication administrations apply the *Publications (Sub-)Distribution Rule* in their examination and approval of the applications for the establishment of Chinese-Foreign joint ventures engaging, *inter alia*, in the wholesale of domestically published electronic publications. The *2006 GAPP Approval Decision*, addressed to the Shanghai Municipal Bureau of Press and Publication, states:

> "[W]e hereby approve Shanghai Bertelsmann Culture Industry Co. Ltd., a joint venture based in Shanghai invested by China Technology Books Co. Ltd. which is a subsidiary of Shanghai Xinhua Publishing Group, and German Bertelsmann Joint Stock Limited Company, to increase the business of wholesale and online sale of domestically published books, newspapers, periodicals and electronic publications….
>
> Please handle the relevant formalities according to the *Publications (Sub-)Distribution Rule*."

7.1083 In another example, the *2007 GAPP Approval Decision*, addressed to Beijing Municipal Bureau of Press and Publication states:

> "The Joyo Amazon Co. Ltd is approved to be established in Beijing by joint investment of Beijing Century Joyo Information Technology Co. Ltd. and Amazon Europe Co. Ltd.

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[638] Article 2 of the *Publication (Sub-)Distribution Rule* (Exhibit US-28).
[639] Exhibits CN-42 and 43.
[640] Article 10 of the *Publications (Sub-)Distribution Rule* (Exhibit US-28).

> ...
>
> The business scope of the Joint Venture with respect to the distribution of publications is engaging in the wholesale, retail and online sale of domestically published books, periodicals, newspapers and electronic publications...
>
> Please handle the relevant formalities according to the *Publications (Sub-)Distribution Rule. ...*"

7.1084 We note that the GAPP is the competent administration that implements the *Publications (Sub-)Distribution Rule*. It is also one of the two governmental departments that drew up and issued the *Rule*. We further note that the GAPP's administrative decisions are addressed to the municipal press and publication administrations to guide their practice in examining and approving establishment applications. We understand that these decisions are not only effective for those specific cases, but also serve as precedents for future practice of local press and publication administrations. In our view, the *Response of GAPP on Electronic Publications* and the two GAPP Decisions referred to support the view that the *Publications (Sub-)Distribution Rule* is applied to the establishment of foreign-invested enterprises engaging in, *inter alia*, the wholesale of electronic publications, even though electronic publications are not explicitly mentioned in the *Rule*.

7.1085 We also note, as the United States points out, that the two GAPP Decisions only approve the establishment of foreign-invested enterprises engaging in the wholesale and retail of domestically published reading materials, including electronic publications. We recall that Article 2 of the *Publications (Sub-)Distribution Rule* defines "books, newspapers and periodicals" as books, newspapers and periodicals published in China and that electronic publications are not mentioned therein. It appears reasonable to assume that, when the measure is applied to an additional type of reading materials, i.e. electronic publications, its application would not go beyond the limitation on "books, newspapers and periodicals". The two GAPP Decisions seem to confirm this understanding. Indeed, the GAPP Decisions explicitly state that the business scope of the joint ventures is the distribution of "domestically published books, newspapers, periodicals and electronic publications". They further require the administrative agencies to "handle the relevant formalities according to the *Publications (Sub-)Distribution Rule*". In response to a Panel question, China also confirms that foreign-invested enterprises can only engage in the wholesaling of domestically published electronic publications.[641]

7.1086 We recall the US allegation that the *Publications (Sub-)Distribution Rule* prevents foreign-invested enterprises from engaging in the wholesale of imported electronic publications or master wholesale of any electronic publications because it does not provide for the right of foreign-invested enterprises to engage in these service activities. The US argument is based on China's acknowledgement that the *Publications (Sub-)Distribution Rule* together with the *Publications Market Rule* are the measures currently governing the wholesale of electronic publications.

7.1087 As noted above, the *Publications Market Rule* does not provide detailed rules on the distribution of reading materials by foreign-invested enterprises. To the extent that the *Publications (Sub-)Distribution Rule* is applied to the distribution of electronic publications, it is limited to the electronic publications published in China. Neither the *Publications Market Rule* nor the *Publications (Sub-)Distribution Rule* provides that foreign-invested enterprises are permitted to engage in the master wholesale of any electronic publications or the wholesale of imported electronic publications. We also note, however, that neither of the two measures explicitly prohibits foreign-invested enterprises from engaging in these activities.

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[641] China's response to question No. 235.

7.1088 The issue before the Panel is whether the fact that the *Publications (Sub-)Distribution Rule* does not explicitly address these activities means that foreign-invested enterprises are excluded from engaging in these activities in violation of China's GATS commitments on wholesaling. In other words, the Panel needs to consider: (i) whether the *Publications (Sub-)Distribution Rule* has the effect of prohibiting foreign-invested enterprises from engaging in these activities; (ii) if so, whether such prohibition constitutes "less favourable" treatment accorded to service suppliers of another Member than that accorded to like Chinese suppliers within the meaning of Article XVII of the GATS.

7.1089 As noted above, the *Publications (Sub-)Distribution Rule* was issued based on, *inter alia*, the *Publications Market Rule*. The wording of Article 16 of the *Publications Market Rule* suggests that the *Publications (Sub-)Distribution Rule* is intended to be the sole regulation governing the establishment of foreign-invested enterprises engaging in the wholesale and retail of reading materials. There appears to be no other regulation that could serve as a legal basis for such establishment. Since the *Publications (Sub-)Distribution Rule* only applies to the establishment of foreign-invested enterprises engaging in the wholesale and retail of reading materials published in China, it, together with Article 16 of the *Publications Market Rule*, has the effect of excluding foreign-invested enterprises from engaging in other distribution activities relating to reading materials. We note in this context, regarding wholly Chinese-owned enterprises, that the *Publications Market Rule* applies to the wholesale of electronic publications and does not subject wholly Chinese-owned enterprises to this restriction. Indeed, under the *Publications Market Rule*, wholly Chinese-owned enterprises are permitted to engage in the wholesale of any electronic publications, whether imported or domestically published.

7.1090 We therefore find that to the extent that it is applied to electronic publications, the *Publications (Sub-)Distribution Rule*, together with the *Publications Market Rule*, prohibits foreign-invested enterprises from engaging in the wholesale of imported electronic publications.

7.1091 The Panel must now determine whether the prohibition of foreign-invested enterprises from wholesaling imported electronic publications under the *Publications (Sub-)Distribution Rule* constitutes a breach of Article XVII of the GATS, as claimed by the United States.

7.1092 Since China states that the *Publications Market Rule* and the *Publications (Sub-)Distribution Rule* are the measures that currently govern the distribution of electronic publications, it is evident that they "affect" the supply of electronic publications distribution services for the purpose of Article XVII.

7.1093 As noted above, China's national treatment commitment to the wholesale trade services sector implies a commitment to *all* services comprised in that sector, including the wholesale of imported electronic publications. As well, to the extent that, under the measure at issue, a difference of treatment between foreign-invested enterprises that would, if not prohibited, engage in the wholesale of imported electronic publications and wholly Chinese-owned enterprises that are permitted to supply this service is based exclusively on the origin of service suppliers, the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure at issue are the same in all material respects except for origin. There is no doubt that there will, or can, be foreign-invested enterprises prohibited from engaging in the wholesale of imported electronic publications that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measure at issue. We thus consider that, for the measure at issue, the "like" service suppliers requirement in Article XVII is met.

7.1094 As we observed earlier, the total prohibition on foreign service suppliers from wholesaling imported electronic publications, when like Chinese suppliers are permitted to do so, clearly modifies

the conditions of competition to the detriment of the foreign service supplier, and thus constitutes "less favourable" treatment in terms of Article XVII. The Panel therefore finds that, to the extent that it is applied to the wholesale of electronic publications, the *Publications (Sub-)Distribution Rule*, in conjunction with the *Publications Market Rule*, constitutes a breach of Article XVII of the GATS.

7.1095 With respect to the US assertion that the *Publications (Sub-)Distribution Rule* also prohibits foreign-invested enterprises from engaging in the master wholesale of any electronic publications, we note that this measure only applies to two types of distribution activity, namely wholesale and retail. It does not apply to master wholesale. We also note that the *Response of GAPP on Electronic Publications* and the two GAPP Approval Decisions do not refer to master wholesale either. We are thus not convinced that the United States has made a prima facie case that the *Publications (Sub-)Distribution Rule* prohibits foreign-invested enterprises from engaging in the master wholesale of any electronic publications.

Conclusion

7.1096 Based on the considerations in paragraphs 7.1070-7.1074, the Panel finds that Article 62 of the *1997 Electronic Publications Regulation* is inconsistent with China's national treatment obligations under Article XVII of the GATS as it prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale or wholesale of electronic publications while like domestic service suppliers are not similarly prohibited.

7.1097 Based on considerations in paragraphs 7.1078-7.1095, the Panel finds that to the extent that it is applied to the wholesale of electronic publications, the *Publications (Sub-)Distribution Rule*, in conjunction with the *Publications Market Rule*, is inconsistent with China's national treatment obligations under Article XVII of the GATS as these two measures together have the effect of prohibiting foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported electronic publications while like domestic service suppliers are not similarly prohibited.

7.1098 We do not find an inconsistency of the *Publications (Sub-)Distribution Rule* with Article XVII in respect of the master wholesale of electronic publications as the United States has not established that the *Publications (Sub-)Distribution Rule* prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale of any electronic publications as claimed.

(b) Discriminatory requirements applying to foreign-invested enterprises

7.1099 Having examined the US claims concerning discriminatory prohibitions by China on the distribution of reading materials by foreign-invested enterprises, we now turn to the US claims concerning alleged discriminatory requirements applied by China to foreign-invested enterprises, in cases where the wholesale of reading materials by them is authorized.

7.1100 The **United States** submits that, where foreign-invested enterprises are permitted to engage in the sub-distribution of books, newspapers and periodicals published in China, they are subject to various discriminatory requirements. The United States claims that each of the five discriminatory requirements – with respect to registered capital, operating terms, pre-establishment legal compliance, examination and approval process, and GAPP decision-making criteria – constitutes a breach of Article XVII of the GATS, as each of them is inconsistent with China's national treatment commitments on "Wholesale Trade Services" (Sector 4.B of China's Schedule) supplied through commercial presence. According to the United States, these discriminatory requirements are imposed through the *Publications (Sub-)Distribution Rule* and the *(Sub-)Distribution Procedure*.

7.1101 **China** requests the Panel not to consider the requirements concerning the "pre-establishment legal compliance", "approval process requirements" and "decision-making criteria" to be within its terms of reference, because they are not specifically mentioned in the US panel request. China also requests the Panel not to consider the *(Sub-)Distribution Procedure* as it is not a "measure" within the meaning of Article 3.3 of DSU.

7.1102 The **Panel** recalls its finding in paragraph 7.104 that the requirements concerning pre-establishment legal compliance, examination and approval process, and GAPP decision-making criteria, as well as the *Sub-Distribution Procedure* are not within its terms of reference. The Panel will therefore examine only whether the alleged discriminatory requirements with respect to registered capital and operating terms are inconsistent with Article XVII of the GATS.

(i) Registered capital requirement

7.1103 The **United States** alleges that the requirement that the foreign-invested reading materials wholesaler shall have a registered capital of no less than RMB 30 million (approximately US$4 million) is inconsistent with Article XVII of the GATS, as this requirement is higher than the RMB 2 million (approximately US$286,000) that a wholly Chinese-owned reading material wholesaler is required to have. The United States notes that the capital requirement for foreign-invested wholesalers is contained in Article 7.4 of the *Publications (Sub-)Distribution Rule*, while that for wholly Chinese-owned wholesalers is set out in the *Publications Market Rule*. For the United States, this fifteen-fold difference in capital requirement accords to foreign-invested wholesalers treatment significantly less favourable than that accorded to like Chinese-owned wholesalers and modifies conditions of competition. The United States adds that China has not listed in its Schedule any limitations on its national treatment commitment with respect to the wholesaling of reading materials supplied through commercial presence. According to the United States, the limitations that are listed by China in the horizontal section of its Schedule do not cover the case of a higher registered capital requirement for foreign-invested wholesalers. The United States submits therefore that the requirement is inconsistent with China's national treatment commitments under Article XVII of the GATS.

7.1104 **China** argues that formally different treatment between domestic and foreign services and services suppliers is not sufficient for establishing a violation of Article XVII of the GATS. According to China, the different registered capital requirement does not impact the actual conditions of competition since foreign-invested wholesalers benefit from a degree of flexibility that is not available to wholly Chinese-owned wholesalers. China submits that wholly Chinese-owned wholesalers have to contribute the entire registered capital before incorporation, while foreign-invested wholesalers can contribute the registered capital in several subsequent instalments, including after incorporation. China maintains that the United States fails to make a prima facie case under Article XVII of the GATS as it has not demonstrated that the registered capital requirement on foreign-invested wholesalers has modified the conditions of competition to the detriment of foreign service suppliers.

7.1105 The **United States** submits that China is incorrect in countering that wholly Chinese-owned wholesalers, unlike foreign-invested wholesalers, must contribute the entirety of their registered capital prior to establishment. The United States notes that the *2005 Company Law* allows wholly Chinese-owned enterprises to contribute their registered capital in instalments over time as well. **China**, in its answer to a question from the Panel, confirms that after the amendment of the Company Law in 2005, both foreign-invested and wholly-Chinese owned enterprises may contribute their registered capital in instalments over the same period of time.

7.1106 The **Panel** begins by examining the provision of the *Publications (Sub-)Distribution Rule* that sets the registered capital requirement for foreign-invested enterprises for the purpose of wholesaling

books, newspapers and periodicals in China. Article 7.4 of the *Publications (Sub-)Distribution Rule* states:

> "The following conditions shall be satisfied for the establishment of a foreign-invested books, newspapers and periodicals wholesale enterprise:
>
> ...
>
> (4) A registered capital of no less than 30 million RMB;"

7.1107 The Panel then examines the relevant provision of the *Publications Market Rule*, which sets the registered capital requirement for wholly Chinese-owned wholesalers of books, newspapers and periodicals in China. Article 8.4 states:

> "To set up a publication wholesale enterprise or for some other unit to engage in the wholesale of publications, the following conditions must be met:
>
> ...
>
> (4) Having a registered capital of no less than 2 million RMB."

7.1108 This provision confirms that the registered capital requirement for wholly Chinese-owned, as compared to foreign-invested wholesalers of books, newspapers and periodicals in China is significantly lower.

7.1109 The Panel notes that China argued, at least initially, that the greater capital requirement imposed on foreign-invested wholesalers is "balanced" by the flexibility accorded to those foreign wholesalers, and not wholly Chinese-owned ones, to pay in the registered capital amount in instalments. However, China's initial statement that only foreign-invested wholesalers benefit from flexibility in payment of their registered capital no longer, according to China itself, represents Chinese law.[642] Since 2005, both foreign-invested and wholly Chinese-owned enterprises may contribute their registered capital in instalments over the same period of time. Article 26 of the *2005 Company Law* makes no distinction between Chinese and foreign firms in this respect:

> "The registered capital of a limited liability company shall be the total amount of the capital contributions subscribed to by all the shareholders that have registered with the company registration authority. The amount of initial capital contributions made by all shareholders of this company shall be no less than 20% of its registered capital, nor less than the legally-defined minimum amount of registered capita, and the outstanding part shall be paid off by the shareholders within 2 years as of the date of the incorporation of this company: in terms of an investment company, that outstanding part may be paid off within 5 years."

7.1110 The Panel notes also that the 2006 *Implementation Opinions* provides that the capital contribution made for a foreign-invested company shall meet the requirements of the *2005 Company Law*. Further, paragraph 11 of Article 20 of China's *Company Registration Regulation* provides that:

> "For a shareholder of a foreign-invested limited liability company, the amount of his initial capital contributions shall meet the requirements of laws and administrative regulations, and the outstanding part shall be paid off within two years from the date

[642] China's response to question No. 224.

> of the incorporation of that company or within five years if that company is an investment company."

7.1111 We therefore understand, and China acknowledges, that after the amendment of the Company Law in 2005, both foreign-invested and wholly-Chinese owned enterprises may contribute their registered capital in instalments over the same period of time.

7.1112 We note that Article XVII of the GATS applies to "all measures affecting the supply of services". We understand that measures affecting the ability of foreign service suppliers to establish a commercial presence, such as the registered capital requirement on service suppliers at issue, constitute such measures, and are thus within the scope of Article XVII. We note that the parties do not dispute this. We next examine whether the registered capital requirement under the measure at issue constitutes "less favourable treatment" under Article XVII of the GATS.

7.1113 As noted above, in order to establish "less favourable treatment" for the purpose of Article XVII, we also need to determine whether, under the measure at issue, foreign-invested wholesalers and wholly Chinese-owned wholesalers are "like" service suppliers. We consider that foreign-invested wholesalers qualify as "service suppliers of another Member" as long as the entity is owned or controlled by persons of another Member. We note that under the measure at issue, the difference of treatment, i.e. the registered capital requirement, is based exclusively on the origin of service suppliers. We consider that the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that, under the measure at issue, are the same in all material respects except for origin. In our view, there is no doubt that there will, or can, be foreign-invested wholesalers subject to a higher registered capital requirement that are the same in all material respects as wholly Chinese-owned enterprises not subject to such limitation, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measures at issue.

7.1114 With respect to the difference in the registered capital requirement, we note that the parties do not dispute that such difference has an impact on the conditions of competition between foreign-invested wholesalers and like, wholly Chinese-owned wholesalers. Clearly, differing requirements in the amount of minimum capital required to establish a business affect service suppliers' market access opportunities.

7.1115 We observe that, with respect to the supply of services through commercial presence, if service suppliers from other Members are subject to a higher registered capital requirement than that for domestic service suppliers, they face a higher cost for market entry that would, in some cases, have a negative effect on their ability to compete with domestic service suppliers. In this dispute, a Chinese wholesaler needs to raise no less than 2 million RMB for its establishment while a foreign-invested wholesaler has to raise no less than 30 million RMB. As demonstrated by the United States, 15 wholly Chinese-owned wholesalers could establish their businesses using the amount of capital required to establish a single foreign-invested wholesaler in China. It is evident that the threshold for market entry of wholly Chinese-owned wholesalers is significantly lower than that for foreign-invested wholesalers. This places foreign-invested wholesalers at a competitive disadvantage in seeking to establish a commercial presence so as to supply the Chinese market through commercial presence.

7.1116 Looked at from a different angle, one can see that the 30 million RMB registered capital requirement would exclude from the Chinese market all foreign-invested enterprises who cannot raise this amount of capital, while Chinese suppliers that are similarly not able to meet a registered capital requirement of RMB 30 million would not be excluded (assuming they could nonetheless meet the RMB 2 million threshold).

7.1117 The Panel also notes that China has decided to insert in other parts of its own Schedule of commitments similar types of alleged discriminatory capital or asset requirements. For example, China's commitment on technical testing and analysis services, which is found under the sector heading "Other Business Services", lists an entry under mode 3 which limits establishment of joint ventures to those with no less than US$350,000 in registered capital. Further, under the sector heading "Tourism and Travel-Related Services", China's commitment on travel agency and tour operator services also lists a registered capital requirement of no less than RMB 4 million for the establishment of a joint venture travel agency or tour operator, which is scheduled to be brought down to RMB 2.5 million within three years after accession. Although these examples are not determinative in the Panel's analysis of the precise measure at issue here, they do support the view that China was aware of the possibility of inscribing such limitations in its Schedule, but that it chose not to do so.

7.1118 As noted above, under the measure at issue, foreign-invested wholesalers who are service suppliers of another Member and wholly Chinese wholesalers will, or can, be "like" service suppliers in the sense of Article XVII. Furthermore, in light of the above considerations, we consider that the significantly greater amount of registered capital required for foreign-invested wholesalers unfavourably modifies the conditions of competition that they face by exacting a higher price for market entry. We consider therefore that China accords foreign-invested wholesalers supplying services through commercial presence treatment less favourable than that accorded to like, wholly Chinese-owned wholesalers within the meaning of Article XVII of the GATS.

7.1119 Finally, we recall that China does not inscribe in Sector 4.B. (Wholesale Trade Services) of its Services Schedule a specific limitation that foreign-invested wholesalers are subject to a higher registered capital requirement. Consequently, China is not entitled to maintain a measure containing such a condition.

7.1120 Thus, the Panel concludes that the registered capital requirement set forth in Article 7.4 of the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS.

(ii) Operating term requirement

7.1121 The Panel now examines the second of the two measures, an operating term requirement, that the United States claims applies only to foreign-invested wholesalers and discriminates against them contrary to Article XVII of the GATS.

7.1122 The **United States** notes that pursuant to Article 7.5 of the *Publications (Sub-)Distribution Rule*, the operating term for foreign-invested wholesalers is limited to 30 years, while wholly Chinese-owned wholesalers are free of any term limitations. The United States argues that the 30-year term places foreign-invested wholesalers at a competitive disadvantage as their continued operations are subject to the discretion of government authorities. The United States further argues that this imposes considerable uncertainty on commercial relationships, particularly when an operating term is close to its expiry. In the view of the United States, maintaining current business and generating new business becomes more difficult when a foreign-invested wholesaler cannot guarantee that it will continue to be in business after the expiry of its operating term. The United States also argues that the limited operating term not only disadvantages foreign-invested enterprises in terms of their post-30 year operations, but also undermines the quality of their pre-30 year operations. According to the United States, this requirement imposes a chilling effect on the business opportunities and commercial relationships available to foreign-invested enterprises.

7.1123 **China** argues that, to succeed in its claim, the United States must show not merely that foreign invested wholesalers are treated differently from domestic wholesalers, but also that they are treated less favourably. According to China, the United States must show that the different

requirements affecting foreign-invested wholesalers alter the conditions of competition so that foreign-invested wholesalers are placed at a genuine and concrete competitive disadvantage compared to like domestic wholesalers. China further argues that the 30-year operating term requirement for foreign invested wholesalers has no impact on actual conditions of competition. China submits that an operating term that is close to expiry can be extended pursuant to a non-discretionary, automatic and simplified procedure. China further submits that in practice, neither the wholly-Chinese wholesaler nor the foreign-invested wholesaler is subject to any actual time-limitation for their activity. China maintains that denying its right to introduce the requirement on operating terms would undermine its sovereign right to regulate market access in the field of services consistently with its GATS commitments.

7.1124 The **United States** disagrees with China's assertions, contending that the extension of the operating term is not automatic under Chinese law, but requires an approval process that is not governed by objective criteria. The United States notes that any extension of the operating term requires the agreement of all investors and board directors, and must comply with China's laws, regulations and policies on foreign investment. The United States thus understands that under Chinese law, each of these parties holds a veto on extension and can use that leverage to extract concessions from the foreign-invested parties. The United States argues that this artificial and unnecessary commercial situation places undue strain and extra burdens on the foreign-invested wholesalers, a predicament not faced by wholly Chinese-owned wholesalers. The United States also notes that even after the agreement of the joint venture parties is secured, extension of the operating term depends on approval by governmental authorities, which is not based on objective criteria.

7.1125 Rejecting the US arguments above, **China** submits that the operating term requirement for foreign-invested enterprises in China is in fact adopted to protect the reasonable expectations and interests of such enterprises by guaranteeing their business activity within the approved business scope and operating term. China further submits that it has the sovereign right to determine and adjust which sectors of its economy should be open to foreign investment in a manner not inconsistent with its international obligations. According to China, with an operating term, the business of foreign-invested enterprises is free from the influence of any change in foreign investment policy, and this helps to minimize the uncertainty in foreign investment policy faced by foreign service providers.

7.1126 China indicates that the extension of the operating term is required by law to meet three conditions: the agreement of all investors, the agreement of all directors and compliance with the laws, regulations and policies on foreign investment applicable at the time of application. According to China, these three conditions are neutral; as long as the application for extension satisfies the three conditions, the examining authority is obliged by law to grant approval.

7.1127 The **Panel** begins its analysis by observing that it is uncontested that foreign-invested wholesalers are subject to a maximum 30-year operating term, whereas wholly Chinese-owned wholesalers face no such limitation. Foreign-invested wholesalers are therefore accorded treatment that is formally different from that accorded to wholesalers who are wholly Chinese-owned. The parties do not dispute this. The issue for us to examine is whether this formally different treatment constitutes "treatment no less favourable" under Article XVII of the GATS.

7.1128 We need first to examine whether, under the measure at issue, foreign-invested wholesalers and wholly Chinese-owned wholesalers are "like" service suppliers for the purpose of Article XVII. We consider that foreign-invested wholesalers qualify as "service suppliers of another Member" as long as the entity is owned or controlled by persons of another Member. We note that under the measure at issue, the difference of treatment, i.e. the operating term requirement, is based exclusively on the origin of service suppliers. We consider that the "like" service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that, under the measure at issue, are the same in all material respects except for origin. In our view, there is no doubt

that there will, or can, be foreign-invested wholesalers subject to a 30-year operating term limitation that are the same in all material respects as wholly Chinese-owned enterprises not subject to such limitation, except for their origin. We note that the parties do not dispute the likeness of the service suppliers under the measures at issue.

7.1129 Since the operating term requirement governs the distribution of reading materials by foreign-invested enterprises, we consider that it is "affecting" the supply of the relevant services for the purpose of Article XVII.

7.1130 We recall the requirement under Article XVII that a Member accord "no less favourable treatment" to foreign services or service suppliers than it does to like domestic ones. Under paragraph 2 of Article XVII, the treatment need not be identical. Formally different treatment may be accorded to foreign services or service suppliers, as long as that treatment does not modify conditions of competition in favour of like domestic services or service suppliers. Therefore, China's formally different treatment of foreign-invested wholesalers with respect to operating term does not necessarily indicate an inconsistency with Article XVII. It is for the United States, as the complaining party, to demonstrate that the formal difference in treatment by China has modified the conditions of competition in favour of wholly Chinese-owned wholesalers.

7.1131 The demonstration of "less favourable treatment" of foreign services or service suppliers under Article XVII must proceed through careful analysis of the measure and the market. In examining the national treatment obligation applying to trade in goods, the Appellate Body in *US – FSC (Article 21.5 – EC)* stated:

> "The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'[643]. This examination cannot be rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace[644]."[645]

7.1132 We consider that this statement by the Appellate Body is relevant also to an analysis under Article XVII of the GATS, since an examination of "less favourable treatment" involves, in goods as well as services cases, an analysis of the effects of a measure on conditions of competition.

7.1133 We first examine the basic requirement for a maximum 30-year operating term. It is contained in paragraph 5 of Article 7 of the *Publications (Sub-)Distribution Rule*, which states

> "7. Establishment of a foreign-invested enterprise for the wholesale of books, newspapers and periodicals requires the following conditions:
>
> ...
>
> 5) The term of business shall be no more than 30 years."

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[643] *(footnote original)* Appellate Body Report on *Korea – Various Measures on Beef*, *supra*, footnote 44, para. 142.

[644] *(footnote original)* Appellate Body Report on *Japan – Alcoholic Beverages II*, *supra*, footnote 116, at 110.

[645] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 215 and 221.

7.1134 We now turn to the conditions which a foreign-invested enterprise must fulfil in order to extend the 30-year operating term. The parties refer us to four Chinese regulations that set out the requirements for an extension: the *Chinese-Foreign Equity Joint Venture Law*, the *2000 Chinese-Foreign Contractual Joint Venture Law*, the *Foreign-Funded Enterprise Law*, and the *Opinions on the Extension of Operating Terms*. These regulations all provide, in similar language, the date by which an application for the extension of the operating term shall be submitted to the approval authority, and the time allowed for the authority to decide whether to approve the application.[646] Paragraph 1 of the *Opinions on the Extension of Operating Terms* states:

> "[I]f a foreign-invested enterprise wants to extend its operation terms, it shall apply for extension to the approving authority prior to the 180th day before the expiry date of the operation terms ('Mandatory Time Period'). The approving authority shall decide whether to approve or not to approve within 30 days after receipt of application. If no decision is made before the expiry date of the operation terms, approval for extension shall be deemed to have been granted."

7.1135 Apart from the timely submission of the request, three substantive conditions must be met for an extension to be granted. Article 3 of the *Opinions on the Extension of Operating Terms* states:

> "The application for extension shall meet the following conditions:
>
> (1) the extension shall be agreed by all investors;
>
> (2) the extension shall be agreed by all directors of the Board; and
>
> (3) the extension shall comply with the laws, regulations and policies on foreign investment at the time of application."

7.1136 The main issue before us is whether the requirement to renew the 30-year operating term unfavourably modifies "conditions of competition" to the detriment of the foreign-invested wholesaler. The Panel observes that the extension procedure on its face is not a mere formality. First, a positive decision by the competent authority is required, and a time period for its decision is given. Thus, the application by the foreign-invested wholesaler is not a simple requirement to notify the competent authority. Secondly, there are three substantive conditions laid down that a wholesaler's application must fulfill. The failure to meet any of the three conditions leads to the rejection of the application. Thus any single investor, or any single member of the Board of directors, in effect has the power to veto an application to extend the operating term of the foreign-invested wholesaler. This potential veto, which matures at the end of the 30-year operating term, accords significant bargaining power to any individual investor or board member, undermining the normal governance rules of these affected wholesalers. Likewise, the requirement to "comply with the laws, regulations and policies on foreign investment at the time of application" could well mean that a wholesaler who had been authorized to do business in a particular way under its initial licence, and had continued to do so legally for the duration of its operating term, might find that its application to extend its operating term is denied since the conditions of its initial licence might no longer accord with China's current "laws, regulations and policies on foreign investment". In sum, the occurrence of any of these eventualities could impose significant costs on the foreign-invested wholesaler.

7.1137 These considerations indicate to the Panel that the maximum 30-year operating term imposed on foreign invested wholesalers, coupled with a renewal process subject to three conditions, imposes

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[646] Article 13 of the *Chinese-Foreign Equity Joint Venture Law* (Exhibit CN-48), Article 24 of the *2000 Chinese-Foreign Contractual Joint-Venture Law* (Exhibit CN-49), Article 20 of the *Foreign-Funded Enterprise Law* (Exhibit CN-50), and Article 1of the *Opinions on the Extension of Operating Terms* (Exhibit CN-51).

risk, and therefore may lead to costs, on foreign-invested wholesalers that their like wholly Chinese-owned competitors do not bear. As demonstrated by the United States, the disadvantages experienced by foreign-invested wholesalers are particularly acute in the context of multi-year and supply contracts, where repeat services cannot be guaranteed by the foreign-invested enterprises as the expiration of its operating term approaches. Producers and customers alike are likely to disfavour suppliers with operating term limitations because that restraint entails the risk of service interruptions. Foreign-invested wholesalers may also have difficulty in securing in a timely manner the finances needed for their continued operations due to uncertainties in the extension of operating terms.

7.1138 Although these costs stem from risks that are realized only toward the end of the 30-year operating term, they nonetheless have a present value. That present value can be evaluated as early as the moment a decision is being taken whether to establish a new foreign-invested wholesaler. In this way, the 30-year operating term requirement, together with the associated renewal procedures, could potentially affect the current conditions of competition between foreign-invested and wholly Chinese-owned wholesalers. This would particularly affect those foreign-invested wholesalers who have operation plans for more than 30 years.

7.1139 We therefore understand that the operating term requirement and the associated renewal procedures, which only apply to foreign-invested wholesalers, indeed have implications in the marketplace. We observe that China has the undoubted right to regulate trade in services under the GATS, including by adjusting its foreign investment policy. This regulation must however be in accordance with the GATS commitments that China has chosen to make in its Schedule. Should China wish to maintain discriminatory measures on foreign service suppliers in service sectors for which it has undertaken national treatment commitments, then it must indicate those measures as limitations in its Schedule. We recall that China has not inscribed in Sector 4B (Wholesale Trade Services) of its Schedule any limitation related to a limited operating term for foreign-invested wholesalers. Consequently, China is not entitled to maintain such a condition under Article XVII of the GATS.

7.1140 In light of the above considerations, we find that the operating term requirement and the associated renewal procedures modify, with respect to foreign-invested wholesalers who qualify as "service suppliers of another Member", the conditions of competition in favour of wholly Chinese-owned wholesalers. As noted above, we consider that, for the measure at issue, the "like" service suppliers requirement in Article XVII is met. We therefore consider that China has accorded foreign-invested wholesalers treatment less favourable than that accorded to wholly Chinese-owned wholesalers within the meaning of Article XVII of the GATS.

7.1141 The Panel therefore finds that the operating term requirement provided for by Article 7.5 of the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS.

(iii) Conclusion

7.1142 Based on the considerations in paragraphs 7.1106-7.1120 and 7.1127-7.1141, the Panel finds that the requirements concerning registered capital and operating term for foreign-invested wholesalers respectively contained in paragraphs 4 and 5 of Article 7 of the *Publications Sub-Distribution Rule* are inconsistent with China's national treatment obligations under Article XVII of the GATS.

2. Distribution of sound recordings in electronic form: claims under Article XVII of the GATS

7.1143 The **United States** submits that China takes measures that prohibit foreign-invested enterprises from engaging in the electronic distribution of sound recordings. This prohibition is

inconsistent with Article XVII of the GATS, according to the United States, because it violates China's national treatment commitments under mode 3 with respect to "sound recording distribution services", as listed in Sector 2.D. of its Services Schedule. According to the United States, each of the four Chinese measures – the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, and the *Several Opinions* – is inconsistent with Article XVII. The United States submits that the four measures taken together also breach Article XVII as they create a regime governing the electronic distribution of sound recordings. The United States further submits that the *Catalogue* and the *Foreign Investment Regulation* are also part of this regime.

7.1144 **China** rejects the US claims, contending that the services at issue are "network music services", a new type of service totally different from the "sound recording distribution services" listed in China's Schedule. According to China, "sound recording distribution services" only covers the distribution of sound recordings embedded in physical media.

7.1145 The **Panel** notes that the major issue in dispute under this claim is whether the services at issue, which the United States says are affected by specified Chinese measures, are "sound recording distribution services" listed in the sectoral column of China's Schedule and can therefore be covered by China's national treatment commitment. Accordingly, we will first determine whether the services at issue are "sound recording distribution services" listed in China's Schedule. We will then examine the measures identified by the United States under this claim, to determine whether they affect the services at issue and are inconsistent with China's national treatment commitments under "sound recording distribution services".

(a) Whether China has undertaken GATS commitments for the distribution of sound recordings in electronic form

7.1146 In order to address the question of whether the services at issue are covered by China's GATS commitments on "Sound recording distribution services", the Panel first needs to identify the services that have been invoked by the United States, and then determine the scope of China's commitments for these services.

(i) Services at issue

7.1147 For the **United States,** the services at issue are the "electronic distribution of sound recordings". In its panel request, the United States claims that Chinese measures place market access restrictions and discriminatory requirements on foreign service suppliers seeking to engage in the "digital distribution of sound recordings" that is, the distribution of sound recordings not embedded in a physical medium. For the United States, "sound recordings" include songs, "ring tones" and "ring back tones". In its answer to a question from the Panel, the United States submits that "electronic distribution" of the services at issue should be understood in a broad sense. According to the United States, such "distribution" encompasses wholesale, retail, and other transmission activities over the Internet and through other electromagnetic means. It should be understood to cover the dealing out, dispersing, or otherwise the moving of a good or service further downstream in the chain from production to consumption. Thus, the "electronic distribution of sound recordings" encompasses the wholesale and retail of sound recordings, as well as other activities involved in conveying the sound recording downstream and to the ultimate consumer, whether distributed through the Internet, telecom networks, or other electronic means.

7.1148 **China** submits that the United States in its panel request limits the scope of its claim to distribution of sound recordings over the Internet, and not by other means such as telecommunications systems, including mobile telephony. According to China, transmission of music through other electromagnetic means is therefore not within the scope of the dispute.

7.1149 The **United States** notes that the measures at issue, in particular the *Network Music Opinions*, are more broadly applicable to dissemination over the "network". This would include wired or wireless media such as the internet and mobile communications.

7.1150 The **Panel** notes China's argument that the services at issue raised by the United States do not include the transmission of music by electronic means other than the Internet, since the United States in the panel request limits its claim to the digital distribution of sound recordings over the Internet. The relevant section of the panel request reads as follows:

> "The measures at issue, however, appear to place market access restrictions and discriminatory requirements on foreign service suppliers seeking to engage in the digital distribution of sound recordings. For example, the Interim Regulations on Internet Culture Administration (the 'Interim Regulations') define 'internet cultural activities' as including activities such as wholesaling and retailing of 'internet cultural products' on the internet (including to mobile telephones). The Interim Regulations further define "internet cultural products" as including various kinds of 'network audiovisual products', including both audiovisual products that have been produced specifically for transmission over the internet and products that are the result of the transformation of an audiovisual product existing in physical form into a format that can be transmitted over the internet. It appears, therefore, that the definition of "internet cultural products" extends to digital sound recordings, and that the definition of 'internet cultural activities' extends to the digital distribution of such products."[647]

7.1151 In examining the panel request, we note that the United States claims that specific Chinese measures are inconsistent with Article XVII of the GATS, since these measures discriminate against foreign service suppliers seeking to engage in the "digital distribution" of sound recordings. The US claim is thus specified as "digital" distribution, which China argues means distribution only over the Internet. In examining the dictionary meaning of "digital", we note that it refers in a technical sense to "signals or information represented by discrete numeric values of a physical quantity such as voltage or magnetic polarization (commonly representing the digits 0 and 1)".[648] In a more general sense, the same dictionary states that "digital" can refer to "the use of computer technology or digital communications, especially digital multimedia and the Internet".

7.1152 Looking at this more general meaning of "digital", we take particular note of the use of the qualifying phrase "especially digital media and the Internet". This indicates to us that there can exist "digital" communications other than over the Internet, which might include, for example, mobile telephone networks. From this we deduce that there can also be "digital" distribution other than through the Internet. We see no contextual reason to restrict the scope of the term "digital" in the US claim solely to distribution over the Internet.

7.1153 We therefore find that the US claim relating to the "electronic distribution of sound recordings" include their distribution through the Internet or by other electronic means. We shall refer to these services in this part as the "services at issue".

(ii) Sectoral scope of "sound recording distribution services"

7.1154 The **United States** submits that the proper application of the customary rules of treaty interpretation reflected in the Vienna Convention leads to the conclusion that China's commitments on "sound recording distribution services" include the distribution of sound recordings through electronic means, and this conclusion is consistent with the principle of technological neutrality.

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[647] United States' panel request WT/DS363/5, page 6.
[648] *Oxford English Dictionary*, online version, http://dictionary.oed.com

7.1155 In the United States' view, the ordinary meaning of "recording" is "the action or process of recording audio or video signals for subsequent reproduction" or "recorded material".[649] Thus, the term "recording" does not distinguish between recordings of sound stored on physical media or those stored electronically. Distribution of sound recordings thus includes distribution of any recorded sound, whether in hard-copy or electronically. Accordingly, the ordinary meaning of the term "sound recording distribution services" includes electronic distribution of sound recordings.

7.1156 The United States argues that the term "distribution" does not necessarily mean the distribution solely of goods, but also services, as suggested by Article XXVIII(b) of the GATS. Distribution refers to the range of activities undertaken to move a product further downstream. For the United States, the sale of a sound recording on a CD to a retail outlet or electronically to a company that then sells it through transmission over the Internet both involve distribution of a sound recording. The United States asserts that the definition of "distribution services" in Annex 2 to China's Services Schedule expressly applies only to the distribution of goods under sector 4, and is thus not relevant for the interpretation of sector 2.D.

7.1157 For the United States, the definitions of certain terms in the GATS provide relevant context for the interpretation of China's commitments. Article I:3(b) of the GATS defines services broadly to "includ[e] any service in any sector except services supplied in the exercise of government authority." In addition, Article XXVIII(e)(i) defines "sector" to mean "with respect to a specific commitment, one or more, or all, sub-sectors of that service as specified in a Member's Schedule." In light of the ordinary meaning of "sound recording distribution" and the context, the United States submits that China's commitments in this sector must be read to include the electronic distribution of sound recordings.

7.1158 Because an analysis of the relevant treaty terms pursuant to Article 31 does not leave the meaning of the terms of China's GATS schedule ambiguous, obscure, or unreasonable, the United States contends that there is no need to resort to supplementary means of interpretation. Even if this were not the case, an analysis of the supplementary means of interpretation under Article 32 confirms, according to the United States, its interpretation under Article 31 that China's services commitments cover the electronic distribution of sound recordings.

7.1159 Electronic distribution of sound recordings existed before China's accession to the WTO, according to the United States. China itself was aware that music was being distributed electronically at the time of its accession. Even if China were correct that it did not intend to make a commitment with respect to the electronic distribution of sound recordings, the United States submits that its intent is not determinative. In *US – Gambling*, the panel made clear that a Member's intent is not relevant in discerning whether the Member has a commitment with respect to a particular means of delivery. Because China did not explicitly exclude electronic distribution of sound recordings from its commitment on sound recording distribution services, the United States contends that China's services commitments include this form of distribution.

7.1160 According to the United States, its interpretation of China's Schedule is also consistent with the principle of technological neutrality. Electronic distribution of sound recordings constitutes a modern means to supply an existing service. If China's arguments were accepted, the United States contends that WTO Members could invoke this reasoning to evade services commitments any time a new means of delivering a service was developed. On the other hand, the principle of technological neutrality is consistent, according to the United States, with the concept that the GATS is sufficiently dynamic so that Members need not renegotiate the Agreement or their commitments in the face of ever-changing technology. The United States notes that the Panel in *US – Gambling* states that "the

[649] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993) Vol. II, p. 2506 (Exhibit US – 59).

GATS does not limit the various technologically possible means of delivery under mode 1" and that "if a Member desires to exclude market access with respect to the supply of service through one, several or all means of delivery included in mode 1, it should do so explicitly in its schedule". According to the United States, this reasoning applies equally to China's market access commitments under mode 3.

7.1161 **China** submits that its commitments on "sound recording distribution services" cover the distribution of sound recordings only in physical form. For China, the commitments should be interpreted according to the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention.

7.1162 China contends that the term "recording" refers to the physical medium that contains the result of a recording process. The ordinary definition of the term "distribution", according to China, necessarily refers to the action of marketing and supplying goods and commodities[650], and does not refer to "distribution" of sound through electronic means. Thus, when read together, "sound recording" and "distribution services" refer to the marketing and supply of a specific category of goods, namely goods containing recorded music. For China, therefore, "sound recording distribution services" does not cover the transmission of intangible content to users via the Internet. China submits that this is further confirmed by the specific meaning which China attributes to the concept of "distribution services" provided in Annex 2 to its GATS schedule.

7.1163 China notes that the Republic of Korea, in its answers to the questions of the Panel, submits that its commitment on "record production and distribution services (Sound Recording)" in Sector 2.D. of its Services Schedule "only covers the production and distribution of sound recordings in physical form (e.g. Long-Play (LP) disc)" and that "electronic production or distribution of sound recordings is not covered".

7.1164 China also submits that its Services Schedule has to be interpreted in light of the circumstances of its conclusion. At the time of negotiations on China's accession to the WTO, network music services did not, according to China, constitute an established business operating within a legal framework. China contends that network music services only emerged fully after China acceded to the WTO in 2001. Until the breakthrough of network music services around 2003, China submits that these services were largely illegal. Until the entry into force of the WIPO Copyright Treaty in 2002, China argues that no international consensus on the protection of Intellectual Property Rights had been reached allowing a worldwide legal exploitation of music over the Internet. China notes that it revised its Copyright Law in 2001 in order to protect for the first time the right to authorize the legal exploitation of music over the Internet. China submits that its awareness of technological developments does not alter the conclusion that the GATS negotiators did not agree to include a new and unfamiliar service in China's commitments under Sector 2.D. of its Services Schedule.

7.1165 China notes, in addition, that the *in dubio mitius* principle, applied by the Appellate Body in *EC – Hormones*, states that one should not lightly assume that a sovereign state intends to impose upon itself the more onerous, rather than the less burdensome, obligation. This suggests, according to China, that when a GATS commitment cannot be interpreted clearly to include a new service not existing at the time of negotiation, it should not be interpreted to do so. Therefore, China argues that its commitments should not be interpreted as covering the new sector "network music services".

7.1166 In China's view, the United States' reference to the principle of "technological neutrality" is irrelevant in this dispute, because network music services are a service distinct from the distribution

[650] *American Heritage Dictionary of the English Language*, 4th ed. (Houghton Mifflin 2000) (Exhibit CN-72) and *Shorter Oxford English Dictionary*, 6th ed. (Clarendon Press 2007) (Exhibit CN-73)

of sound recordings in physical form, and cannot be considered as a mere means of delivery of sound recording distribution services. China further submits that the principle of "technological neutrality" as such and its systemic implications are still under consideration among WTO Members. For China, the application of the principle of technological neutrality, as set out by the panel in *US – Gambling*, to the interpretation of Members' GATS Schedules, would conflict with the principle of progressive liberalisation embodied in the text of the GATS, especially in the Preamble and Article XIX.

7.1167 The **Panel** recalls that the main issue arising under this claim is whether the services at issue are covered by China's commitments on "sound recording distribution services" in Sector 2.D. of its Services Schedule. In resolving this issue, the main interpretative question is whether China's sectoral entry extends to the supply of such services through the delivery of content to the consumer "electronically", and not embedded in a physical medium such as a CD or DVD.

(iii) Interpretation of GATS Schedules

7.1168 As noted previously, Article XX:3 of the GATS provides that Members' schedules of specific commitments form an integral part of the GATS. Therefore, the rules of interpretation that apply to services schedules are the same as those applicable to the GATS itself. Our interpretation will therefore need to proceed according to the customary rules of interpretation of public international law as codified in Articles 31 and 32 of the Vienna Convention.

7.1169 Pursuant to Article 31 of the Vienna Convention, we should interpret China's Services Schedule in good faith in accordance with the ordinary meaning to be given to the terms of the Schedule when read in their context and in light of the object and purpose of the GATS and the WTO Agreement. Pursuant to Article 32 we may have recourse to supplementary means of interpretation, in order to "confirm" the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning "ambiguous or obscure" or, leads to a result which is "manifestly absurd or unreasonable".

7.1170 The relevant part of China's commitments is reproduced as follows:

Sector or sub-sector	**Limitations on Market Access**	**Limitations on National Treatment**	**Additional Commitments**
D. Audiovisual Services - Videos, including entertainment software and (CPC 83202), distribution services - Sound recording distribution services	... (3) Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)	... (3) None	Without prejudice to compliance with China's regulation on the administration of films, upon accession, China will allow the importation of motion pictures for theatrical release on a revenue-sharing bases and the number of such imports shall be 20 on an annual basis.

Sector or sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
- Cinema Theatre Services	(3) Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent. ...	(3) None ...	

(Footnote 1 that is referenced here is a footnote contained in the Horizontal part of China's Schedule. It states that the operation, management and equity participation in a contractual joint venture are determined by the contract establishing it.)

7.1171 The Panel notes that the parties, in applying the applicable rules of interpretation codified in Articles 31 and 32 of the Vienna Convention to interpret the inscription "sound recording distribution services" in Sector 2.D. of China's Services Schedule, have drawn different conclusions. The United States submits that by this inscription, China has made commitments on the distribution of recorded sound, whether as a physical or non-physical product. China, on the other hand, contends that its commitment under "sound recording distribution services" covers the distribution of sound recordings only as a physical product.

Ordinary meaning

7.1172 We will begin our interpretation of the ordinary meaning of "sound recording distribution services" by examining in turn the two main elements that compose this entry in China's Schedule: "sound recording", and "distribution services".

"sound recording"

7.1173 We observe that the main interpretative difficulty in the term "sound recording" is the meaning of the word "recording". To determine the ordinary meaning of "recording", both parties have referred to dictionary definitions. We consider that, of the several definitions of "recording" offered in this dictionary, the most relevant for our purposes is "recorded material; a recorded broadcast, performance."[651]

7.1174 In light of this dictionary definition, China argues that the word "material" designates the physical medium containing the result of the recording process, and that a "sound recording" is therefore a physical object. The United States, on the other hand, holds that the ordinary meaning of "recording" does not distinguish between recordings of sound stored on physical media and those stored electronically.

7.1175 In the Panel's view, the reference to the phrase "recorded material" in the cited dictionary definition can only mean, in a grammatical sense, the "material that is recorded" and not the "recording material". This is confirmed by the two specific examples given in the dictionary definition: a "recorded broadcast" and a "recorded performance" are both considered as "recorded material". Since the terms "broadcast" and "performance" clearly refer to content, and not to a particular medium on which the content is embedded or transferred, the word "material" in the dictionary definition must refer to content. Had the dictionary definition intended to define a "recording" as a physical object, it would have used a different term, such as "recording material", and

[651] *Shorter Oxford English Dictionary*, 6th ed. (Clarendon Press 2007), Vol. II, p. 2927.

not "recorded material", and given examples of types of physical media on which recordings are embedded or transferred.

7.1176 An analysis of the ordinary meaning of "sound recording", based on this dictionary definition, suggests therefore that the term cannot be limited to sound embedded or transferred on physical media. In other words, the ordinary meaning of "sound recording" depends not on the technology of storage or distribution of the sound, but rather on its nature as "content".

"distribution services"

7.1177 Having examined the ordinary meaning of "sound recording", we now look at the ordinary meaning of "distribution services". The parties differ also in their views on the meaning of this term. China submits that it refers to the action of marketing and supplying physical products and commodities only, while the United States argues that it can also involve the distribution of services.

7.1178 We begin by looking at a dictionary definition of the term "distribution". The *Shorter Oxford English Dictionary* defines this term, in an economic or commercial sense, as:

> "the dispersal of commodities among consumers affected by commerce."[652]

7.1179 The term "commodity" is then further defined as:

> "[A] thing of use or value; spec. a thing that is an object of trade, esp. a raw material or agricultural crop"; or "a thing one deals in or makes use of".[653]

7.1180 According to this dictionary meaning of the term, "distribution" means the "dispersal of commodities", and this dispersal can include, in its most general sense, anything that is "of use or value". We note the use of the term "commodities". While historically it may be true that the term "commodity" was commonly understood to refer more to tangible goods than to services, nowadays technology allows an increasing range of intangible products to be distributed in a commercial sense. These intangible products, such as digitised content, often involve services, and can be distributed to consumers. In fact, Article XXVIII of the GATS explicitly defines the supply of a service – which, of course, is not in itself a good – as including its distribution. At least one other dictionary consulted by the Panel directly supports this interpretation, defining "distribution" as the "movement of goods *and services* from the source through the distribution channel".[654] In our view, therefore, distribution can be understood as referring to a transaction whereby anything of value, tangible or intangible, is dispersed among consumers, with or without intermediaries.

7.1181 Our analysis so far, based on an examination of basic dictionary definitions, suggests that the ordinary meaning of the words "sound recording" refers to content, and not to any physical medium on which the content may be embedded. At the same time, our analysis suggests that the ordinary meaning of the term "distribution" can be understood as the dispersal of things of value, and that this can involve tangible or intangible products. Combining both of these elements, our discussion so far suggests that China's commitment on "sound recording distribution services", covers the distribution of sound recordings through an electronic medium, and not just the distribution of sound recordings embedded on a physical medium as argued by China. We must now further examine this preliminary

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[652] *Shorter Oxford English Dictionary* 6th ed. (Clarendon Press 2002), Vol. I, p. 721. We note that other dictionary definitions of the term "distribution", quoted in the context of Article III:4 of the GATT 1994 at paras. 7.1457-7.1459, are not inconsistent with this definition.

[653] *Shorter Oxford English Dictionary* 5th ed. (Clarendon Press 2007), Vol. I, p. 461.

[654] Businessdictionary.com. Emphasis added. The Monash Marketing Dictionary also describes a distribution channel as the path or route taken by goods *and services* as they move from producer to final consumer (www.buesco.monash.edu.au/mkt/dictionary/).

meaning, pursuant to Article 31 of the Vienna Convention, which provides that the ordinary meaning of the terms of the treaty must be examined in their "context" and in light of the "object and purpose" of the treaty.

Context

7.1182 According to Article 31:2 of the Vienna Convention, the "context" within which a treaty provision should be interpreted comprises the text of the treaty, including its preamble and annexes, and certain agreements or instruments made at the time of the conclusion of the treaty. With respect to the interpretation of a GATS Schedule, the Appellate Body in *US – Gambling* has stated that this context includes: (i) the remainder of the Member's Schedule, (ii) the substantive provisions of the GATS, (iii) the provisions of covered agreements other than the GATS, and (iv) the GATS schedules of other Members.[655] Accordingly, we will now examine our preliminary view of the meaning of China's commitment on "sound recording distribution services" in the context provided by these elements.

China's GATS Schedule

7.1183 We note that the entry "sound recording distribution services" is inscribed in Sector 2.D. of China's Schedule, entitled "Audiovisual Services", and that this sector is in turn one of the sector groups that China has inscribed in its Schedule. Since a panel "must give meaning and effect to all the terms of the treaty"[656], we consider that we must examine carefully for possible context the whole of China's Schedule. We consider that this examination should include in particular the inscriptions China has made for Audiovisual Services, as well as those made in other relevant sectors, notably Distribution Services and its related Annex 2.

7.1184 Recalling that our overall interpretative task, in light of the United States' claim, is to determine whether China's commitment on the supply of "sound recording distribution services" through commercial presence covers distribution in non-physical form, we begin with an examination of China's other inscriptions in the Audiovisual Services sector.

Audiovisual Services (Sector 2.D)

7.1185 China's commitment on "sound recording distribution services" falls within the sectoral heading of "Audiovisual Services". Having considered the ordinary meaning of this commitment, we now need to consider as possible context the following other elements inscribed under "Audiovisual Services": the meaning imparted by the sector heading itself; the scope of treatment guaranteed under the market access and national treatment columns that apply to "Sound recording distribution services"; additional commitments inscribed by China under the heading Audiovisual Services; and finally, other sub-sectors falling under audiovisual services including any specific commitments applicable to them.

7.1186 We begin our contextual examination of China's GATS Schedule by examining the wording of the sector heading – Audiovisual Services – that the commitment on sound recording distribution services falls within. We observe that the core meaning of the term "audiovisual" means "pertaining to both hearing and vision."[657] This meaning suggests that the scope of "Audiovisual Services" extends to activities in which content is sensed by the user through the faculties of hearing or vision. It would not appear to exclude any service from its scope on the basis of the medium on which the content may be coded, stored or transferred. This suggests that a service in China's Schedule which

[655] Appellate Body Report on *US – Gambling*, para. 178.
[656] Appellate Body Report on *US — Gasoline*, p.23, DSR 1996:I, 3, at 21.
[657] *Oxford English DictionaryOnline*, available at http://dictionary.oed.com./entrance.dtl.

appears under the heading "Audiovisual Services", unless it is specifically modified in the wording of the sectoral entry, relates to such core services as producing, distributing, projecting or broadcasting content ("hearing or vision").

7.1187 We next examine for relevant context the specific commitments undertaken for "sound recording distribution services". These specific commitments – the inscriptions made in the columns entitled "limitations on market access", "limitations on national treatment" and "additional commitments" – serve to qualify the extent of the commitment being undertaken for "Sound recording distribution services", but may also provide context for the scope of sectoral coverage to which that commitment applies, and which is inscribed in the "sector or sub-sector" column. In this light, we note that in the "limitations on market access" column of its Schedule, China has inscribed the following with respect to supply through commercial presence:

> "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of *audiovisual products, excluding motion pictures*, without prejudice to China's right to examine the content of audio and video products (see footnote 1)". (emphasis added)

7.1188 The vertical placement of this commitment within its column shows that it applies to "Sound recording distribution services", as well as to "Videos, including entertainment software and CPC(83202), distribution services". The wording of the commitment is particularly relevant for our purposes, since it provides further information on the extent of the commitment in terms of its sectoral scope, namely "audiovisual products, excluding motion pictures". Examining more closely this wording, we note that it refers specifically to audiovisual "products". We observe that the term "product" in contemporary usage refers to services as well as goods, a view that finds support in the Oxford English Dictionary, which defines this term in its commercial sense as "[a]n article or substance that is manufactured or refined for sale (more recently applied also to services)."[658] We note also that the CPC, on the basis of which document W/120 was drawn up, and to which many Members including China make reference in their schedules, is about "products" that include both goods and services. We find therefore that the use of the term "audiovisual *products*" in China's market access commitment is a further indication that "sound recording distribution services" are not limited to the distribution of physical products, but extend also to the distribution of intangible products and services.

7.1189 Continuing our examination of the wording of China's market access commitment, we note that China excludes "motion pictures" from the distribution of "audiovisual products" that are the subject of its market access commitment. It seems clear to us that China's specific exclusion of the distribution of "motion pictures" indicates that this service is considered by China to be within the normal sectoral scope of "audiovisual products". Further, in responding to a question from the Panel, China indicates that the distribution of motion pictures is not considered to be the distribution of a physical good.[659] It follows that China accepts implicitly that the distribution of non-physical

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[658] *Oxford English Dictionary Online*, available at http://dictionary.oed.com/entrance.dtl.

[659] China's response to question No. 86. The Panel notes in this respect that the CPC contains, under its services section, a category referring to the production of motion pictures (96112). Obviously, the simple production of a good could not be said to constitute a service, nor would it make sense to undertake commitments under the GATS as regards the production of a good. The CPC also contains, under the same section, a category relating to the distribution of motion pictures (96113). Since the production of motion pictures could not be said to relate to the production of a good in this context, we similarly consider that the distribution of motion pictures cannot there relate to the distribution of physical goods, but rather to that of an intangible product. We also note that the CPC uses the term "cinematographic film" when referring to physical goods (CPC 3895). The wholesale and retailing of cinematographic films is therefore found in the CPC section on distribution services (CPC 62263; CPC 63254), which is solely concerned with the distribution of physical

products is included within the scope of "audiovisual products" mentioned in China's market access column. Likewise, the distribution of "audiovisual products" (which as we have seen includes the distribution of non-physical products) in China's market access commitment must logically be included within the scope of the sub-sector inscribed in the sector column of China's Schedule. This is further evidence, in the view of the Panel, that "sound recording distribution services" includes distribution of non-physical products. The Panel notes that this conclusion applies also to the other sub-sector covered by the market access commitment, "Videos (...) distribution services", which we deal with in a later section of these findings.

7.1190 We now examine the column entitled "Additional Commitments" contained in the Audiovisual Services section of China's schedule. In this column, China has committed to 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." Both parties agree that this means 20 distinct titles (content), and not 20 physical copies of titles (goods). In the Panel's view, the entry in this column, which is scheduled alongside, and therefore in relation to, the specific commitments on "videos (...) distribution services" and on "sound recording distribution services" further suggests that the sectoral scope of these entries cannot be said to refer solely to physical products, to the exclusion of services relating to content.

7.1191 In conclusion, our examination of the market access commitments under Audiovisual Services (which cover "audiovisual products" excluding "motion pictures"), as well as our analysis of the entry under additional commitments (which refers to the import of content, not physical products), provides context that lends support to our preliminary view that China's entry on "Sound recording distribution services" does not exclude the distribution of music and other sound content as non-physical products. We note that this conclusion applies also to the other sub-sector covered by China's market access commitment, "Videos (...) distribution services", which we deal with in a later section of these findings.

7.1192 Having explored the context provided by China's market access commitment for "Sound recording distribution services", we now examine the other two sub-sectors inscribed by China under the heading "Audiovisual Services", for further contextual meaning. These two other sub-sectors are: "Videos, including entertainment software and (CPC 83202), distribution services", and "Cinema Theatre Services".

7.1193 With respect to the first of these subsectors, "Videos, including entertainment software and (CPC 83202) distribution services", we will demonstrate later in paragraphs 7.1320 to 7.1349 that it covers, *inter alia*, the distribution of videos embedded in a *physical* carrier, but is not limited to that. We find in those paragraphs that the ordinary meaning of the terms in the entry in light of their context indicates that the sectoral coverage of "Videos (...) distribution services" extends to the distribution of video content.

7.1194 As also demonstrated in paragraphs 7.1334 to 7.1336 the terms "distribution services" in the context of the subsector "Videos (...) distribution services" appears to have a broad meaning in the specific context of China's Schedule. First, the term "distribution services" can cover the distribution of both physical and non-physical products. Second, the subsector description includes the services defined in CPC 83202, which encompass rental-leasing activities, and the movement of products along the network of commerce to the final consumer. We consider that the concept of "distribution services" in China's entries relating to videos and to sound recording must have similar meaning. This view is reinforced by our observation that the text of the market access column referring to the "distribution of audiovisual products", as well as the entries in the national treatment and additional

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goods. We note that such approach is enshrined in the W/120 and reproduced by various Members in their schedules of commitments under the GATS.

commitment columns are common to both "Sound recording distribution services" and "Videos (...) distribution services". Further, we see nothing in China's Schedule that would contradict such reading and that would suggest that "distribution services" in the context of this particular entry has a narrower meaning. Indeed, we recall that China has chosen not to specify in its Schedule the scope of its sectoral entry, nor to include a reference to a particular CPC category.

7.1195 We now consider the contextual relevance of the remaining sub-sector under Audiovisual Services – "Cinema Theatre Services". The wording of this entry would suggest that the main activity in this sub-sector is exhibiting motion pictures to the public, together with any ancillary services. With respect to "Cinema Theatre Services", China has inscribed a market access limitation, for supply through commercial presence, as follows:

> "Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent".

7.1196 The wording of this commitment indicates, with respect to supply through commercial presence, that the sectoral scope of the commitment goes beyond projecting motion pictures to include a service supplier seeking to "construct and/or renovate cinema theatres". We note, however, that this service activity appears to be covered also by China's commitments under "Construction and Related Engineering Services", in Sector 3 of its Schedule. This sector contains a specific reference to CPC 512, which itself contains a sub-sector 51250 ("For public entertainment buildings"), which is described as "Construction work (incl. new work, additions, alterations and renovation work) of public entertainment buildings such as cinemas ...". At first glance, the construction or renovation of cinema theatres would seem to be covered by both Audiovisual Services and Construction Services sectors.

7.1197 The activity of construction or renovation of cinema theatres cannot, however, fall under both sectors at once if ambiguity in the level of commitments is to be avoided. In support of this principle, the Appellate Body in *US – Gambling* has stated that

> "[B]ecause a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."[660]

7.1198 The mutual exclusivity of sectors and subsectors in Members' Schedules is further explained by the Appellate Body in these terms:

> "If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other."[661]

7.1199 Given the specific textual reference to "construction and renovation of cinema theatres" within Audiovisual Services, and the impermissibility for, as noted by the Appellate Body for the same service to be covered under different sectors, we deduce that China has chosen to cover this activity solely under Audiovisual Services, and not under Construction and Related Engineering Services.

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[660] Appellate Body Report on *US – Gambling*, para. 180.
[661] Appellate Body Report on *US – Gambling*, para. 180, footnote 219.

7.1200 We draw three inferences from China's sectoral placement of its commitment covering the construction and renovation of cinema theatres. First, it would appear to indicate that China wished also to group under the heading Audiovisual Services activities that are related to audiovisual services, even if these services have been classified in another sector under relevant classification systems or according to practices of other WTO Members. Second, as a consequence of this grouping of related activities under the audiovisual sector, the range of services included in that sector are wider-ranging than would otherwise be the case.

7.1201 In particular, the inclusion within "Cinema Theatre Services" of services "to construct and/or renovate cinema theatres" shows that sectoral inscriptions under Audiovisual Services contain services that are not focused on the core activities of production, distribution or reproduction of audiovisual content, but also on services that are only auxiliary to such core activities, and that would have been classified in other sections of the Schedule, under relevant classification systems or according to practices of other WTO Members. With respect to our interpretation of the scope of "Sound recording distribution services", this could be an indication that China may have included within its scope service activities (such as the distribution of content embedded in physical products such as CDs and DVDs) that might otherwise be included in another sector (such as Distribution Services) of its Schedule. This may be an indication that the scope of "Sound recording distribution services" extends (as agreed by the parties in this case), to the distribution of content embedded in physical products. However, it does not address the issue of whether the commitment extends also to the distribution of content not embedded in physical products, but conveyed to the consumer on a non-physical carrier.

7.1202 Third, we consider that the entry "Cinema Theatre Services", despite the fact that it apparently extends to activities normally covered in sectors other than "Audiovisual Services", still has at its core the service that is normally understood to fall within "Audiovisual Services": namely services relating to audiovisual content, in this case the projection or exhibition of motion pictures. This suggests that China's apparent desire to expand the scope of commitments normally falling under audiovisual services – by including services and activities normally classified in other sectors – has not come at the expense of excluding from sector 2.D the services that would normally be considered to be subject to scheduling under "Audiovisual Services", that is, those relating to audiovisual content. This is consistent with the view that the entry on "sound recording distribution services" includes what is normally considered an "Audiovisual Service", namely the distribution of sound recordings as content, especially since China has not indicated otherwise in its Schedule.

7.1203 In summary, the context provided by China's inscriptions in the Audiovisual Services sector of its Schedule support the view that the entry on "Sound recording distribution services" extends to the distribution of content in non-physical products.

Distribution Services (Sector 4)

7.1204 Having examined the inscriptions China has entered in the Audiovisual Services sector of its Schedule, we now examine the entries China has made in other sectors to discover any context useful in determining the meaning of "sound recording distribution services". What is striking is that distribution services are covered, more generally, in Sector 4 of China's Schedule, entitled "Distribution Services (as defined in Annex 2)". Annex 2 lists four main sub-sectors: commission agent services, wholesaling, retailing, and franchising. The Annex states at the outset that the "principal services rendered in each subsector can be characterized as reselling merchandise". For commission agents' services, wholesaling, and retailing it specifies that these services consist of the sale of "goods/merchandise". Accordingly, it is clear to us that Annex 2, and the sector on Distribution Services which refers to it, applies only with respect to commission agents' services, wholesaling, or retailing of goods or merchandise – in other words, the distribution of all *physical* products. The only goods that China's commitments under Distribution Services do not cover are

those explicitly listed in the corresponding sector column – salt and tobacco for commission agents' and wholesale services, and tobacco for retail services.

7.1205 In our view, had China's relevant entries under Audiovisual Services (namely "Sound recording distribution services" and "Video (...) distribution services") been intended to cover exclusively audiovisual products in physical form, there would have been no need to insert these entries under a sector other than Distribution Services, where the distribution of physical goods are generally covered in China's Schedule. Thus, it is reasonable to presume that the coverage of the entries in China's Schedule under "Audiovisual Services" should extend to the distribution in *non-physical* form of audiovisual products. In reaching this view, we recall that, in order to ensure unambiguous commitments, the sectors and subsectors in a Member's Schedule must be mutually exclusive, and that a specific service cannot therefore be interpreted as falling within two different sectors or subsectors.[662]

7.1206 The Panel notes China's view that the reference to goods and merchandise, contained in Annex 2 on Distribution Services supports China's position that "Sound recording distribution services", in similar fashion, involves only physical products. We observe however that the definition of "distribution services" contained in Annex 2 appears not to apply to services other than those covered under Sector 4 – Distribution Services. First, China's heading on "Distribution Services" is accompanied by the qualifier "as defined in Annex 2", whereas the heading on "Audiovisual Services" makes no mention of any Annex. Second, the terminology of Annex 2 has little in common with that used in China's commitments on Audiovisual Services. The terms defined in Annex 2 – "commission agents' services", "wholesaling services", "retailing services", and "franchising services" – are used in various sector-specific commitments under Distribution Services, but not under Audiovisual Services or any other sector listed in China's Schedule. Similarly, the definition of "distribution services" in Annex 2 generally accords with the nature of the services listed under Distribution Services in China's Schedule, which principally involve "reselling merchandise". Finally, the term "distribution services" is not used within the GATS and Members' schedules to mean solely "reselling merchandise". China itself indicates, for example, that "motion picture distribution services" is not concerned with the distribution of goods or merchandise.[663] We are therefore not convinced that the definition of "distribution services" contained in Annex 2 is applicable to Audiovisual Services, or that the definitions in Annex 2 suggest in any way that the "distribution services" referred to under Audiovisual Services cover only audiovisual content embedded in physical products.

7.1207 The Panel wishes to recall at this point that the US claim on "Sound recording distribution services" covers only the distribution of the non-physical product. Although not within the scope of the claim, both parties agree that "Sound recording distribution services" concerning the *physical* product are covered in China's Schedule under Audiovisual Services, and not under Distribution Services where distribution of the physical product is generally covered. Since this is not an issue that we are asked to rule on in the present dispute, we make no determination on it.

7.1208 Having examined China's Schedule for useful context for the interpretation of "Sound recording distribution services", we now examine whether provisions of the GATS itself can shed light on this matter.

Provisions of the GATS

7.1209 The Panel recalls that a Member's Schedule, according to Article XX:2, is an integral part of the GATS, and the provisions of the GATS thus apply to the inscriptions in China's Schedule. In examining the definitions in Article XXVIII(b) of the GATS, we note that "the supply of a service" is

[662] See paragraphs 7.1197 and 7.1198.
[663] China's response to question No. 86.

defined as including the "production, *distribution*, marketing, sale and delivery of a service" (emphasis added). This definition makes clear that the activity of "distribution" is included within the notion of the supply of a service. Since a "service" is intangible and not itself a good (although the supply of a service may well involve goods), this definition suggests that the supply of a service listed in a Member's Schedule, unless otherwise specified, can cover the distribution of non-physical products, such as sound recordings delivered over the Internet. In our view, therefore Article XXVIII:(b) of the GATS is further support for the view that the supply of "sound recording distribution services" that China has committed to in its Schedule applies, unless otherwise specified in its Schedule, to the distribution of the intangible content of sound recordings, and is not limited, as China argues, to the distribution of sound recordings as physical products.

GATS Schedules of other Members

7.1210 The Panel observes that other Members' GATS Schedules, like China's, form part of the GATS. They are treaty text, and reflect the common intention of all Members. Under Article 31 of the Vienna Convention, GATS Schedules can therefore provide context for the interpretation of China's commitment on "Sound recording distribution services". We recognize however the need for caution, recalling the Appellate Body's view that "use of other Members' Schedule as context must be tempered by the recognition that each Schedule has its own intrinsic logic"[664].

7.1211 As noted above, China has argued that Korea's position on the scope of Korea's own commitment on sound recording provided support for China's view that its commitment in the same area only concerns the distribution of the physical product, not the electronic distribution of content.[665] Korea, as a third party, has indeed indicated that it considered its entry to cover only sound recordings in physical form.[666]

7.1212 We observe that the relevant entry in Korea's Schedule reads as follows: "Record production and distribution services (Sound Recording)".[667] In examining this sectoral entry, we note that it subordinates the phrase "Sound Recording" by enclosing it in parentheses. What Korea focuses its commitment on is specified as "*record* production and distribution services" (emphasis added). Among the dictionary meanings of "record", the most relevant in this usage appears to be:

> "A disc or, formerly, a cylinder from which recorded sound or television pictures can be reproduced. Occasionally also, a recording made on magnetic tape."[668]

7.1213 We note that the cited dictionary meaning of "record" refers to the medium on which content is recorded, and not primarily to the content itself. On the basis of this meaning, we cannot agree with China's view that the wording of Korea's commitment, coupled with Korea's statement that its commitment covers sound recordings only in physical form, supports China's interpretation of its own commitment on "sound recording distribution services".

7.1214 The Panel also observes that, apart from China and Korea, 15 Members have made commitments relating to sound or audio recording under Audiovisual Services.[669] Of these, two have linked "sound recording" explicitly to the notion of distribution services. The inscriptions in the column "sectors and sub-sectors" of the Schedules of these Members read as follows:

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[664] Appellate Body Report on *US – Gambling*, para. 182; Panel Report on *US – Gambling*, para. 6.98.
[665] See also China's response to question No. 240 and United States' comments on China's response.
[666] Korea, response to question No 3.
[667] GATS/SC/48.
[668] *Oxford English Dictionary Online*, available at http://dictionary.oed.com/entrance.dtl.
[669] Armenia, Cape Verde, Central African Republic, Georgia, Hong Kong China, Japan, Jordan, Kyrgyz Republic, Malaysia, Panama, Singapore, Chinese Taipei, Tonga, United States, and Vietnam.

Malaysia: "Motion Picture, video tape and audio recording distribution services (CPC 96113)".[670]

Singapore: "the services covered are production, distribution and public display of – motion pictures; - video recordings; - sound recordings".[671]

7.1215 With respect to Malaysia's sectoral entry, which refers to "audio recording distribution services", this phrase appears to be synonymous with "sound recording distribution services" (since the only change is the substitution of the word "audio" for "sound"), the ordinary meaning of which we have examined above. We recall from our previous examination that the word "recording" (unlike the word "record") refers primarily to *content*, and not to the medium on which content is embedded. We therefore do not consider that the entry "audio recording distribution services" in Malaysia's Schedule lends support to China's view that its commitment is restricted to the distribution of audiovisual content embedded in a physical product. The same can be said of Singapore's entry on the "production, distribution and public display of motion pictures; video recordings; sound recordings", in that the ordinary meaning of the terms "sound recordings" can be analysed the same way as that of "sound recording" in China's Schedule.

7.1216 In view of China's arguments in relation to Korea's Schedule, we note two important aspects in examining more generally how Members have made commitments in their Schedules on the distribution of sound recordings. First, when Members' services schedules specify commitments for audiovisual products in physical form, they tend to do so under their sector on Distribution Services. Second, when Members' services schedules mention sound recordings in physical form (either to specify their inclusion or exclusion from a commitment), they tend to do so (unlike China) by using terms referring to the medium on which the sound recording is embedded. For both these points, we observe that, although the practice of other Members is in no way binding on any Member, this practice at the very least does not lend support to China's interpretation that its commitment under Audiovisual Services covers only sound recordings in physical form. Illustrating these two points, we note that:

(a) Canada has specifically excluded from its wholesale and retailing commitments under Distribution Services such physical products as "musical scores, audio and video recordings in 62444" (wholesale) and "music scores, audio and video records and tapes in 63234" (retailing).[672]

(b) Some Members, namely Albania, Croatia, Estonia, Latvia, Lithuania, Moldova and Peru[673], which all acceded to the WTO before China, underscore in their section on Distribution Services that their wholesale and/or retailing commitments cover audio and video records and tapes mentioned in the relevant CPC number. These are specific physical products.[674]

(c) Some other Members, including Cambodia, FYR Macedonia, Nepal, Ukraine and Vietnam, which all acceded to the WTO after China, expressly specified under Distribution Services that their wholesale and/or retail commitments covered audio records, scores and tapes, which are all physical products.[675]

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[670] GATS/SC/52.
[671] GATS/SC/76.
[672] GATS/SC/16.
[673] Peru is an original WTO Member.
[674] GATS/SC/131; GATS/SC/130; GATS/SC/127; GATS/SC/126; GATS/SC/133; and GATS/SC/134.
[675] GATS/SC/138, GATS/SC/139, GATS/SC/140, GATS/SC/142, and GATS/SC/144.

7.1217 Although this point was not raised in the parties' arguments, the Panel notes further that some Members, under the Audiovisual Services heading of their schedules, have taken commitments specifically on "distribution services", typically in relation to "motion pictures and video tapes" (CPC 96113).[676] We observe that CPC 96113 defines these services as involving "the sale or rental of movies or tapes *to other industries* for public entertainment, television broadcasting, or sale or rental to others." (emphasis added) However, the Panel does not consider that this inscription, contained in some other Members' schedules, suggests that the "distribution services" mentioned in China's Schedule in "Sound recording distribution services" are restricted to distribution "to other industries", as in the case of the services described in CPC 96113. We observe that China has included no reference to the CPC for its commitment on "Sound recording distribution services", nor has it otherwise defined in specific terms what this sectoral entry entails. Further, as discussed above and in the subsequent section, the particular context in which China's sectoral annotation is found, in particular the accompanying entry on "video, including entertainment software and (CPC 83202), distribution services", in no way suggests that the "distribution services" in China's entry on "sound recording distribution services" are restricted to what is spelled out in CPC 96113.

7.1218 We therefore find that the context provided by the Schedules of other Members, does not point to an interpretation in any way different from that suggested by the other contextual elements we have examined – that China's entry on "Sound recording distribution services" in the Audiovisual Services sector of its Schedule extends to sound recordings distributed in non-physical form.

Object and purpose

7.1219 We now verify whether our interpretation of China's commitment on "Sound recording distribution services" is consistent with the object and purpose of the GATS. We note that the Preamble of the GATS indicates that the Agreement is aimed, *inter alia*, at establishing "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization". In light of this general object and purpose, the Preamble also provides that commitments negotiated under the Agreement should aim at "securing an overall balance of rights and obligations" between the Members. We find that our interpretation of China's commitment on "Sound recording distribution services" is consistent with this object and purpose.

Preliminary conclusion

7.1220 The Panel has now completed its interpretation of the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" according the rules set out in Article 31 of the Vienna Convention. After examining the ordinary meaning to be given to the terms of China's Schedule when read in their context and in light of the object and purpose of the GATS, we have reached the preliminary conclusion that this commitment extends to sound recordings distributed in non-physical form, through technologies such as the Internet.

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[676] These Members are: Armenia (GATS/SC/137), Cape Verde (GATS/SC/145), Georgia (GATS/SC/129), Hong Kong, China (GATS/SC/39), India (GATS/SC/42), Israel (GATS/SC/44), Japan (GATS/SC/46), Jordan (GATS/SC/128), the Republic of Korea (GATS/SC/48), Kyrgyz Republic (GATS/SC/125), Lesotho (GATS/SC/114), Malaysia (GATS/SC/52), New Zealand (GATS/SC/62), Nicaragua (GATS/SC/63), Oman (GATS/SC/132), Panama (GATS/SC/124), Saudi Arabia (GATS/SC/141), Singapore (GATS/SC/76), Chinese Taipei (GATS/SC/136/rev.1), Thailand (GATS/SC/85), Tonga (GATS/SC/143), the United States (GATS/SC/90), and Viet Nam (GATS/SC/142). Of these, we note that the commitments of Cape Verde, Saudi Arabia and Tonga - recently acceded Members - expressly specify or clarify in their schedules that their commitments on motion picture distribution services consist of the licensing of motion pictures.

Supplementary means of interpretation

7.1221 The Panel recalls that pursuant to Article 32 of the Vienna Convention a treaty interpreter may have recourse to supplementary means of interpretation "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable." The Panel considers that, in the circumstances of the present case, recourse to such supplementary means is useful to confirm the Panel's preliminary conclusion.

7.1222 We recall that we have found, in interpreting China's sectoral entry on "Sound recording distribution services" in accordance with Article 31 of the Vienna Convention, that the sectoral scope of this commitment covers the service of distributing non-physical products. However, the parties have presented arguments with respect to documents and circumstances that fall outside the scope of matters that may be considered under the interpretative rules in Article 31 of the Vienna Convention, but may be considered under the supplementary rules in Article 32. We will therefore proceed to examine: (i) preparatory work in the negotiation of the GATS, including documents that negotiators may have relied upon in drafting their Schedules, such as document W/120 and the 1993 Scheduling Guidelines, and (ii) the circumstances of the conclusion of the China's Protocol of Accession annexing China's Schedule to the GATS, in particular evidence of the existence at that time of distribution of sound recordings in non-physical form. We undertake this examination to confirm, as provided under Article 32 of the Vienna Convention, our view that China's sectoral entry includes the distribution of sound recordings in non-physical form.

Preparatory work – Document W/120 and the 1993 Scheduling Guidelines

7.1223 The Panel notes that in the preparation of their GATS schedules, Members generally used document W/120.[677] This document contains a re-arranged and more aggregated version of the five services sectors covered in the CPC. Document W/120 contains a list of 12 service sectoral headings, each (except for a heading "Other services not included elsewhere") further divided into subsectors. To give precision, each of the sectoral and subsectoral items is generally linked to the one or more CPC categories to which they correspond. The categories in document W/120, as well as in the CPC, are exhaustive and mutually exclusive. Statements made by several negotiators at the time of the issuance of document W/120 suggest that the document was not however meant to be a classification scheme that was binding on WTO Members.[678]

7.1224 A second GATT Secretariat document used by negotiators in the preparation of their Schedules is referred to as the 1993 Scheduling Guidelines.[679] These Guidelines set out principles and techniques to be used to draw up GATS Schedules. As an overarching principle, they stipulate that it is "vital that schedules be clear, precise and based on a common format and terminology". With respect to the classification of services sectors, the 1993 Scheduling Guidelines state that "in general" the classification "should be based on" document W/120. Further, any Member wishing to use its own subsectoral classification or definitions "should provide concordance with the CPC". If this were not possible, then the Member "should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment".

[677] MTN.GNS/W/120, dated 10 July 1991.

[678] Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, para. 19 (24 June 1991). The relevant part of this document is as follows: "The representative of the United States, Poland, Malaysia and Austria said that the list (W/120) should be illustrative or indicative and not bind parties to any specific nomenclature."

[679] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993.

7.1225 The Panel views document W/120 and the Scheduling Guidelines as important elements of the preparatory work leading to the conclusion of the GATS, a position that is supported by the Appellate Body in *US – Gambling*.[680] In that case, the Appellate Body stated that document W/120 and the 1993 Scheduling Guidelines "provided a common language and structure which, although not obligatory, was widely used and relied upon". The Appellate Body further emphasized the importance of these two documents, in confirming the interpretation of a GATS Schedule reached under Article 31 of the Vienna Convention, by quoting approvingly the panel's statement that, "unless otherwise indicated in the Schedule, Members were assumed to have relied on W/120 and the corresponding CPC references."[681]

7.1226 We now examine China's Schedule to determine whether document W/120 and the 1993 Scheduling Guidelines confirm our earlier view that its inscription on "Sound recording distribution services" covers the service of distributing non-physical products, by technologies such as the Internet.

7.1227 We observe first that China's Schedule overall follows the same structure, naming and numbering scheme as document W/120, including CPC references. All the first-level sectors that China has inscribed in its Schedule (apart from Business Services, where it lists sub-sectors without referring to any first-level sector), as well as the great majority of sub-sectors listed, adopt the same terminology, numbering scheme and CPC references as document W/120. Even when China has chosen not to inscribe a W/120 sector in its schedule (as in "8. Health Services" and "10. Recreational, Cultural and Sporting Services"), China's Schedule respects the resulting gap, and maintains the same specific numbering as in document W/120. China's Schedule is not identical to document W/120 – China has not, for example, used the same sub-sector wording or CPC codes referred to in document W/120 for its commitments under Audiovisual Services. Nonetheless, the commonality with document W/120 in structuring, naming and numbering of the great majority of sectors and sub-sectors indicates that China drew up its Schedule in light of document W/120, and that this document can impart some meaning to those entries. Indeed, as the Appellate Body stated, "unless otherwise indicated in the Schedule, Members were assumed to have relied on W/120 and the corresponding CPC references".[682] We therefore disagree with China that only the specific entry under examination for its consistency with GATS commitments – "Sound recording distribution services" – is relevant for the interpretation of the sectoral scope of this commitment.[683] It is clear to us that the context and structure in which these specific entries are found can be relevant in their interpretation. Furthermore, although the document W/120 and the 1993 Scheduling Guidelines were prepared in light of original Members' Schedules that entered into force with the WTO Agreement in 1995, there is no evidence before us that these documents have been any less important in drawing up the GATS Schedules of Members, such as China, that have since acceded to the WTO.

7.1228 The Panel will now examine the detailed structure of China's Schedule. It contains nine first-level, sectoral headings that, as stated, correspond largely in name and number to those contained in document W/120. In particular, the heading titled "2. Communications Services" in China's Schedule, under which Audiovisual Services is classified, is the same in name and numbering as in document W/120. The first-level listings compare as follows:

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[680] Appellate Body Report on *US – Gambling*, para. 196.

[681] Appellate Body Report on *US – Gambling*, para. 204, quoting the Panel Report on *US – Gambling*, para. 6.106.

[682] Appellate Body Report on *US – Gambling*, para. 204, quoting the Panel Report on *US – Gambling*, para. 6.106.

[683] China's response to question No. 239.

	China's Schedule		W/120
1.	(Sector heading omitted)	1.	Business Services
2.	Communication Services	2.	Communication Services
3.	Construction and Relating Engineering Services	3.	Construction and Relating Engineering Services
4.	Distribution Services	4.	Distribution Services
5.	Educational Services	5.	Educational Services
6.	Environmental Services	6.	Environmental Services
7.	Financial Services	7.	Financial Services
…	*(sector omitted)*	8.	Health Services
9.	Tourism and Travel Related Services	9.	Tourism and Travel Related Services
...	*(sector omitted)*	10.	Recreational, cultural and sporting services
11.	Transport Services	11.	Transport Services
...	*(sector omitted)*	12.	Other services not included elsewhere

7.1229 Under "Communication Services", China has listed "Audiovisual Services", which we note also corresponds in name and numbering to the equivalent subsector in document W/120. However, as regards the sub-sectors within Audiovisual Services, China has chosen not to follow document W/120, and has not added the CPC reference numbers that are found in document W/120. The three sub-sectors that China has inscribed in Audiovisual Services compare to those contained in document W/120 as follows:

China's Schedule	W/120	
2.D. Audiovisual services	**2.D. Audiovisual services**	
- Videos, including entertainment software and (CPC83202), distribution services	a. Motion picture and video tape production and distribution services	9611
	b. Motion picture projection services	9612
	c. Radio and television services	9613
	d. Radio and television transmission services	7524
- *Sound recording distribution services*	e. *Sound recording*	*n.a.*
- Cinema Theatre Services		

Note: emphasis added, vertical spacing of entries is adjusted to aid comparison of similar items.

7.1230 China's entry on "Sound recording distribution services" appears to be based on a modification in the wording and scope of the W/120 subsector on "Sound recording". However, since there is no CPC number indicated in document W/120 for "Sound recording", the interpretative value of any correspondence between the W/120 subsector and the entry in China's Schedule is not immediately evident. Likewise, China's entry on "Videos ... distribution services" would appear to be related, but only distantly, to the W/120 subsector on "Motion picture and video tape production and distribution services". Finally, China's entry on "Cinema Theatre Services" appears to include the

services in the W/120 subsector on "Motion picture projection services", but also appears to cover other auxiliary cinema services.[684]

7.1231 We recall that China's Schedule generally follows the structure of document W/120, even though it does not do so in every case and, as we have seen, not for the subsectoral entries falling within Audiovisual Services. However, since China uses the same title and numbering for "2.D. Audiovisual Services" as does document W/120, it seems appropriate to try to confirm our interpretation of the scope of China's commitments on Audiovisual Services by comparing the scope of the services included under the same heading in document W/120. These services include the production and distribution of motion pictures and video tapes (CPC 9611), and the projection of motion pictures and video tapes (CPC 9612). Also included are "radio and television services", which refer to the production of radio and television programmes (CPC 9613) and to radio and television transmission services" (CPC 7524), which refers to the broadcasting of television and radio signals. "Sound recording" is also included, although with no corresponding CPC category.

7.1232 The Panel observes that the type of service referred to under Audiovisual Services in document W/120 appears to focus on audiovisual *content*, as opposed to the physical form on which the content may be stored or transferred. For example, the production and transmission of television and radio programmes refers to intangible activities, and not to physical products as such, even though physical products may naturally be used to provide services (e.g. a television set to receive the television signals and allow the viewing of the television programming). This is unsurprising, in our view, since the GATS deals with trade in services. Trade in services, while often involving goods in some way, essentially cover activities and these are intangible. The Audiovisual Services sector in document W/120 thus appears to focus on the activities of production, distribution, and reproduction of audiovisual *content*, and related services, and does not appear to limit its scope by indicating any particular medium on which that content must be stored or transferred. For the reasons stated above, this interpretation of the meaning of "2.D Audiovisual Services" in document W/120 sheds additional light on the meaning of the heading "2.D. Audiovisual Services", and the entries under it, that are contained in China's Schedule, unless the particular wording and context of China's commitment would indicate otherwise.

7.1233 In this respect, the Panel notes that the inclusion of the terms "video tape" under the heading of Audiovisual Services in document W/120 ("motion picture and video tape production and distribution services", CPC 9611) might initially suggest that this sector focuses also on physical goods. Indeed, the terms "video tape" commonly refers not only to content, but also to the physical medium. However, in our view, this wording does not undermine the focus on content within Audiovisual Services in document W/120. Indeed, looking at the CPC categories cross-referenced in document W/120, we note that the heading CPC 9611 reads "motion picture and *video* production and distribution services" (emphasis added). The sub-classes 96112 and 96113 then use the term "video tape" when referring to production and distribution. Since 96112 and 96113 fall under 9611, we are not convinced that the intention in the CPC was to refer to something different from services related to content. In our view, this is confirmed by the fact that CPC 9611 – more specifically 96112 – refers to video tape production services. Under the CPC classification system, the production of goods is not an activity that normally appears within the CPC section devoted to services, and therefore not within the scope of services listed in document W/120. We therefore do not consider that the reference to "video tape" in the W/120 should alter our observation above that the heading Audiovisual Services comprises services relating to content.

[684] The "Cinema Theatre Services" subsector in China's Schedule also appears to comprise services normally classified as construction services, as indicated in paras. 7.1195 to 7.1202 and 7.1345 to 7.1347 of our analysis.

7.1234 The Panel further notes that when the CPC, on which document W/120 is based, refers to audiovisual content embedded in a physical product, it uses unambiguous terms referring to the medium, and not the general term "sound recording". In the goods section of the CPC, physical media containing recorded sound are described as "records, tapes and other recorded media for sound or other similarly recorded phenomena (except cinematographic film)" (CPC 47520). CPC 47520 is further referenced in the definition of relevant CPC categories for commission agents' services (CPC 62114), wholesale trade services (CPC 62244) and retail services (CPC 63234), which are all characterized as sale of merchandise. Likewise, for unrecorded physical media, the CPC refers to "prepared unrecorded media for sound recording or similar recording of other phenomena (except cinematographic film)" (CPC 47510). This listing of types of physical media further confirms the view that the term "sound recording" is not limited to physical media on which sound has been recorded.

Circumstances of the conclusion of the GATS – "nascent and unfamiliar service"

7.1235 **China** argues that the electronic distribution of sound recordings as an established business and the legal framework for such business emerged only after the negotiation of its GATS Schedule and its accession to the WTO. According to China, this was part of the circumstances of the conclusion of its GATS Schedule that have to be taken into account when interpreting its commitment on "sound recording distribution services".

7.1236 The **United States** responds that the commercial or legal status of the business at the time of China's accession is not relevant. Even if it were, according to the United States, the electronic distribution of sound recordings existed well before China's accession, and China was aware of this fact at the time of its accession to the WTO.

7.1237 The **Panel** considers that, in seeking to confirm the "common intention of Members" with respect to a commitment in a GATS Schedule, evidence on the technical feasibility or commercial reality of a service at the time of the service commitment may constitute circumstances relevant to the interpretation of its scope under Article 32 of the Vienna Convention.[685] This is particularly true where, like China's entry on "sound recording distribution services", the commitment is not explicitly linked to a well-defined system of services classification, such as the CPC. At the same time, the significance of any evidence of lack of technical feasibility or absence of commercial reality of the service at the time of the service commitment would need to be carefully evaluated. We consider therefore that any evidence that sound recordings delivered in non-physical form were not, unlike today, technically possible or commercially practiced at the time China's Schedule was negotiated might, in principle, be relevant as a supplementary means of interpretation with respect to the scope of that commitment.

7.1238 A first issue to consider is at what point in time the evidence should be assessed. In answer to a Panel question, China states: "... the decisive point in time – when having recourse to the circumstances of the relevant treaty conclusion – is the time span before the Sino-US accession negotiations were concluded, i.e. by 15 November 1999."[686] China claims that the negotiations of China's GATS Schedules were concluded at the same time.[687] In examining this issue, we note that,

[685] The Appellate Body in *EC – Computer Equipment* stated: "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intention of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectation' of one of the parties to a treaty." (Appellate Body Report on *EC – Computer Equipment*, para. 84). In that case, the Appellate Body also said: "The fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members." (*Ibid.*, para. 109)

[686] China's response to question No. 231.

[687] China's first written submission, para. 478 including original footnote 238.

in accordance with Article XII of the WTO Agreement, a State may accede to the WTO "on terms to be agreed between it and the WTO" – not terms agreed between it and individual WTO Members. We note that a Working Party was established on 7 December 1995, pursuant to Article XII of the WTO Agreement to examine China's accession application.[688] While China undertook certain bilateral market access negotiations with respect to goods and services at the request of interested Members of the Working Party, bilateral agreements between China and individual WTO Members could not be considered as agreements with the WTO.

7.1239 We note further that the Working Party on China's Accession continued to meet regularly after 15 November 1999, the date of the conclusion of bilateral negotiations claimed to be significant by China.[689] The Working Party's last meeting took place on 17 September 2001 and its Report was circulated to WTO Members on 1 October 2001. China's draft Services Schedule, which was annexed to the draft Protocol on China's Accession, was circulated at the same time (document WT/ACC/CHN749/Add.2). China's Accession Protocol, including its GATS commitments, contains the terms of accession agreed between China and the WTO, and reflects the common intention of China and the WTO. This common intention was formed when the final text of the Protocol was approved by the WTO on 10 November 2001 and was accepted by China on 11 November 2001.[690] The circumstances which may be examined in order to assess this common intention include those arising up to the moment that approval was given by the WTO and China. We note that this view on when the evidence of the circumstances should be assessed accords with that of the Appellate Body in *EC – Chicken Cuts* when it stated that "the circumstances of the conclusion should be ascertained over a period of time ending on the date of the conclusion" of the treaty at issue.

7.1240 We now look at the evidence presented by the parties on the technical feasibility and commercial practice with respect to the electronic distribution of sound recordings before and at the time of China's Protocol of Accession. The parties do not dispute the technical feasibility of the electronic distribution of sound recordings at this time. Indeed, distribution of music on the Internet, largely unauthorized, had existed for quite some time before legitimate online music services emerged in the late 1990s. With respect to overall commercial practice, the *2004 Online Music Report* by the International Federation of the Phonographic Industry, submitted to the Panel by China, states that the commercial origins of electronic downloading of sound recordings go back at least as far as 1998, when a commercial site began selling music singles and albums on the internet in the United States.[691] Other commercial sites followed, and by the early 2000s record companies were expanding their licensing agreements across a wide variety of online retailers, beginning to licence the *Catalogue*s of major international performers, and shortening the gap between off-line and online releases.[692] With respect to the commercial situation in China, the United States presents evidence of a joint-venture agreement, dated 21 February 2000, between an American firm and a Chinese enterprise, to distribute music electronically within China.[693] Although China considers that this joint venture had not resulted in the establishment of any website in China by mid-2001, it does not present evidence that

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[688] Following China's accession application pursuant to Article XII of the WTO Agreement, the existing Working Party on China's Status as a GATT 1947 Contracting Party was transformed into a WTO Accession Working Party, effective from 7 December 1995.

[689] The Working Party on the Accession of China met on 13 occasions from March 2000 to September 2001.

[690] China's Accession Protocol was adopted by a decision of 10 November 2001 at the WTO's Ministerial Conference. China notified its acceptance to the WTO on 11 November 2001. China became a Member of the WTO on 11 December 2001.

[691] The report states that in 1998, eMusic.com began selling singles and albums in mp3 format on the web in the US. The Report continues to say that by the summer of 2001, OD2 launched its WebAudioNet platform, enabling retailers to offer legitimate services in Europe. See *2004 Online Music Report*, Exhibit CN-57.

[692] *2004 Online Music Report*, Exhibit CN-57.

[693] Exhibits US-85 and US-100.

the parties to this "cooperative agreement" did not have, in 2000, the intent to supply music electronically within China.

7.1241 We also note that, within the WTO, the background note on Audiovisual Services prepared by the Secretariat, dated on 15 June 1998, makes the factual statement that the "distribution [of audiovisual content] can be through physical media such as CD-ROMs, as well as through the Internet or the other new networks".[694]

7.1242 Thus, the evidence presented by the parties suggests that the electronic distribution of music had become a technical possibility and commercial reality, albeit limited, by 1998, and in any case before the entry into force of China's GATS Schedule following its accession to the WTO on 11 December 2001.

7.1243 We note China' argument that, whatever the commercial reality with respect to the electronic distribution of sound recordings, there was no international consensus on a legal framework for the protection of intellectual property rights until the entry into force of the WIPO Copyright Treaty in 2002. In answer to a question by the Panel, China acknowledged however that the Copyright Treaty was adopted in 1996, and that China had participated in the negotiation of this treaty.[695] Whatever the date, however, we observe that the lack of an international framework of intellectual property rights with respect to the electronic distribution of sound recordings would not, in itself, be an impediment either to the legal supply of those services within a WTO Member, or that Member's ability to make full commitments on them in its Schedule.

7.1244 We note that China also raises arguments based on the absence of a domestic legal framework for the exploitation of music over the internet. According to China, this domestic legal framework was only put in place in its 2001 Copyright Law. China's first legally-authorized enterprise undertaking this activity was authorized in the same year. However, in its answer to a Panel's question, China states that the first draft of the amendment of the Copyright Law was provided to a committee of the National People's Congress in November 1998, but withdrawn in June 1999 because of the absence of any provision for the protection of copyright in network environments.[696] An amended version adopted in December 2000 filled in this gap in coverage.[697] This process shows that China was considering a legal framework for services related to online music business at least since 1999.

7.1245 Even if the electronic distribution of sound recordings had been shown not to be specifically permitted within China at the relevant time, the Panel takes the view that this would not in itself have prevented China from making a valid commitment on these services in its Schedule. A Member's service commitments need not reflect its existing legal framework. A number of Members, including China itself, have undertaken specific commitments whereby they have committed to guarantee a market access level higher than their regulatory regimes at the time the commitments were made.

7.1246 In sum, the record indicates that the electronic distribution of sound recordings had become a commercial reality in many markets before China's accession to the WTO. China was aware of this fact. The domestic legal framework for the electronic distribution of sound recordings in China, to the extent that this is relevant for our interpretation, was under consideration in China from as far back as 1998, although put in place only in 2001. China had clearly taken note of, and was altering its domestic law to take into account the commercial reality of electronic distribution of sound recordings before its accession to the WTO in 2001.

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[694] WTO document S/C/W/40.
[695] China's response to question No. 230.
[696] China's response to question No. 229.
[697] *Ibid*.

7.1247 We find therefore that the electronic distribution of sound recordings was technically feasible and a commercial reality as early as 1998 and, in any case, before China's accession to the WTO in December 2001. We are therefore not persuaded that the meaning of the phrase "sound recording distribution services" cannot extend to the distribution of sound recordings in non-physical form, for the reason that negotiators of China's GATS Schedule and, more broadly, WTO Members, had at the time no conception of the technical or commercial viability of this form of distribution. This finding is consistent with our earlier analysis, under Article 31 of the Vienna Convention, of China's commitment on sound recording distribution services.

Other arguments – "technological neutrality" and "relevant factors"

7.1248 The **United States** invokes the principle of "technological neutrality" to argue that any practical differences that may exist between the supply of sound recordings in physical and non-physical form are simply differences with respect to the "means of delivery". According to the principle of technological neutrality, these differences are not relevant to the interpretation of the scope of a GATS commitment, unless specified in a Member's Schedule. The United States asserts that the principle of technological neutrality was espoused by WTO Members in a report adopted by the General Council for Trade in Services, and supported by a statement by the panel in *US – Gambling*.

7.1249 **China** submits that a principle of technological neutrality cannot be invoked to make irrelevant, for the purpose of determining the scope of its GATS commitment, the practical differences between the supply of sound recordings in physical as compared to non-physical form. According to China, the principle of technological neutrality has never been formally accepted by Members. Even if the principle had been accepted, China claims that it only applies to different technologies used in the supply of the *same* service, which is not the case with respect to the distribution of sound recordings in non-physical, as compared to physical, form. For China, the services at issue, which are distributed on a non-physical medium, are different services ("network music services"), and not "sound recording distribution services".

7.1250 Having dismissed the status and relevance for this case of a principle of technological neutrality, China then argues that it is necessary to examine a number of relevant "factors" with respect to the two service activities, in order to determine whether they constitute the same or different services. These factors vary case-by-case, with no single one being decisive. In the present circumstances, China states that four factors are important: "essential operational characteristics", "perception of the end-users", "international classification", and the applicable "international recognized legal framework".[698] China argues that these factors, applied to the services at issue, are sufficiently divergent to indicate that the distribution of sound recordings on non-physical media is a different service from the distribution of sound recordings using physical media. Thus, according to China, the services at issue, which involve the use of non-physical media, do not fall within China's commitment on sound recording distribution services. The "network music services" are different, and for that reason the principle of technical neutrality is not applicable.

7.1251 The United States responds that there is no textual basis whatsoever for distinguishing and classifying services according to a relevant "factor" approach.[699] Furthermore, for the United States, there are practical difficulties that arise in attempting to apply the factors advanced by China. The United States notes that the application of the first two factors mentioned by China produce widely varying results across different services as well as different means of supply. The United States also points out that the application of certain other factors mentioned by China to the services at issue do not consistently result in differences between sound recording distribution on physical as opposed to

[698] China's response to question No. 97(a).
[699] United States' second written submission, paras. 157-161.

non-physical media, and that there are other flaws with respect to the application of the remaining factors.

7.1252 The **Panel** notes that, in seeking to assess the interpretative value of the differences that arise in the supply of the services at issue, compared to the supply of sound recording distribution services using physical media, the parties have invoked two principles or tests. The United States invokes the principle of "technological neutrality" to say that any such differences should not be interpreted to narrow the scope of China's commitment on sound recording distribution services. China argues to the contrary that a series of relevant "factors" must be examined, and that these lead in this case to the interpretation of its commitment as not including the distribution of sound recordings on non-physical media, which is a separate service ("network music services") for which China has not taken GATS commitments.

7.1253 We recall that in determining the scope of China's commitment on "sound recording distribution services", we have sought to apply the customary rules of interpretation of public international law, as set out in Articles 31 and 32 of the Vienna Convention. In doing so, we have examined the ordinary meaning of the terms of China's commitment, in the context provided by the rest of China's Schedule, the provisions of the GATS, and other Members' Schedules. We have arrived at an interpretation of the words that China, after negotiation with other WTO Members, chose to inscribe in its Schedule – "sound recording distribution services". These words have not been further qualified by China with respect to the medium on which the audio content is distributed.

7.1254 We observe that a Member is free, when making a commitment, to add greater precision to its Schedule by qualifying the terms of the commitment. That greater precision may qualify the scope of a service with respect to a wide range of attributes. A Member may, for example add descriptive terms that specifically exclude a service supplied in a certain way, or include that service under a different heading with different commitments. A Member may also add precision (unlike China in this case) by referring directly to a product classification system, such as that contained in document W/120 or the CPC. A reference to an external classification system is in fact recommended in the Scheduling Guidelines.[700]

7.1255 Further emphasizing the need to specify any desired qualifications to the scope of inscribed services, we note the statement by the Appellate Body that a commitment with respect to a service includes a commitment with respect to all of its sub-services.[701] This, to us, is further evidence that the appropriate interpretation of the scope of a commitment flows primarily from the meaning of the terms of that commitment. A panel cannot read into a schedule qualifications that do not arise from an interpretation carried out in accordance with the rules set out in Article 31 of the Vienna Convention. It is on this foundation that we have interpreted the core meaning of China's commitment on "sound recording distribution services" to cover the distribution of audio content in non-physical form.

7.1256 In light of our interpretation of China's commitment, we now examine the US argument on "technological neutrality". This principle, according to the United States, establishes that any differences between the supply of the sound recording distribution services on physical, as compared to non-physical, media are merely "technological", and thus should not, unless specified in China's Schedule, serve to narrow the scope of China's commitment. The United States derives this principle from a statement in a Progress Report on a "Work Programme on Electronic Commerce", dated

[700] The 1993 Scheduling Guidelines indicate that where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognized classification. See para. 16 of the Guidelines.

[701] Appellate Body Report on *US – Gambling* para. 180.

19 July 1999, prepared by the Council for Trade in Services for the General Council.[702] The statement says:

> "It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied."[703]

7.1257 We note that this statement has been referred to by the panel in *US – Gambling*. That panel, in examining the range of possible means of delivery included in a full market access commitment on cross-border supply, concluded that such a commitment includes "all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule."[704] The panel in that case added that this was "in line" with the principle of technological neutrality that "seems to be largely shared among WTO Members" as evidenced by the statement in the Progress Report.[705]

7.1258 We note, however, that in interpreting China's commitment on "sound recording distribution services", we have no need to invoke a principle of technological neutrality. We have already found that the core meaning of China's commitment on these services includes the distribution of audio content on non-physical media. The principle of technological neutrality might have come into play had we found that China's commitment covered distribution on physical media and that there was doubt about whether it also covered the distribution of content on non-physical media. But this was not the case here.

7.1259 We now turn to China's argument that, to determine whether the services at issue – the distribution of sound recordings on non-physical media – are covered by China's commitments on "sound recording distribution services", we need to examine four relevant "factors". According to China, these factors would include in this case: "essential operational characteristics", "perception of the end-users", the "international classification", and the applicable "international recognized legal framework".[706]

7.1260 While these four factors might be illuminating in an analysis of policy perspectives, the Panel finds that they are of limited value in arriving at, or confirming a proper interpretation of, the relevant commitment in China's Schedule. Importantly, we also observe that China has offered no textual basis for these four factors.

7.1261 Even when China seeks to apply these factors to the practical differences between the distribution of sound recordings on non-physical and physical media, in order to show that these activities are different services, the resulting analysis is far from clear. The United States puts forward cogent arguments showing that the analysis of certain elements in China's factor analysis does not lead to an unambiguous result.

7.1262 We examine, for example, China's analysis of the factor of "international classification". China points to the draft of the forthcoming CPC version 2, which creates a new category explicitly

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[702] S/L/74.

[703] *Work Programme on Electronic Commerce – Progress Report to the General Council*, adopted by the Council for Trade in Services on 19 July 1999, S/L/74, 27 July 1999. para. 4. This view was not, however, unanimous since the Report adds that "[s]ome delegations expressed a view that these issues were complex and needed further examination".

[704] Panel Report on *US – Gambling*, para 6.285

[705] *Ibid.* The reference by that panel to the principle of technological neutrality was not referred to by the Appellate Body in its report on the subsequent appeal in that case.

[706] China's response to question No. 97(a).

covering the distribution of sound recordings using non-physical media.[707] At the same time, the forthcoming CPC maintains an entirely separate category for the distribution of sound recordings in physical form.[708] For China, this is a further indication that the distribution of sound recording using non-physical media is a different service from the distribution of sound recordings on physical media, and that the former is not covered by China's commitment on "sound recording distribution services".

7.1263 We do not, however, find this reference by China to the forthcoming CPC version 2 to be relevant in determining the issue before us. The Panel recalls that it has not based its finding that China's commitment on "sound recording distribution services" covers the distribution of non-physical media on an assumption that this activity is the same service as the distribution of sound recording using physical media. Further, we note that China's commitment on "sound recording distribution services" does not refer to the CPC, nor provides any further definition of the covered service. Finally, we note that the new categorization in the forthcoming CPC was completed well after agreement was reached on China's Schedule.

7.1264 For all these reasons, we find that China's "factor" approach sheds little light on the issue before us, and that the principle of technological neutrality, whatever its status within the WTO, is likewise not needed in this case for the proper interpretation of China's commitment on "sound recording distribution services".

Conclusion

7.1265 Overall, based on the above considerations, we conclude that the inscription of "sound recording distribution services" under the heading of Audiovisual Services (Sector 2.D) of China's Services Schedule extends to the distribution of sound recordings in non-physical form, notably through electronic means.

(b) Whether the measures at issue are inconsistent with China's national treatment commitments (Article XVII)

7.1266 The Panel will now examine whether the measures at issue are inconsistent with China's national treatment commitments under Article XVII of the GATS for the supply, through commercial presence, of sound recording distribution services.

7.1267 The **United States** claims that several Chinese measures accord less favourable treatment to foreign-invested entities, compared to like Chinese ones, that seek to engage in the electronic distribution of sound recordings, and that this treatment is inconsistent with China's commitments under Article XVII. According to the United States, these Chinese measures include: the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, the *Several Opinions*, the *Catalogue* and the *Foreign Investment Regulation*.

7.1268 The United States submits that the *Circular on Internet Culture*, the *Network Music Opinions*, and the *Several Opinions* each explicitly prohibit foreign-invested entities from distributing sound recordings electronically, and that each is inconsistent with China's commitments under Article XVII of the GATS. The United States contends that the *Internet Culture Rule*, on the other hand, does not on its own provide for less favourable treatment for foreign-invested enterprises engaging in sound

[707] A new group 843 covers "On-line content" with a new class 8432 "On-line music content". This in turn covers two subclasses: 84321 "Musical audio downloads", and 84322 "Streamed audio content". We note that the CPC version 2 is now in final form.

[708] Subclass 61242 covers "Wholesale trade services on a fee or contract basis, of radio and television equipment and recorded audio and videodiscs and tapes", which explicitly includes goods of group 476, which in turn includes subclass 47610 "physical media".

recording distribution services, but sets up an overarching regime that, as implemented, accords less favourable treatment to foreign-invested suppliers.

7.1269 The United States argues that the *Catalogue* and the *Foreign Investment Regulation* are also part of the regime prohibiting foreign-invested entities from engaging in the electronic distribution of sound recordings. The United States points to Article X:7 of the *Catalogue*, under the heading "*Catalogue* of Prohibited Foreign Investment Industries", which 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". The United States further notes that the *Foreign Investment Regulation* provides guidance on the meaning of terms in the *Catalogue*. Accordingly, for the United States, the *Catalogue* and the *Foreign Investment Regulation* are together inconsistent with Article XVII of the GATS because they modify the conditions of competition in favour of like wholly Chinese-owned entities.

7.1270 **China** does not provide specific responses to the arguments of the United States, relying instead on its argument that the services at issue are not within the scope of "sound recording distribution services" appearing in its Schedule. In its answer to a question from the Panel, China confirms that foreign-invested entities are prohibited from engaging in the supply of the services at issue.[709]

(i) Requirements of Article XVII

7.1271 The **Panel** begins its analysis by recalling the terms of paragraph 1 of Article XVII, which reads:

> "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

7.1272 The wording of Article XVII indicates that we need to determine: (a) whether the services at issue are inscribed in China's Schedule; (b) whether the measures at issue affect the supply of these services; (c) the extent of China's national treatment commitment, including any conditions or qualifications, with respect to these services entered in its Schedule; and (d) whether these measure accord less favourable treatment to service suppliers of other Members, in comparison to like domestic suppliers.

Whether the services at issue are within the scope of services listed in China's Schedule

7.1273 With respect to this element, we have already made a finding above that the services at issue are indeed within the scope of "Sound recording distribution services" inscribed in China's Schedule, and are therefore subject to any national treatment commitment that China may have indicated.

Whether the measures at issue are "affecting" trade in services

7.1274 With respect to this element, we consider that, since the measures at issue (and which are examined in detail below) directly govern the suppliers of the services at issue, they "affect" the supply of these services in the sense of Article XVII, and the parties have not argued otherwise.

[709] China's response to question No. 81.

Extent of China's national treatment commitment for "sound recording distribution services" supplied through commercial presence

7.1275 We must now determine the extent of China's national treatment commitment for "Sound recording distribution services". In the national treatment column of its Schedule corresponding to the sectoral entry on "Sound recording distribution", China has inscribed "None". This means that, with respect to this mode of supply, China has committed not to introduce or maintain any limitations with respect to national treatment for "Sound recording distribution services".

7.1276 Despite this initial indication of a full national treatment commitment by China for the services at issue, we can only have a full picture of this commitment by looking as well at the inscriptions in the market access column for the corresponding sector and mode of supply, and at China's horizontal commitments.

7.1277 Turning first to the *market access* column for Audiovisual Services, we note that China has inscribed, for commercial presence, the following :

> "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)."

7.1278 We note that the vertical position of this inscription in the market access column shows that it applies to the services at issue – "sound recording distribution services". The inscription indicates that China allows foreign service suppliers to engage in the distribution of audiovisual products, including sound recordings, through the establishment of contractual joint ventures. The only limitation on market access that China is entitled to maintain for "sound recording distribution services" under Article XVI of the GATS is therefore a joint venture requirement on foreign investment, made subject to a content review requirement. Since this limitation applies to service suppliers solely of foreign origin, it must also be read, by virtue of Article XX:2 of the GATS, as a limitation on China's national treatment commitments on "sound recording distribution services". China has not, therefore, committed to full national treatment for the services at issue supplied through commercial presence.

7.1279 Turning next to the *horizontal* section, we recall that the inscriptions here apply, unless otherwise specified in individual sector commitments, to commitments in all sectors listed in China's Schedule. Here, with respect to commercial presence, China has not indicated any national treatment limitations. It has, on the other hand, inscribed market access limitations. Only three forms of foreign-invested enterprises are permitted: foreign capital enterprises (also referred to as wholly foreign-owned enterprises), equity joint ventures, and contractual joint ventures. Contractual joint ventures are permitted to be established in China for the purpose of supplying services. Foreign investment in equity joint ventures must account for a minimum of 25 per cent of total registered capital; no maximum percentage is indicated. Further limitations in the horizontal section of China's Schedule are also applicable to the services we are concerned with, but these limitations are not at issue in this claim.[710]

7.1280 Summarizing our analysis, we find that China's national treatment commitment on "sound recording distribution services", supplied through commercial presence, is limited by requiring that

[710] These elements contain limitations to market access commitments for commercial presence concerning branches, representative offices, existing agreements and licences, as well as land usage periods. They also contain limitations to national treatment concerning existing subsidies for domestic services suppliers in three sectors, including audiovisual services.

foreign service suppliers take the form of a contractual joint venture. China's national treatment commitment for the services at issue is also limited by other types of measures indicated in the horizontal section of its Schedule but, as stated, these are types of measures that are not at issue in this dispute.[711]

Interpretative issues on the treatment of like service suppliers

7.1281 Finally, we must assess whether each of the measures at issue is inconsistent with Article XVII because it results in "treatment less favourable than that [China] accords to its own like services and service suppliers". We will make this final assessment for each measure in part VII.D.2(b)(ii) below, but need now to clarify three preliminary issues.

Service suppliers "of any other Member"

7.1282 As a first preliminary issue, we note that Article XVII:1 establishes rights and obligations with respect to "service suppliers of any other Member". The measures at issue, however, and China's commitments in its Schedule, refer to the supply of services by a "foreign-invested entity". Recalling the relevant definitions set out in Article XXVIII of the GATS, we observe that any "foreign-invested entity" supplying the services at issue in China, and that is owned or controlled by persons of another Member, is a service supplier "of any other Member" within the terms of Article XVII. In the absence of any contrary evidence before us, we find that there are, or can be, foreign-invested enterprises that are foreign-owned or controlled, and thus "service suppliers of any other Member".

Service suppliers that are "like"

7.1283 As a second preliminary issue, we observe that Article XVII:1 requires that treatment be assessed between domestic and foreign services or service suppliers that are "like". Since the United States focuses its claim on the treatment of suppliers rather than services, we will likewise centre our analysis on the likeness of the suppliers of the services at issue.

7.1284 We note that the measures at issue (examined in detail in part VII.D.2(b)(ii) below) are alleged by the United States to contain prohibitions on the right to establish and supply the services at issue – thereby according less favourable treatment to services suppliers of other Members exclusively on the basis of origin. When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.

7.1285 In examining the specific measures at issue, discussed in more detail below, we have no reason not to believe, nor have the parties argued, that the measures do not accord different treatment to foreign suppliers based exclusively on their foreign origin. We therefore find that, with respect to these measures, there will, or can, be "like" service suppliers in the sense of Article XVII.

Measures that are discriminatory prohibitions

7.1286 As our third preliminary issue, we recall that the United States alleges that the measures at issue concern a prohibition with respect to foreign suppliers seeking to supply the services at issue. The United States further asserts that the prohibition does not extend to wholly-owned Chinese entities supplying these services.[712] Since the record does not indicate otherwise, and China does not

[711] Except as regards existing subsidies to domestic service suppliers.
[712] United States' first written submission, para. 154.

contest this assertion, we accept that wholly Chinese-owned entities are permitted to engage in Internet cultural activities that involve the services at issue.

7.1287 Recalling our earlier discussion on this point, we find also that, to the extent a discriminatory prohibition can be identified in the measures at issue, foreign suppliers of the services at issue are prevented from competing with like Chinese suppliers, and less favourable treatment in terms of Article XVII can be inferred. A total absence of competition between the domestic service suppliers and like service suppliers of other Members resulting from the measure would, if shown, clearly modify the conditions of competition in favour of wholly Chinese-owned service suppliers.

(ii) Measures at issue

Coverage of electronic distribution other than through the Internet

7.1288 We now examine the six Chinese measures that the United States has invoked, in order to determine whether the scope of these measures suggest a wider or narrower meaning be given to "digital" distribution of sound recordings. The United States identifies and lists in its panel request six Chinese measures: the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, the *Several Opinions*, the *Foreign Investment Regulation* and the *Catalogue*. We will examine whether the scope of these measures extends to the electronic distribution of sound recordings by means *other* than the Internet.

7.1289 The parties agree that five of the measures cited by the United States in its panel request specifically cover activities related to the Internet. The *Internet Culture Rule* governs "Internet cultural entities" engaging in "Internet cultural activities" with respect to "Internet cultural products".[713] The *Circular on Internet Culture* implements the *Internet Culture Rule*, and retains the same scope. The *Several Opinions* states that "[f]oreign investors are prohibited from setting up and operating ... a business dealing with Internet culture."[714] The *Foreign Investment Regulation* incorporates by reference the *Catalogue*, which states that foreign investment is prohibited in enterprises engaging in "news websites, network audiovisual program services, internet on-line service operation sites, and internet culture operations."[715]

7.1290 The parties differ, however, on whether the *Network Music Opinions* applies to the transmission of sound recordings through electromagnetic means other than the Internet. This measure is drawn up based on, *inter alia*, the *Internet Culture Rule*,[716] and consists of three sections and two attachments. The United States bases its argument on the view that the measure applies to distribution means other than the Internet by quoting from Section I of the measure, entitled "Status Quo and Development Objectives of China's Network Music Market". Article 1 of Section I states:

> "In recent years, the network music market in our country has developed swiftly. Music products transmitted through such wired or wireless media as the internet and mobile communications have helped shape the digital music production, dissemination, and consumer models, thus promoting the network culture industry in China and enriching the cultural and recreational life of the people."

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[713] *Internet Culture Rule*, Articles 1-3 (Exhibit US-32).

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

[715] *Catalogue*, Article X.7 of the Catalogue of Prohibited Foreign Investement Industries (Exhibit US-5).

[716] The legal basis of the *Network Music Opinions* includes the Cultural Development Program of the National 11th Five-Year Plan, the State Council's Decision on Establishing Administrative Licensing for Administrative Examination and Approval Matters Necessary to be Retained and the *Internet Culture Rule*.

7.1291 Section I contains a narrative describing the development of China's network music market. The part quoted by the United States describes the recent development of China's network music market, in which music products are transmitted through wired or wireless media, including the Internet and mobile communications. The quote from the measure does not, however, prescribe that the measure applies to the transmission of music through means other than the Internet.

7.1292 Section II, entitled "Supporting the Healthy Development of the Network Music Industry", provides general guidance on the development of network music, including: ensuring correct value orientation, promoting the integration of technology and content, and enhancing the competitive ability of network music enterprises on the market. This section does not define the scope of application of the measure either.

7.1293 Section III, entitled "Regulating the Network Music Order", sets out a number of requirements that apply specifically to activities related to the Internet. No provision applies to the transmission of music through means other than the Internet. Article 8 states that the application for establishing an Internet cultural entity to engage in network music business shall meet the requirement of the *Internet Culture Rule*. Article 9 provides that, "for imported music products which are to be disseminated through a network and whose content has been reviewed by the Ministry of Culture, commercial Internet culture entities shall complete legal formalities (see attachment for relevant requirements)". Article 11 provides that the dissemination of illegal content shall be punished in accordance with Article 24 of the *Internet Culture Rule*, and that websites operated without approval or dealing in illegal content shall be investigated and punished pursuant to the same measure.

7.1294 The two attachments to the *Network Music Opinions* similarly refer specifically to activities related to the Internet. The first is a "Declaration Form to the Ministry of Culture for Importation of Network Music Works". It refers, *inter alia*, to the "operational website", the "IP address" and the "number of licence of the internet culture operation". Clearly, the form is meant to apply only to Internet culture entities. The second attachment is entitled "Procedures and Materials for Content Review of Network Music Products", and it likewise applies only to Internet culture entities.[717]

7.1295 We note that the United States points to a news report on the official website of the Chinese MOC as evidence of an official interpretation of the *Network Music Opinions*. The news item states that in the *Network Music Opinions*:

> "[M]usic was defined for the first time, referring to music products as transmitted through the Internet, mobile communication network as well as other wired and wireless media... This pattern is mainly composed of two parts: one is to provide – via the Internet – online music to be downloaded or played in the computer terminals; the other is for wireless network business operators to provide – through their value-added wireless services- wireless music to be played in the terminals of mobile phones, which is also known as mobile music. For the purpose of network music, the work "network" not just refers to what we normally call as the Internet. It refers to information networks, including telecommunication network, mobile Internet, cable television network, satellite communications, microwave communication, optical fibre communication, as well as other various interconnection between intelligent networks whose interaction is achieved based on the IP protocol."[718]

7.1296 The Panel notes that the original source of the news item is not the MOC, but "China Culture Market Net" (www.ccm.gov.cn), a website on China's culture market, sponsored by the Culture

[717] This attachment provides for the content review procedures that only apply to commercial Internet culture entities. *Network Music Opinions*, Appendix 2 (Exhibit US-34).

[718] Exhibit US-101.

Development Centre under the MOC and operated by an Internet culture company.[719] More important, the news report itself does not suggest that its understanding of the *Network Music Opinions* represents the official interpretation by the MOC. We are not convinced that such a news report, even if published on the Ministry website, can serve as an authoritative interpretation of the *Network Music Opinions* by the MOC. Even if the content of this news item were taken into account, we note that it indicates that for the purpose of network music, the interaction of networks involved is achieved based on the IP protocol.[720] In other words, transmission through the Internet is the essential element of network music.

7.1297 We also note that the *Internet Culture Rule* defines "Internet cultural activities" as primarily consisting of:

> "(1) Activities of producing, reproducing, importing, wholesaling, retailing, renting out or broadcasting Internet cultural products;
>
> (2) Putting cultural products online on the Internet, or sending cultural products through the Internet to end user's computers, fixed telephones, mobile phones, radios, TV sets, game players, etc. enabling Internet users to browse, read, appreciate, watch on demand, use or download the cultural products; and
>
> (3) Activities such as exhibitions and competitions of Internet cultural products."

7.1298 After examining the structure and content of the *Network Music Opinions* – as well as its relationship to the *Internet Culture Rule* – we find that this measure does not apply to the transmission or distribution of material, including music, without using the Internet.

7.1299 We conclude therefore that the measures at issue – the *Internet Culture Rule*, the *Circular on Internet Culture*, the *Network Music Opinions*, the *Several Opinions*, the *Foreign Investment Regulation* and the *Catalogue* – extend only to services at issue that depend at some stage on electronic distribution over the Internet. This, however, does not imply that the measures at issue do not cover services that may be initiated or terminated using technology other than the Internet, such as mobile phone systems.

Specific measures

7.1300 We now examine more closely the measures at issue, to determine whether as claimed by the United States they impose a prohibition on service suppliers of other Members, with respect to the supply through commercial presence of "sound recording distribution services".

Internet Culture Rule

7.1301 We note that the United States argues that the *Internet Culture Rule* sets up an overarching regime that, as implemented, prohibits foreign-invested entities from supplying sound recording distribution services, inconsistently with Article XVII.

7.1302 We first examine the scope of the *Internet Culture Rule*. It applies to persons engaging within the territory of China in "Internet culture activities".[721] These are defined in Article 3 as including

[719] http://www.ccm.gov.cn

[720] Internet is defined as a collection of interconnected networks using the Internet Protocol which allows them to function as a single, large virtual network. See the office website of the International Telecommunication Union: www.itu.int

[721] *Internet Culture Rule*, Article 4 (Exhibit US-32).

wholesaling and retailing on the internet (including through mobile telephones) of "internet cultural products". These are in turn defined in Article 2 as:

> "[C]ultural products produced, disseminated and circulated through the Internet, primarily consisting of: audiovisual products, game products, performances (drama) work of art, animated cartoons, and other Internet cultural products produced or reproduced by use of certain technological means to disseminate over the Internet."

7.1303 Since Internet culture activities include wholesaling and retailing Internet cultural products, which include audiovisual, products and thus sound recordings, we infer that sound recordings disseminated through the Internet are within the scope of application of the *Internet Culture Rule*.

7.1304 The main provisions of the *Internet Culture Rule* provide a legal framework for regulating "Internet culture activities", in particular the entities engaging in such activities. Article 4 defines "Internet culture entities" as "Internet information service providers approved by cultural administrations and telecommunications administrations to engage in Internet cultural activities". Articles 7 to 11 set out the requirements regarding the establishment of Internet culture entities. We observe, however, that no provision in the *Internet Culture Rule* appears explicitly to prohibit foreign investment in Internet culture entities, and thus to prohibit service suppliers who are foreign-invested entities from engaging in the electronic distribution of sound recordings over the Internet.

7.1305 We note that the United States challenges this measure *as implemented*. However, the United States has not demonstrated how this individual measure, as implemented, accords less favourable treatment to foreign-invested suppliers of sound recording distribution services compared to wholly Chinese-owned suppliers. We therefore consider that the United States has not made a prima facie case that the *Internet Culture Rule* accords less favourable treatment to foreign-invested suppliers of sound recording distribution services.

Circular on Internet Culture

7.1306 We now examine the *Circular on Internet Culture*, which serves to implement the *Internet Culture Rule*. Article II states that "[p]rovisionally, applications submitted by Internet information service providers with foreign investment for engaging in Internet cultural activities shall not be accepted." It is therefore evident that foreign-invested information service suppliers are explicitly prohibited from engaging in Internet cultural activities, for an indefinite period of time. Since the distribution of sound recordings over the Internet is one of the "Internet cultural activities" defined in the *Internet Culture Rule*, we find that the *Circular on Internet Culture* prohibits foreign-invested entities, including service suppliers of another Member, from supplying the services at issue.

Network Music Opinions

7.1307 Turning to the *Network Music Opinions*, we recall that it is a measure based in part on the *Internet Culture Rule*, which applies to Internet culture entities engaging in the network music business, including the transmission of music in digital form over the Internet. Article (8) of the *Network Music Opinions* states in clear terms that "it is prohibited to establish network cultural entities with foreign investment." As in the case of the *Circular on Internet Culture*, we find therefore that Article (8) of the *Network Music Opinions* prohibits foreign-invested entities, including service suppliers of another Member, from supplying the services at issue.

Several Opinions

7.1308 We now examine the *Several Opinions*. This is a measure issued jointly by several Chinese government departments, including the MOC. Article 4 prohibits foreign investors from "setting up

and operating a business dealing in internet culture". We understand that the reference to "Internet culture business" in the *Several Opinions* has the same meaning as "Internet cultural activities" referred to in the *Internet Culture Rule*, as the parties do not dispute this and that there is nothing on the record to suggest the contrary. We therefore find that Article 4 of the *Several Opinions* contains a prohibition on foreign-invested entities, including service suppliers of another Member, from supplying the services at issue.

Catalogue and the *Foreign Investment Regulation*

7.1309 Finally, we examine the *Catalogue* and the *Foreign Investment Regulation*. We note that 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 sites, and Internet culture operations". We understand that "Internet culture operations" refers to "Internet cultural activities", as the parties do not dispute this and that there is nothing on the record to suggest the contrary. With respect to the *Foreign Investment Regulation*, we observe that on its own it contains no prohibition on these activities.

7.1310 We recall our observations in paragraph 7.1037, with respect to the relationship between the *Catalogue* and the *Foreign Investment Regulation*. Based on this analysis, we find that Article X:7 of the *Catalogue*, under the heading "*Catalogue* of Prohibited Foreign Investment Industries", in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, prohibits foreign-invested entities from engaging in Internet cultural activities which include the services at issue.

(c) Conclusion

7.1311 The Panel finds that the *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), are each inconsistent with China's national treatment commitments under Article XVII of the GATS as each prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the electronic distribution of sound recordings, while like domestic service suppliers are not similarly prohibited. For the same reasons, Article X:7 of the *Catalogue*, under the heading "*Catalogue* of Prohibited Foreign Investment Industries", in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with Article XVII of the GATS.

7.1312 The Panel, however, does not find that the *Internet Culture Rule* in itself is inconsistent with Article XVII of the GATS.

3. Distribution of AVHE products in physical form: claims under Articles XVI and XVII of the GATS

7.1313 The United States puts forward claims under Articles XVI and XVII of the GATS concerning the distribution in China of audiovisual home entertainment (AVHE) products through commercial presence. It defines these products as including "videocassettes, video compact discs (VCDs) and digital video discs (DVDs)". Some provisions of the measures on which the US claims are based, have been determined by the Panel not to be within its terms of reference, and we are therefore unable to rule on them.[722] For the remaining claims, the Panel will first examine those relating to China's commitments on market access, and then those relating to national treatment. In each case, the Panel will examine the commitments on the services at issue that China has inscribed in its GATS Schedule, and then determine whether the measures raised by the United States are consistent with those commitments.

[722] See Section VII.B.6.

(a) Whether China has undertaken GATS commitments for the distribution of AVHE products in physical form

7.1314 The **United States** alleges that China maintains a limitation on foreign equity participation in contractual joint ventures engaging in the distribution of AVHE products through commercial presence, in violation of Article XVI:2(f) of the GATS. According to the United States, the limitation on foreign equity is maintained in four measures: the *Audiovisual (Sub-)Distribution Rule, the Catalogue, the Foreign Investment Regulation, and the Several Opinions*. Since China does not schedule this type of limitation in its market access commitments on mode 3 under "Audiovisual Services", the United States argues that each of the four measures constitutes a breach of Article XVI of the GATS. The United States also argues that these four measures are inconsistent with China's national treatment commitments under Article XVII of the GATS.

7.1315 **China** rejects the US claim, contending that the challenged measures do not provide for a limitation on foreign equity participation in contractual joint ventures engaging in the distribution of audiovisual products, contrary to Article XVI:2(f). According to China, the measures limit only the rate of profit and loss allocation between partners of these contractual joint ventures. For China, since Article XVI does not impose any obligations on Members to insert limitations with respect to the rate of profit and loss allocation in their GATS schedules, these measures do not violate China's obligations under this provision.

7.1316 The **Panel** observes that China's market access commitments under Article XVI and national treatment commitments under Article XVII only apply to the services at issue if it can be shown that these services are covered within the sectors inscribed by China in its Schedule. Our first task is therefore to define the services at issue, and to determine whether these fall within the scope of sectoral commitments that China has undertaken in its Schedule.

(i) Services at issue

7.1317 The Panel notes that the United States makes its claim with respect to the wholesale, retail and rental of AVHE products, which it defines as including "videocassettes, video compact discs (VCDs) and digital video discs (DVDs)", all of which are physical products. We will refer in this part to these distribution activities (wholesale, retail and rental of AVHE products) as the "services at issue".

Sectoral scope of China's entry on "Videos, including entertainment software and (CPC 83202), distribution services"

7.1318 The **United States** submits that China's inscription under Audiovisual Services for "Videos, including entertainment software and (CPC 83202), distribution services" covers the services at issue. The United States contends that China's inscription includes not only the distribution of the basic AVHE products specified above, but also the distribution of "videogames, computer games as well as the leasing or renting services concerning videocassettes."[723]

7.1319 **China** does not contest the US assertion that the distribution of AVHE products in physical form is covered by its GATS commitments under Audiovisual Services within "Videos, including entertainment software and (CPC 83202), distribution services". Although the distribution of products in physical form is generally covered in China's Schedule under the heading Distribution Services (Sector 4), China explains that it has chosen to group the distribution of products relating to the audiovisual sector under Audiovisual Services (Sector 2.D).

[723] United States' first written submission, para. 311.

7.1320 The **Panel** recalls that the services at issue in the US claim are the distribution through wholesale, retail or rental of audiovisual home entertainment (AVHE) products delivered in physical form, including videocassettes, VCDs, and DVDs. In order to determine whether these services are covered, as claimed by the United States, by China's commitment on "Videos, including entertainment software and (CPC 83202), distribution services", we must examine China's Schedule. China's commitments in its Schedule under Audiovisual Services (including here only the relevant commitments on mode 3 or commercial presence) read as follows:

Sector or sub-sector	**Limitations on Market Access**	**Limitations on National Treatment**	**Additional Commitments**
2. D. Audiovisual Services			
- Videos, including entertainment software and (CPC 83202), distribution services - Sound recording distribution services	(3) Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)	(3) None	Without prejudice to compliance with China's regulation on the administration of films, upon accession, China will allow the importation of motion pictures for theatrical release on a revenue-sharing bases and the number of such imports shall be 20 on an annual basis.
- Cinema Theatre Services	(3) Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent.	(3) None	

(Footnote 1 that is referenced here is a footnote contained in the Horizontal part of China's Schedule. It states that the operation, management and equity participation in a contractual joint venture are determined by the contract establishing it.)

7.1321 We note that the entry on "Videos, including entertainment software and (CPC 83202), distribution services" appears in the column of China's Schedule titled "Sector or sub-sector", indicating that China is making commitments for these services. Our task is to determine whether the services at issue – AVHE products distributed on a physical medium – are within the scope of the service inscribed by China in its Schedule. Since the description of the services at issue – distribution of "AVHE" products, and the terms used by the United States to describe further this activity – are not the same as the terms China uses in its entry, we must engage in an interpretation of China's Schedule.

7.1322 Noting that the claim by the United States concerns solely the distribution of audiovisual products in physical form, in particular videocassettes, VCDs and DVDs, the core interpretative issue before us is whether the entry applies to content distributed on these physical media. We note that China accepts that the entry covers the distribution of audiovisual products in physical form. The Panel recognizes, however, that a common view of the parties on the interpretation of an entry to a GATS schedule cannot be determinative.

Ordinary meaning

7.1323 As always, our interpretation begins with the *ordinary meaning* of the relevant terms in China's entry. At the outset, we observe that the sectoral entry that China has inscribed under Audiovisual Services – "Videos, including entertainment software and (CPC 83202), distribution services" – is not explicitly defined elsewhere in its Schedule. Nor is the entry as a whole explicitly defined through reference to an external services classification scheme, such as the CPC. Although part of the entry – the reference to CPC 83202 – is defined by linking to an external category definition, this constitutes only one element of a complete sectoral entry.

7.1324 We now turn to the precise wording of China's entry. We will look first at the ordinary meaning of the categories of product specified, namely "videos", "entertainment software", and "(CPC 83202)". We will then look at the ordinary meaning of the second element of the sectoral entry, which is "distribution services".

"videos"

7.1325 The United States argues that the term "videos" in China's entry means "film recorded on tape, DVD, etc." Consulting a dictionary, we find that the first-listed definition of the term "video" is "[t]hat which is displayed or to be displayed on a television screen or other cathode-ray tube; the signal corresponding to this."[724]

7.1326 This definition suggests that video, in itself, refers primarily to visual content, and not to a physical product. This interpretation is also suggested by the frequent combination of "video" with other terms such as "video on demand", "video transmission" or "recording of video". In these cases, the meaning of video also appears not to refer primarily to physical products as such. As well, in the goods section of the CPC, to which this entry makes reference, physical products are referred to as "video records and tapes", which also suggest that "video" refers primarily to content. We note that the use of the plural form of the term ("videos") in China's commitment does not appear to us to be determinative one way or the other, since there can be a plurality of different content just as there can be a plurality of physical products.

7.1327 We note, however, that a dictionary definition of "video" quoted by the United States defines this term as "film etc. recorded on videotape: colloquial = video cassette. Also, videotape as a recording medium."[725] This definition indicates that the term "video" can also be used to refer to the video content when embedded in a physical medium. In this colloquial sense, the term "video" refers to "video tape" or "video cassette" which, with recent technological development, would presumably include VCDs and DVDs. The dictionary we have consulted confirms this second meaning by stating that the term "video" can also refer to "videotape as a recording medium".[726] For the reasons indicated, however, we think that the term "video" can be used equally, if not primarily, to refer to visual content.

"entertainment software"

7.1328 We now examine the term "entertainment software". Starting with the word "software" we note that this term is defined in the dictionary as "[t]he programs and procedures required to enable a computer to perform a specific task, as opposed to the physical components of the system".[727] The

[724] *Oxford English DictionaryOnline*, available at http://dictionary.oed.com/entrance.dtl.
[725] *Shorter Oxford Dictionary*, 5th ed. (Clarendon Press 2002), Vol. II., p. 3534 (Exhibit US-42).
[726] *Oxford English Dictionary Online*, available at http://dictionary.oed.com/entrance.dtl.
[727] *Shorter Oxford Dictionary*, 5th ed. (Clarendon Press 2002), Vol. II., p. 2910.

term "entertainment" is defined in the same dictionary as "the action of occupying a person's attention agreeably" or "that which affords interest or amusement".[728]

7.1329 In our view, the term "entertainment software" can therefore be understood as meaning computer programs or procedures designed to interest or amuse its users. The Panel observes that these often take the form of video or computer games produced by the entertainment software industry. A core element of the software definition – "programs and procedures" – would indicate that the term "entertainment software" refers primarily to intangible content. Nevertheless, the Panel recognizes that such content – in the form of computer or video games, for example – is frequently, but not exclusively, distributed to consumers as a physical product. For that reason, it appears to us that the term "entertainment software" can refer, as a collective noun, not only to content distributed on a non-physical medium (such as the internet), but also using a physical medium (such as a DVD).

7.1330 We note that China's entry reads "Videos, *including* entertainment software ... ". The use of the term "including" indicates that the term "videos" is broad enough to encompass "entertainment software" which, as we noted, can include video and computer games distributed either on a non-physical medium, or as a physical product.

"CPC 83202"

7.1331 The inclusion of the phrase "and (CPC 83202)," is a rather terse addition to China's sector entry, consisting only of a numerical reference. It points to a specific category of the CPC which reads as follows:

> "83202 Leasing or rental services concerning video tapes
>
> Renting or hiring services concerning pre-recorded video cassettes for use in home entertainment equipment, predominantly for home entertainment."

7.1332 The Panel notes that the CPC definition explicitly refers to "video cassettes", which are clearly physical products. Since the term "videos" is stated to "include" CPC 83202, "videos" must include "video cassettes", and hence the physical product. Thus, the reference to CPC 83202 suggests that China's entry on "video, including entertainment software and (CPC 83202), distribution services" must cover at least *some* services related to physical products. Both parties consider that this is the case. We further observe that the CPC was published in 1991, before VCDs and DVDs existed. Noting that VCDs and DVDs are video recording media that have replaced video tapes in the market, it is reasonable to assume that CPC 83202 applies to VCDs and DVDs as well.

7.1333 The Panel reaches the preliminary view, based on an examination of the ordinary meaning largely as reflected in dictionary and other definitions, that the terms "videos" and "entertainment software" refer primarily to intangible content, but can refer also, in a colloquial sense, to the content as embedded in a physical product such as a videocassette, VCD or DVD. Viewed in light of the reference to "CPC 83202", we would consider that the terms "videos" and "entertainment software" in China's Schedule would include services related to the physical product. To reach a more definitive view, however, we need to proceed further and look at the context in which these words are used.

"distribution services"

7.1334 With respect to the meaning of "distribution services" in China's entry, we note that the parties consider that it covers at least the wholesale and retail of physical products. Both parties are also of the view that rental or leasing of video tapes referred to in CPC 83202 is covered by China's

[728] *Shorter Oxford Dictionary*, 5th ed. (Clarendon Press 2002), Vol. I., p. 936.

sectoral entry.[729] We note that China's entry reads "Videos, *including* … (CPC 83202), distribution services". The use of the term "including" would indicate that the rental of video tapes is part of video distribution. In our view, this suggests a broad scope for "distribution services" in the context of this specific entry.

7.1335 We do not think that the fact that the terms "including (...) CPC 83202" follow the term "videos" rather than the term "distribution services" should be interpreted to mean that CPC 83202 serves only to qualify the type of "videos" that are distributed. Rather, the inclusion of CPC 83202 in our view means that the service of renting and leasing forms part of the sectoral entry, and both parties agree on this. However, unlike China, we think that the use of the term "including" (instead of, say, "as well as") means that the activity of leasing or rental is comprised within the meaning of "Videos (...) distribution services" in this entry.[730]

7.1336 The Panel recalls that the issue before it is whether the activities subject to the claim – wholesale, retail and rental of hard-copy AVHE products – are covered by the entry under Audiovisual Services in China's Schedule. While there may be different definitions of "distribution services", a common activity in the distribution of goods is reselling, and the most common forms of reselling of goods are wholesale and retail. To the extent that physical products are covered by the entry under Audiovisual Services in China's Schedule, the term "distribution services" covers at least wholesale and retail. The reference to CPC 83202 in the entry indicates that the lease or rental of video tapes is also within the scope of the entry. This suggests that China's entry on "videos, including entertainment software and (CPC 83202), distribution services" does cover the services at issue.

Preliminary view based on ordinary meaning

7.1337 Based on an analysis of the ordinary meaning of the main terms in China's commitment, we take the preliminary view that the distribution of AVHE products is within the sectoral coverage listed by China under "videos, including entertainment software and (CPC 83202), distribution services" that appears under the sectoral heading of Audiovisual Services in China's Schedule. We will now analyse whether the contextual elements alter our reading of the scope of this committed sector.

Context

7.1338 We recall that the principles of treaty interpretation direct us to consider the ordinary meaning of treaty terms "in their context", and we turn next to consider the context provided by other elements in China's Schedule.

Market access entries

7.1339 The Panel observes further that, in the market access column under Audiovisual Services, China has inscribed the following:

> "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual

[729] However, the parties disagree on whether the rental or leasing of video tapes referred to in CPC 83202 is part of "distribution services" in Sector 2.D, or is a distinct activity. That said, they both agree that the sectoral entry as a whole covers both rental-leasing as well as reselling. See parties' responses to question No. 242, as well as the parties' comments on each other's responses to that question.

[730] In *Canada — Autos*, the panel found that a sectoral entry mentioning only "retailing" did not limit the scope of a CPC reference in the same entry that included "wholesale trade" (Panel Report on *Canada – Autos*, para. 10.278-10-282). This, in our view, underscores the significance of entering a CPC category in a Schedule.

> products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)." (footnote omitted)

7.1340 This limitation introduced by China in its Schedule refers to the distribution of "audiovisual products". Examining the dictionary meaning of the term "product", we note that it refers generally to "a thing produced".[731] In a trade sense, it is defined as "an article or substance that is manufactured or refined for sale (more recently also applied to services)".[732] We deduce that the term "product" can therefore be a good or a service, depending on the context in which it is used. Part of the context is the CPC, on the basis of which document W/120 was drawn up, and to which many Members including China make reference in their schedules, is about "products", and these include both goods and services. Turning to the term "audiovisual", we note that it is a composite of "audio" and "visual", meaning that it pertains to sound and vision.[733] The term "audiovisual products" as used by China to indicate a market access limitation, may therefore refer to goods with audio or video content, as well as to audiovisual services – that is, activities related to audiovisual content.

Distribution Services (Sector 4 of China's Schedule)

7.1341 The Panel notes that China's commitments under Distribution Services in Sector 4 of its Schedule cover the distribution of all goods (that is, physical products), except salt and tobacco for wholesale, and tobacco for retail. Accordingly, commitments on the wholesale and retail of audiovisual products in physical form might at first sight be interpreted as being covered under Distribution Services in Sector 4, rather than Audiovisual Services in Sector 2.D, of China's Schedule. As we have discussed earlier, these commitments cannot fall under both sectors at once.[734]

7.1342 Accordingly, we find that commitments on the wholesale and retail of physical audiovisual products could fall either under Audiovisual Services (Sector 2.D.) or Distribution Services (Sector 4) in China's Schedule, but not both. In resolving this interpretative issue, we note at the outset that the commitment at issue – "Videos, including entertainment software and (CPC 83202), distribution services" – is not, as a whole, referenced to a CPC number. Nor does the commitment correspond to any sub-category under "Audiovisual Services" in document W/120, although the same sector heading is used.

7.1343 We now examine more closely the nature of China's commitments under Distribution Services (including explanations referenced in Annex 2) in Sector 4 of China's Schedule. These commitments seem to cover, in principle, the distribution of all goods. The sectoral entries appearing under Distribution Services (Commission Agents' Services, Wholesale Trade Services, Retailing Services, Franchising and Wholesale or Retail Trade Services Away from a Fixed Location) do not specify the nature of the goods the distribution of which is subject to a commitment. By contrast, in document W/120 the nature of the goods that are distributed is specified by including CPC numbers of particular physical products. China has not included CPC numbers nor otherwise specified under the Distribution Services sector of its schedule the nature of the products for which it has made distribution commitments. That said, China has, in some cases, made specific reference to the coverage of certain products under Distribution Services. Tobacco, for example, is excluded from China's commitment on retailing services. China also indicates, in Annex 2 of its Schedule that "(d)istribution services are generally covered by CPC 61, 62, 63 and 8929". This suggests to us that, while China's commitments in Distribution Services sector appear to cover generally the distribution of all goods (except those expressly excluded), at the same time, they do not explicitly indicate whether the distribution of goods such as audiovisual products are covered under that sector.

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[731] *Oxford English DictionaryOnline*, available at http://dictionary.oed.com/entrance.dtl.
[732] *Ibid.*
[733] *Oxford English DictionaryOnline*, available at http://dictionary.oed.com/entrance.dtl.
[734] See paragraphs 7.1197, 7.1198 and 7.1205.

7.1344 We next look at China's commitments under the heading of Audiovisual Services in China's Schedule. In view of the reference to the CPC which brings in video cassettes, China's commitments under Audiovisual Services might be viewed as providing a more particular and specific treatment of commitments with respect to the distribution of audiovisual goods. For this reason, it is possible that the commitments under Audiovisual Services are intended to cover the distribution of the physical audiovisual products at issue. We note that both parties agree on this interpretation. However, as we observed above, the coverage of the entry "Videos, including entertainment software and (CPC 83202), distribution services" may be wider in scope than the distribution of audiovisual products in physical form.

Other sub-sectors within Sector 2.D.

7.1345 In order to provide further context for the meaning of China's entry on "Videos, including entertainment software and (CPC 83202), distribution services", we now examine the two other sub-sectors that China has inscribed under Audiovisual Services – "Sound recording distribution services" and "Cinema Theatre Services". We have found in paragraph 7.1265 that the scope of "Sound recording distribution services" extends to the distribution of non-physical products, and did not exclude that the distribution of physical products was also covered, although this last aspect was not the subject of the claim. With respect to "Cinema Theatre Services", we note that the term is undefined in China's Schedule. It would logically include the core activity of cinemas, which is the projection of motion pictures mentioned in document W/120, but would seem broader than that. The wording of China's limitations on market access under mode 3 for this sector indicates that "Cinema Theatre Services" include also certain construction/renovation activities:

> "Upon accession, foreign services suppliers will be permitted to *construct and/or renovate* cinema theatres, with foreign investment no more than 49 per cent." (emphasis added)

7.1346 The construction/renovation services mentioned in this limitation are however classified in document W/120 under Construction Services (Sector 3), not under Audiovisual Services (2,D.). This entry shows that China has chosen, with reference to the classification system generally utilized by Members in document W/120), to extend the scope of services activities coming within the audiovisual sector. It has done for "Cinema Theatre Services" what it has done for "Videos, including entertainment software and (CPC 83202), distribution services". In both cases, China has broadened the range of audiovisual services beyond those core services related to "content", to include related activities that would normally fall in other sectors in document W/120.

7.1347 The entry for "Cinema Theatre Services" shows that, like in the case of "Videos, including entertainment software and (CPC 83202), distribution services", China's Schedule contains services commitments that at first sight appear to overlap. As noted in paragraph 7.1196, the service of constructing cinemas is found, in the CPC, in category 51250. We already pointed out that China's commitments on construction services (Sector 3 in its Schedule) contain a specific reference to CPC 512, which itself contains CPC 51250. At the same time, in light of the specific reference in the market access column, the commitment on "Cinema Theatre Services" could also be understood to cover the construction of cinemas. In these cases, a panel needs to determine which entry represents a the actual commitment on the relevant services. This suggests that China intended in its Schedule to group everything to do with audiovisual activities under one heading, supporting the view that "Videos (...) distribution services" is intended to cover the distribution of physical products.

Object and purpose

7.1348 As we have done previously with respect to China's commitment on "Sound recording distribution services", we now verify whether our interpretation of China's commitment on "Videos

(...) distributions services" is consistent with the object and purpose of the GATS. As before, we note that the Preamble of the GATS indicates that the Agreement is aimed, *inter alia*, at establishing "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization". In the light of this general object and purpose, the Preamble also provides that commitments negotiated under the Agreement should aim at "securing an overall balance of rights and obligations" between the Members. We find that our interpretation of China's commitment on "Videos (...) distribution services" is consistent with this object and purpose.

(ii) Conclusion

7.1349 We have examined the meaning of China's commitment on "Videos, including entertainment software and (CPC 83202), distribution services" inscribed under Audiovisual Services in China's Schedule, based on its ordinary meaning, in its context, and in light of the object and purpose of the GATS. Based on this analysis, we conclude that China's commitment covers the services at issue – the wholesale, retail and rental of physical AVHE products. Noting that the parties agree with this interpretation, and have not referred to other means of interpretation to support this view, we do not consider there is a need to turn to a separate examination of supplementary means of interpretation under Article 32 of the Vienna Convention.

(b) Whether the measures at issue are inconsistent with China's market access commitments (Article XVI)

7.1350 The **United States** challenges four measures under this claim. According to the United States, each contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, inconsistent with Article XVI:2(f) of the GATS. More specifically, the United States points to Article 8 of the *Audiovisual (Sub-)Distribution Rule*, Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, Article 8 of the *Foreign Investment Regulation*, and Article 1 of the *Several Opinions*.

7.1351 **China** rejects the US allegation, contending that the US translation and interpretation of the relevant provisions in the measures at issue are incorrect. According to China, these provisions refer to the rate of profit and loss allocation between Chinese and foreign partners in contractual joint ventures, and not to the participation of foreign capital. China argues that since a requirement on the rate of profit and loss allocation is not among the six types of market access measures under Article XVI of the GATS, the measures at issue are not inconsistent with Article XVI.

(i) Requirements of Article XVI:2(f)

7.1352 The **Panel** observes that the market access commitments by China with respect to the services at issue are governed by Article XVI of the GATS, which states in relevant part:

> "1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, 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 share holding or the total value of individual or aggregate foreign investment." (original footnotes omitted)

7.1353 Paragraph 1 of Article XVI sets out the general principle that a Member must accord to services and service suppliers of other Members treatment no less favourable than that specified under the "terms, limitations and conditions" contained in its schedule. Paragraph 2 is more specific. It defines, in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain "unless otherwise specified in its Schedule". The six types of measures form a closed or exhaustive list, as indicated by the wording of the chapeau to paragraph 2 ("the measures … are defined as"). Under Article XVI, a Member undertakes a minimum standard of treatment, and is thus free to maintain a market access regime less restrictive than set out in its schedule, as confirmed in paragraph 1 which refers to a standard of "no less favourable" treatment. Of the six types of measures listed in Article XVI:2, only sub-paragraph (f), on limitations on the participation of foreign capital, has been invoked by the United States and is relevant to this claim.

7.1354 The wording of Article XVI indicates that we must next examine the precise terms of China's Schedule to determine whether, with respect to the services at issue, there is a market access commitment and, if so, what are the "terms, limitations and conditions" entered with respect to those commitments. We proceed to do so.

Extent of China's commitments on market access for the services at issue

7.1355 The Panel notes that in the market access column under Audiovisual Services (Sector 2.D), China has inscribed this limitation:

> "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)."

7.1356 This inscription states that foreign service suppliers are allowed to engage in the distribution of audiovisual products, limited however to the establishment of contractual joint ventures. In the Panel's view, this limitation falls under Article XVI:2(e), which refers to "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service". A footnote to China's market access limitation refers to yet another footnote in the horizontal section of China's Schedule. The horizontal section, together with the referenced footnote, describe further characteristics of permissible joint ventures, which we now examine.

7.1357 China's horizontal market access commitment under mode 3 describes three permissible forms of foreign-invested enterprise – foreign capital enterprises (also referred to as wholly foreign-owned enterprises), equity joint ventures and contractual joint ventures. For contractual joint ventures – the relevant form under this claim – footnote 1 of China's horizontal commitments states:

> "The terms of the contract, concluded in accordance with China's laws, regulations and other measures, establishing a "contractual joint venture" govern matters such as the manner of operation and management of the joint venture as well as the investment or other contributions of the joint venture parties. *Equity participation by all parties to the contractual joint venture is not required, but is determined pursuant to the joint venture contract*." (emphasis added)

7.1358 Footnote 1 of China's horizontal commitments states unequivocally that "[e]quity participation by all parties to the contractual joint venture is not required, but is determined pursuant to the joint venture contract." It is evident that China's entry neither requires nor sets any particular limit on foreign equity participation in a contractual joint venture, leaving that issue to be negotiated by the parties to the joint venture contract.

7.1359 We note that China has made other horizontal market access and national treatment commitments for commercial presence. These refer to branches, representative offices, existing agreements and licences, land usage, and existing subsidies. The parties have not referred to these other horizontal limitations, and we do not consider them relevant to this claim.

7.1360 We observe that the wording of China's commitments, with respect to market access through commercial presence in Audiovisual Services, including applicable horizontal commitments, indicates no explicit "limitation on the participation of foreign equity" in the sense of Article XVI:2(f). We recall that Article XVI:2(f) stipulates that any such limitations must be "in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment". Thus, limitations within the meaning of Article XVI:2(f) would need to take one of two forms: (1) a maximum percentage of capital that can be held by foreign investors; or (2) a total value of foreign investment, either by an individual investor or foreign investors as a whole. Thus, China has committed to allow foreign service suppliers to establish contractual joint ventures to distribute AVHE products, but in doing so has not inscribed in its Schedule, either under Audiovisual Services or in the horizontal section, any form of limitation on the level of foreign equity participation in these contractual joint ventures.

(ii) The measures at issue

7.1361 The Panel will now examine each of the four measures at issue to determine whether they constitute "limitations on the participation of foreign capital", within the meaning of Article XVI:2(f) of the GATS, in contractual joint ventures engaging, through commercial presence, in the distribution of AVHE products.

Audiovisual (Sub-)Distribution Rule (Article 8.4)

7.1362 The **United States** claims that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* is inconsistent with China's market access obligations under Article XVI:2(f) of the GATS because it contains a limitation on foreign equity participation that is not set out in China's Schedule. The United States translates this provision as:

> "The Chinese co-operator shall hold no less than 51 % *equity* in the contractual joint venture." (emphasis added)

7.1363 **China** contends that the US translation is incorrect and that the proper translation of this provision should be:

> "The Chinese co-operator shall hold no less than 51 % *rights and interests* in the contractual joint venture." (emphasis added)

7.1364 China submits that, in accordance with the *2000 Chinese-Foreign Contractual Joint Venture Law*, the distribution of profit and allocation of loss in a contractual joint venture is not dependent on the ratio of equity participation, but is determined by the parties in the joint venture contract. Referring to footnote 1 of China's Services Schedule, China indicates that equity is not a required term in contractual joint venture. According to China, when the reference to "rights and interests" is made for contractual joint ventures, it does not mean equity participation but share of the profits and

losses. China therefore maintains that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* refers to a limitation on the allocation of profits and losses, which is not inconsistent with Article XVI of the GATS.

7.1365 The **United States** responds that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* does not contain any textual basis for "profit and loss". Regarding China's reliance on the *2000 Chinese-Foreign Contractual Joint Venture Law*, the United States contends that this law does not negate the existence of those other measures identified by the United States, which explicitly provide for a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products. As to China's reliance on footnote 1 of its Services Schedule, the United States points out that it is not alleging a requirement of equity participation, but the limitation on the foreign partner's equity participation when it chooses to invest equity in a contractual joint venture. The United States submits that the term "rights and interests" is so broad that a limitation cast in these terms would appear to be a limitation on every aspect of a foreign firm's participation in the contractual joint venture, including equity, shareholding, and total investment, not just profit. The United States maintains that China's alternative translation does not support its contention that participants in contractual joint ventures are limited only in the percentage of profits and losses attributed to them.

7.1366 The **Panel** notes at the outset that the parties disagree on the proper translation of the original Chinese term *Quan Yi* appearing in Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*. While the United States submits that it should be translated as "equity", China contends that the proper translation of the term should be "rights and interests". We observe however that the parties do not dispute the literal translation of the term *Quan Yi* as such. They agree that *Quan Yi* could be translated as "rights and interests", since *Quan* could mean "rights" and *Yi* could mean "interests".[735] This literal translation is confirmed by the Panel's independent translator.[736] What the parties fundamentally disagree on is the proper interpretation of this term in the context of Article 8.4 of *Audiovisual(Sub-)Distribution Rule*, which would determine the consistency of the provision with Article XVI of the GATS.

7.1367 With respect to the burden of proof in this matter, we consider that a party that advances a particular legal interpretation of a measure of a Member bears the burden of demonstrating that its interpretation is correct.[737] This is consistent with the general principle whereby the burden of proof rests upon the party, whether complaining or defending, which asserts the affirmative of a particular claim or defence.

7.1368 In interpreting the wording of Article 8.4 of the *Audiovisual(Sub-)Distribution Rule*, both parties refer to the terms of the *2000 Chinese-Foreign Contractual Joint Venture*s *Law*. The *Audiovisual (Sub-)Distribution Rule* was issued in part based on the *2000 Chinese-Foreign Contractual Joint Venture*s *Law*,[738] and applies to Chinese-foreign contractual joint ventures engaging in the distribution of audiovisual products established in China.[739]

7.1369 We recall that a contractual joint venture is one of two permissible forms of joint venture in China, the other being equity joint venture. We note that an equity joint venture is required to take the form of a limited liability company where the parties shall share the profits, risks and losses in

[735] See the United States' and China's comments on translation issues.

[736] According to the Panel's independent translator, while noting that the term "Quanyi" is given both "equity" and "rights and interests" in certain Chinese dictionaries, there is no compelling reason to depart from the more liberal rendering which is "rights and interests".

[737] Appellate Body Report on *US – Carbon Steel*, para. 157.

[738] *Audiovisual (Sub-)Distribution Rule*, Article 1 (Exhibit US-18).

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

proportion to their respective contribution to the registered capital.[740] There are no such legal requirements on a contractual joint venture. We note that a contractual joint venture need not have the status of a juridical person under Chinese law.[741] Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law* states:

> "In establishing a contractual joint venture, the Chinese and foreign parties shall prescribe in their contractual joint venture contract such matters as the investment or conditions for cooperation, the distribution of earnings or products, the sharing of risks and losses, the manners of operation and management and the ownership of the property at the time of the termination of the contractual joint venture".

7.1370 This is consistent with footnote 1 of China's Schedule, which states:

> "The terms of the contract, concluded in accordance with China's laws, regulations and other measures, establishing a "contractual joint venture" govern matters such as the manner of operation and management of the joint venture as well as the investment or other contributions of the joint venture parties. Equity participation by all parties to the contractual joint venture is not required, but is determined pursuant to the joint venture contract.".

7.1371 Based on this evidence, we understand that the parties to a contractual joint venture set out the investment and other conditions on cooperation, including those on the distribution of profits, in their contract establishing the joint venture. In its answer to a question from the Panel, China states that, according to Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law*, the share of the profits, risks and losses is not required to be in proportion to each party's contribution to the registered capital, but can be negotiated and prescribed in the contractual joint venture contract.[742] This statement appears to us to be straightforward. However, China then argues that Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law* and footnote 1 of China's Schedule shows that the "rights and interests" in Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* refer to profits. We have asked China how, based on its own translation, Article 8.4 can be understood as referring to the allocation of profits and losses in contractual joint ventures. China explained as follows:

> "[E]quity participation in a contractual joint venture is not required. When reference is made to rights and interests in the contractual joint venture, it does not mean equity participation but share of the profits, risks and losses as provided in Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law*." [743]

7.1372 We note that China appears to argue as follows. As a general matter, a limitation on "rights and interests" could be with respect to equity participation or share of profits. But since equity participation is not legally required in a contractual joint venture, the "rights and interests" in a contractual joint venture must refer to the share of profits. We are not persuaded by this line of argument.

7.1373 In our view, the meaning of "rights and interests" is broad enough to refer to investors' equity, shareholding, total investment, profits, and other rights and interests in an enterprise. As indicated in Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law* and footnote 1 of China's Schedule, the parties to a contractual joint venture prescribe in the joint venture contract the investment and other conditions on cooperation, including those on the distribution of profits. In

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[740] *Chinese-Foreign Equity Joint Venture Law*, Article 4 (Exhibit CN-48).
[741] *2000 Chinese-Foreign Contractual Joint Venture Law*, Article 2 (Exhibit CN-49).
[742] China's response to question No. 227.
[743] China's response to question No. 228.

other words, the parties to a contractual joint venture determine their various "rights and interests" in the contract. We understand the statement in China's Schedule that "equity participation by all parties to the contractual joint venture is not required" as meaning that equity participation by all parties is not mandatory, and not that the joint venture contract cannot prescribe equity participation by all parties. We therefore do not see how China has arrived at the conclusion that for a contractual joint venture, a limitation on "rights and interests" cannot refer to equity participation but only to the distribution of profits.

7.1374 We note that in asserting that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* cannot be understood as a limitation on equity participation, China refers to the *2000 Chinese-Foreign Contractual Joint Venture Law*. China appears to argue that the *2000 Chinese-Foreign Contractual Joint Venture Law* would preclude other measures from placing limitations on equity participation because it provides that equity participation is determined by the joint venture contract. We are not convinced by this argument, which appears to lack a textual basis. We note that the distribution of profits in a contractual joint venture, like equity participation, is also determined by the joint venture contract in accordance with the *2000 Chinese-Foreign Contractual Joint Venture Law*. China does not explain how Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* can place a limitation on the distribution of profits but not on equity participation. We also note that Article 8.1 of the *Audiovisual (Sub–)Distribution Rule* provides that a Chinese-foreign contractual joint venture engaging in the distribution of audiovisual products must have the status of a juridical person. However, as observed above, the *2000 Chinese-Foreign Contractual Joint Venture Law* does not require that a contractual joint venture be a juridical person. The parties to a contractual joint venture may choose to establish a juridical person, or not, as they wish. If the requirement for having the status of juridical person is not in contradiction with the *2000 Chinese-Foreign Contractual Joint Venture Law*, we see no reason why in the same measure, Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* cannot limit equity participation.[744]

7.1375 We further take the view that "rights and interests" are abstract and unquantifiable, and that it is therefore counterintuitive to relate a limitation of 51 per cent to this particular concept. Further, the term *Quan Yi* used in Article 8.4 of the *Audiovisual(Sub-)Distribution Rule* can be translated in some senses as "equity", as confirmed by the Panel's independent translator. As indicated by the United States, *Quan Yi* is a compound term used in China's accounting system to mean "equity". For example, Article 79 of the *Accounting System* provides that "owners' *Quan Yi* 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." Article 26 of the *Accounting Standards* provides that "owners' *Quan Yi* is the residential interest in the assets of an enterprise after deducting all its liabilities".

7.1376 Based on the preceding analysis, we find that China has failed to rebut the interpretation of Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* advanced by the United States – namely, that the Chinese joint venture partner should hold no less than 51% of any equity in a contractual joint venture engaging in the distribution of audiovisual products. Given this interpretation of the Chinese measure, we find that the United States has demonstrated that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* contains a "limitation on the foreign equity participation in terms of maximum percentage limit on foreign share holding" under Article XVI:2(f) of the GATS, contrary to China's commitments in its Schedule for the services at issue.

[744] The contractual joint venture contract submitted by China as an example shows that the joint venture is a limited liability company (Exhibit CN – 107). We note that Article 35 of China's *2005 Company Law* provides that in the limited liability company, "the shareholders shall distribute dividends in light of the percentages of capital contributions actually made by them, unless all shareholders agree that the dividends are not distributed on the percentages of capital contributions".

Catalogue (Article VI:3) and Foreign Investment Regulation (Article 8)

7.1377 The **United States** claims also that Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, and Article 8 of the *Foreign Investment Regulation* are inconsistent with Article XVI of the GATS. According to the United States, these two measures place a limit on foreign equity participation, within the meaning of Article XVI:2(f), on service suppliers of other Members, contrary to China's commitments in its Schedule. The United States points out that Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue* reads:

> "Sub-distribution of audiovisual products (excluding motion pictures) limited to contractual joint ventures where the Chinese partner holds *majority share*." (emphasis added)

7.1378 According to the United States, this provision is defined by Article 8 of the *Foreign Investment Regulation*, which states that the reference in the *Catalogue*

> "'have the Chinese party hold majority share' means the total proportion of investment of the Chinese investor in the foreign-invested project is *51% and above*" (emphasis added)

7.1379 **China** contends that the US translation of the above provisions is incorrect. According to China, Article VI:3 of the *Catalogue* should be translated as:

> "Distribution of audiovisual products (excluding motion pictures) (limited to contractual joint ventures where the Chinese partner holds *controlling interest*)." (emphasis added)

7.1380 China submits further that Article 8 of the *Foreign Investment Regulation* should be translated as:

> "Have the Chinese party hold *majority share/interest* means the total proportion of investment of the Chinese investor in the foreign-invested projects is *51% and above*." (emphasis added)

7.1381 Repeating its reference to Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law* and footnote 1 of its Schedule, China maintains:

> "When the term of 'majority of the shares' is used for equity joint ventures, it refers to majority of equity interest, i.e. contribution to the registered capital. When the term of 'majority of the shares' is used for contractual joint ventures, it refers to majority of ratio in the share of the profits, risks and losses."[745]

7.1382 The **United States** rejects China's argument, contending that Article 8 of the *Foreign Investment Regulation* governs the translation of Article VI:3 of the *Catalogue* and supports the US translation. The United States notes that Article 8 of the *Foreign Investment Regulation* indicates that the total proportion of investment of the Chinese investor in the foreign-invested projects is 51 per cent and above.

7.1383 The **Panel** notes that the parties differ on the correct translation and interpretation of the Chinese term *Kong Gu* contained in Article VI:3 of the *Catalogue*. The United States submits that it should be translated as "hold majority share", while China contends that the accurate translation is

[745] China's response to question No. 227.

"hold controlling interest". The Panel's independent translator, on the other hand, states that the Chinese term "Kong Gu" literally refers to "hold a controlling number of shares" and that there is no indication that control necessarily requires a majority According to China, shares are used in a joint stock company whose equity is divided into certain number of shares. China argues that the concept of "shares" is not applicable to contractual joint ventures because equity is not a requirement in a contractual joint venture.

7.1384 We note that the United States argues that Article VI:3 of the *Catalogue* imposes a limitation on foreign equity participation in the contractual joint venture, while China contends that this provision refers to a limitation on the allocation of profits and losses. China refers again to Article 2 of the *2000 Chinese-Foreign Contractual Joint Venture Law* and footnote 1 of its Schedule to support its position.

7.1385 We are not however convinced by China's argument. China fails to show how, based on its translation of Article VI:3 of the *Catalogue*, the provision refers to a limitation on the allocation of profits and losses. As noted above in our discussion on "rights and interests", the meaning of "interest" is very broad, and may encompass investment, shareholding, profits and other interests. Moreover, as also explained, we do not consider that the *2000 Chinese-Foreign Contractual Joint Venture Law* precludes other measures from imposing a limitation on equity participation in the contractual joint venture. Further, we are not persuaded by China's contention that "shares" can be used only in a joint stock company.

7.1386 We recall our previous observation that the *Foreign Investment Regulation* incorporates the *Catalogue* by reference and gives legal effect to it. The interpretation of Article VI:3 of the *Catalogue* should therefore be consistent with the relevant provisions in the *Foreign Investment Regulation*, which is Article 8. We note that the parties do not differ fundamentally on the proper translation of Article 8, which states:

> "The *Catalogue* of Industries for Guiding Foreign Investment may provide that foreign-invested projects 'are restricted to Chinese-foreign equity joint ventures and contractual joint ventures', 'have the Chinese party hold majority share', or 'have the Chinese party hold relative majority share'.
>
> 'Restricted to Chinese-foreign equity joint ventures and contractual joint ventures' means these are the only forms allowed. *'have the Chinese party hold majority share' means the total proportion of investment of the Chinese investor in the foreign-invested projects is 51% and above*. 'have the Chinese party hold relative majority share' means the total proportion of investment of the Chinese investor in the foreign-invested projects is larger than the proportion of any one foreign investor."[746] (emphasis added)

7.1387 We note that, according to this provision, "have the Chinese party hold majority share" (China's translation: "have the Chinese party hold majority share/interest") means that the total proportion of investment of the Chinese investor in the foreign-invested projects is 51% and above. Since this definition is not textually limited, it applies to both equity joint ventures and contractual joint ventures. We note that China does not contest the US argument that Article 8 of the *Foreign Investment Regulation* provides guidance on the interpretation of Article VI:3 of the *Catalogue*.

7.1388 Reading Article VI:3 of the *Catalogue* in light of Article 8 of the *Foreign Investment Regulation*, we consider that Article VI:3 is properly understood as limiting the distribution of

[746] This is the text submitted by the United States. China does not submit a text of this measure, only the translation of the part of Article 8 cited above.

audiovisual products (excluding motion pictures) to contractual joint ventures in which the Chinese party holds a "majority share", meaning that the Chinese party must hold a minimum of 51% of the investment. We find therefore that Article VI:3 of the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, is inconsistent with China's commitments under Article XVI:2(f) of the GATS since these provisions together constitute a "limitation on the foreign equity participation in terms of maximum percentage limit on foreign share holding" within the meaning of that provision.

Several Opinions (Article 1)

7.1389 The **United States** claims that Article 1 of the *Several Opinions* is inconsistent with Article XVI of the GATS because it only permits foreign-invested enterprises to engage in the sub-distribution of audiovisual products (excluding motion pictures) through a Chinese-foreign contractual joint venture if the Chinese party holds a majority of the shares. The United States points to Article 1 of the *Several Opinions* which provides, according to the US translation:

> "Under the condition where the right of our country to examine the content of audiovisual products is not harmed, 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 the dominant position*". (emphasis added)

7.1390 **China** does not provide any specific response to this US argument. At the request of the Panel, China provided its translation of Article 1 of the *Several Opinions* as follows:

> "Under the condition where the right of our country to examine the content of audiovisual products is not harmed, foreign investors are permitted to set up enterprises for the distribution of audiovisual products, excluding motion pictures, in the form of Chinese-foreign contractual joint ventures *where the Chinese partner holds a dominant position*". (emphasis added)

7.1391 The **Panel**, for the purposes of this claim, sees no significant difference between the translations of the two parties. The United States argues that Article 1 of the *Several Opinions* confirms the meaning of Article VI:3 of the *Catalogue* and Article 8 of the *Foreign Investment Regulation*, namely that the Chinese party to a contractual joint venture engaging in the sub-distribution of audiovisual products must hold a majority of shares. The United States appears to suggest that holding "the dominant position" in a company means holding a majority of the shares of the company. In resolving this interpretative issue, we note that that the United States bears the burden of demonstrating that its interpretation of Article 1 of the *Several Opinions* is correct. As the Appellate Body in *US – Carbon Steel* stated:

> "[A] responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[747]

7.1392 In assessing this interpretative issue, we note that "holding a dominant position" suggests that one has a "controlling" position in an entity, while "holding a majority of shares" means simply that one must hold over 50% of the shares. These notions are not the same. In an entity in which shares are owned by a number of different persons, a single shareholder may, due to the dispersal of ownership interests, have a "dominant position" while holding far fewer than 50 per cent of the

[747] Appellate Body Report on *US – Carbon Steel*, para. 157.

shares. Thus "holding a dominant position" does not necessarily imply "holding a majority of shares" in an entity.

7.1393 We note in this respect that the GATS, in its origin rules for service suppliers of another Member, makes a similar distinction between ownership and control of an entity. According to Article XXVIII(n), a juridical person is "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, while a juridical person is "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.

7.1394 We consider therefore that the United States has not advanced sufficient evidence to establish that "holding a dominant position" in Article 1 of the *Several Opinions* refers to "holding a majority of shares". It has not been able to show that this provision constitutes a "limitation on foreign equity participation" in the form either of "the maximum percentage of capital that can be held by foreign investors" or "the total value of foreign investment either by an individual investor or foreign investors as a whole", as required under Article XVI:2(f) of the GATS. The United States has failed to meet its burden of establishing that Article 1 of the *Several Opinions* imposes a limitation in the form specified in Article XVI:2(f), inconsistently with China's commitments on the services at issue.

(iii) Conclusion

7.1395 We recall that we have found that the distribution of AVHE products is covered by China's commitments under the heading "Videos, including entertainment software and (CPC 83202), distribution services" in Sector 2.D. of China's Services Schedule. We have further found that China has not inscribed in its Services Schedule any limits on the level of foreign equity participation in contractual joint ventures engaging in the distribution of AVHE products. Since we have found that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule* contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, which falls within the scope of Article XVI:2(f) of the GATS, we have concluded that this provision is inconsistent with China's market access commitments under Article XVI of the GATS.

7.1396 We have also found that Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, which also falls within the scope of Article XVI:2(f) of the GATS. Therefore, we arrive at the conclusion that Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, also falls within the scope of Article XVI:2(f) of the GATS, and that these provisions together are inconsistent with China's market access commitments under Article XVI of the GATS.

7.1397 We do not, however, find that Article 1 of the *Several Opinions* constitutes a breach of Article XVI of the GATS, because the United States has not established that it imposes a limitation that falls within the scope of Article XVI:2(f) as claimed by the United States.

(c) Whether the measures at issue are inconsistent with China's national treatment commitments (Article XVII)

7.1398 The **United States** claims that five discriminatory requirements, with respect to foreign equity participation, operating terms, pre-establishment legal compliance, examination and approval process, and decision-making criteria, are inconsistent with Article XVII of the GATS. According to the United States, these discriminatory requirements are imposed through four measures: the *Audiovisual (Sub-)Distribution Rule*, the *Catalogue*, the *Foreign Investment Regulation* and the *Several Opinions.*

7.1399 **China** requests the Panel not to consider the requirements concerning "pre-establishment legal compliance", "approval process requirements" and "decision-making criteria" to be within its terms of reference, because they are not specifically mentioned in the panel request. China also contends that the United States fails to make a prima facie case that the requirements regarding foreign equity participation, operating terms and approval process violate Article XVII of the GATS.

7.1400 The **Panel** recalls its finding above that, with respect to this US claim, the requirements concerning pre-establishment legal compliance, examination and approval process, and decision-making criteria are not within its terms of reference. We will therefore examine only whether the alleged discriminatory requirements with respect to foreign equity participation and operating term are inconsistent with Article XVII of the GATS.

7.1401 The Panel notes that it has previously examined the scope of China's commitments with respect to "Videos, including entertainment software and (CPC 83202), distribution services" under the heading of Audiovisual Services in its Schedule, and concluded that the distribution of physical AVHE products is covered by this entry.

(i) Requirements of Article XVII

7.1402 The Panel recalls its discussion above on the requirements in Article XVII of the GATS. Paragraph 1 thereof reads:

> "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

7.1403 As previously noted, the wording of Article XVII indicates that we need to determine: (a) whether the services at issue are inscribed in China's Schedule, (b) whether the measures at issue affect the supply of these services, (c) the extent of China's national treatment commitment, including any conditions or qualifications, with respect to these services entered in its Schedule, and (d) whether these measure accord less favourable treatment to service suppliers of other Members, in comparison to like domestic suppliers.

Whether the services at issue are within the scope of services listed in China's Schedule

7.1404 We have already made a finding above that the services at issue – the distribution of AVHE products in physical form – are within the scope of "Videos, including entertainment software and (CPC 83202), distribution services" inscribed in China's Schedule, and are therefore subject to any national treatment commitment that China may have undertaken.

Whether the measures at issue are "affecting" trade in services

7.1405 Similarly to what we have found in our examination of China's measures with respect to sound recording distribution services, we consider that, since the measures at issue (which are examined in detail below) directly govern the suppliers of the services at issue, they "affect" the supply of these services in the sense of Article XVII, and the parties have not argued otherwise.

Extent of China's commitments on national treatment for the services at issue

7.1406 In order to determine the extent of China's national treatment commitments with respect to the services at issue, we need now to examine China's Schedule to see whether there are any limitations

inscribed, in the national treatment column for services supplied through commercial presence, for the entry "Videos, including entertainment software and (CPC 83202), distribution services". We need also to examine the horizontal section of China's schedule. Finally, we need to examine the market access column, including any horizontal entries, to the extent that a limitation there might also be discriminatory.

7.1407 The Panel notes that for the entry "Videos, including entertainment software and (CPC 83202), distribution services" under the heading Audiovisual Services of its Schedule, China has inscribed "None" in the national treatment column, for services supplied through commercial presence. This is an initial indication that there are "no limitations" on national treatment. In the market access column, with respect to the same service and mode of supply, the inscription reads, as for sound recording distribution services, as follows:

> "Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1)."

7.1408 This inscription indicates that China has committed to allow foreign service suppliers to engage in the distribution of audiovisual products through the establishment of contractual joint ventures. Since this is a limitation that only applies to foreign service suppliers, it is also, by virtue of Article XX:2 of the GATS, a limitation on national treatment.

7.1409 We have previously examined China's horizontal commitments with respect to mode 3. The entry in the national treatment column indicates that China has made no national treatment commitments with respect to existing subsidies in sectors including audiovisual services. As noted above, the entries in the market access column: (a) limit the forms of foreign-invested enterprises in China; (b) specify that no commitment is made on the right of foreign enterprises to establish branches, unless specifically mentioned in a service sector entry in a China's schedule; (c) limit the activities of representative offices; (d) commit that existing foreign service suppliers will not have their conditions of ownership, operation and scope of activities made more restrictive; and (e) limit maximum duration on the use of land by enterprises and individuals. The first three limitations constitute limitations on national treatment as well, because they accord formally different treatment to foreign service suppliers.

7.1410 To summarize China's national treatment commitment with respect to the services at issue supplied through commercial presence, we note that China has undertaken a full national treatment commitment, subject to the condition that foreign service suppliers can only engage in the distribution of AVHE products through the establishment of contractual joint ventures, as well as further limitations in its horizontal section that have not been raised in this dispute.

(ii) Measures at issue

7.1411 Having determined the level of China's commitments with respect to the services at issue, we now examine the individual measures to determine whether, as claimed by the United States, they are inconsistent with China's commitments with respect to the supply through commercial presence of "Videos, including entertainment software and (CPC 83202), distribution services".

Measures limiting foreign equity participation

7.1412 At the outset, the Panel notes that it has already found certain measures containing a foreign equity participation limitation inconsistent with Article XVI of the GATS. These measures are Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*, and Article VI:3 of the Catalogue of Industries

with Restricted Foreign Investment in the *Catalogue* (in conjunction with Article 8 of the *Foreign Investment Regulation*). Based on the principle of judicial economy, we consider that we do not need to examine whether these measures are also inconsistent with Article XVII of the GATS. Accordingly, we refrain from offering any findings under Article XVII in respect of these measures.

7.1413 Since we have found, however, that the United States has not established that Article 1 of the *Several Opinions* is inconsistent with Article XVI of the GATS, we now need to examine whether, as claimed by the United States, Article 1 is inconsistent with Article XVII.

7.1414 The **United States** claims that Article 1 of the *Several Opinions* is inconsistent with Article XVII of the GATS as it directly prohibits foreigners from holding the dominant position in a joint venture engaging in the distribution of AVHE products in China. The United States submits that this measure treats foreign-invested distributors who are services suppliers of other Members less favourably than their like, wholly Chinese-owned competitors. The United States further submits that the measure at issue does not fall within the terms, limitations, conditions, or qualifications on national treatment that China has specified in its Schedule with respect to the supply through commercial presence of the services at issue.

7.1415 **China** rejects the US claim, contending that the measure at issue refers to the rate of distribution of profit and allocation of loss in the contractual joint venture, and does not negatively impact the actual conditions of competition of the contractual joint ventures.

7.1416 The **Panel** recalls that Article 1 of the *Several Opinions* provides:

> "Under the condition where the right of our country to examine the content of audiovisual products is not harmed, foreign investors are permitted to set up enterprises for the distribution of audiovisual products, excluding motion pictures, in the form of Chinese-foreign contractual joint ventures where the Chinese partner holds the dominant position."

7.1417 We note that this provision explicitly prohibits foreigners from holding the dominant position in a contractual joint venture engaging in AVHE product distribution. The United States claims that this provision as such is inconsistent with Article XVII of the GATS. As noted above, under Article XVII, we need to determine whether: (a) China has made national treatment commitments with respect to the services at issue; (b) the measure at issue affects the supply of these services; and (c) this measure accords less favourable treatment to service suppliers of other Members, in comparison to like domestic suppliers.

7.1418 Since we have previously determined that China has made national treatment commitments with respect to the distribution of AVHE products, and that Article 1 of the *Several Opinions* affects the supply of these services, we next examine whether this provision accords treatment to service suppliers of other Members less favourable than that accorded to like domestic suppliers.

7.1419 We note that the measure at issue concerns a contractual joint venture, which is the only permissible form that a foreign-invested enterprise may take if it wishes to engage in the distribution of AVHE products in China. We recall our previous observation that foreign-invested enterprises in China qualify as "service suppliers of another Member" under the GATS where the entity is owned or controlled by natural persons or juridical persons of another Member. As noted above, we also understand that, under the measure at issue, "holding a dominant position" means holding a controlling position. However, those contractual joint ventures in which the Chinese partner holds the dominant position do not qualify as "service suppliers of another Member", since they are not controlled by persons of another Member. In contrast, we consider that those contractual joint ventures where the foreign partner holds the dominant position qualify as "service suppliers of another

Member" under Article XVII. We note in this respect that in its answer to a Panel question, China agrees that a Chinese-foreign contractual joint venture qualifies as a "service supplier of another Member" only where it is controlled by persons of another Member.[748]

7.1420 As noted above, Article 1 of the *Several Opinions* prohibits those contractual joint ventures where the foreign partner holds the dominant position from engaging in the distribution of AVHE products. According to the United States, wholly Chinese-owned enterprises are permitted to supply these services. We note that there is nothing on the record to suggest that those suppliers are subject to any restrictions, and China never contested the US contention. There is, as a result, a difference of treatment as between, on the one hand, contractual joint ventures in which the foreign partner holds the dominant position, and, on the other hand, wholly Chinese-owned enterprises and contractual joint-ventures in which the Chinese partner holds the dominant position. We observe that this difference of treatment is based exclusively on the national origin of the service supplier. As we have observed earlier, there therefore will, or can, be domestic and foreign suppliers that under the measures at issue are "like". We thus consider that the "like" service suppliers requirement in Article XVII is met.

7.1421 Under the measure at issue, the contractual joint ventures where the foreign partner holds the dominant position – the foreign service suppliers – are prevented from engaging in the distribution of AVHE products, while like domestic service suppliers (wholly Chinese-owned enterprises) are permitted to supply these services. The measure at issue thus imposes a discriminatory prohibition on foreign service suppliers, which clearly modifies conditions of competition in favour of domestic suppliers. We therefore consider that the measure at issue – Article 1 of the *Several Opinions* – accords to foreign service suppliers treatment less favourable than that accorded to like domestic suppliers.

7.1422 We note that China's national treatment commitments for Audiovisual Services under Sector 2.D. of its Schedule are not subject to a limitation that only the Chinese partner can hold the dominant position in contractual joint ventures. We therefore find that Article 1 of the *Several Opinions* is inconsistent with Article XVII of the GATS.

Measures requiring an operating term

7.1423 The **United States** alleges that the operating term requirement contained in Article 8.5 of the *Audovisual (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS. The United States notes that in accordance with this provision, the operating term of a Chinese-foreign contractual joint venture for the distribution of audiovisual products is limited to 15 years. The United States also notes that no such limitation is imposed on wholly Chinese-owned distributors. The United States submits that foreign-invested distributors thus face greater uncertainty and cost in the continuity of their operations in China than wholly Chinese owned distributors. According to the United States, maintaining current business and generating new business becomes more difficult when the foreign-invested distributor cannot guarantee that it will continue to be in business after the expiry of its operating term. The United States therefore submits that the operating term requirement has thus modified conditions of competition in favour of wholly Chinese-owned distributors.

7.1424 **China** rejects the US allegation, contending that the 15-year operating term requirement has no impact on actual conditions of competition. China argues that an expiring operating term can be extended pursuant to a non-discretionary, automatic and simplified procedure and that *de facto*, neither the wholly-Chinese nor the foreign-invested distributor is subject to any actual time-limitation for their activity. China further argues that denying China the right to introduce the requirement on

[748] China's response to question No. 111.

operating terms would undermine China's sovereign right to regulate market access in the field of services consistently with its GATS commitments.

7.1425 The **Panel** notes that this claim raises the same issues that were discussed with respect to the operating term requirement in the wholesaling of reading materials (see Section X). The parties have presented similar arguments and counterarguments. Though this claim involves China's GATS commitments for Audiovisual Services under Sector 2.D. of its Schedule, we note that China's national treatment commitments in this sector, like those for Distribution Services in Sector 4, are not subject to a limitation with respect to the operating term. We recall the reasoning presented in paragraphs 7.1127-7.1141. We also note that compared to the 30-year operating term requirement with respect to the distribution of reading materials, the 15-year operating term requirement is likely to bring even greater uncertainty to business operations, further altering the conditions of competition against the foreign-invested service supplier. We therefore arrive at the conclusion that the operating term requirement provided for by Article 8.5 of the *Audiovisual (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS.

(iii) Conclusion

7.1426 The Panel finds that Article 1 of the *Several Opinions* and the operating term requirement provided for by Article 8.5 of the *Audiovisual (Sub-)Distribution Rule* are inconsistent with Article XVII of the GATS.

7.1427 Since the Panel has found that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule,* and Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue* in conjunction with the *Foreign Investment Regulation*, are inconsistent with Article XVI of the GATS, the Panel exercises judicial economy with respect to the US claim on the same measures under Article XVII of the GATS.

4. Summary of conclusions

(a) Distribution of reading materials

7.1428 Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation* are together inconsistent with China's national treatment commitments under Article XVII of the GATS as they prohibit foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported reading materials subject to subscription, while like domestic service suppliers are not similarly prohibited.

7.1429 Article 2 of the *Publications (Sub-)Distribution Rule*, in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS as it prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported reading materials subject to sales through the market, while like domestic service suppliers are not similarly prohibited.

7.1430 In the cases where master distribution involves wholesale or retail services, Article X:2 of the Catalogue of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is inconsistent with China's national treatment commitments under Article XVII of the GATS as it prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master distribution of reading materials while like domestic service suppliers are not similarly prohibited. Article 4 of the *Several Opinions* is inconsistent with Article XVII for the same reasons.

7.1431 Article 62 of the *1997 Electronic Publications Regulation* is inconsistent with China's national treatment commitments under Article XVII of the GATS as it prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale or wholesale of electronic publications while like domestic service suppliers are not similarly prohibited.

7.1432 To the extent that it is applied to the wholesale of electronic publications, the *Publications (Sub-)Distribution Rule*, together with the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS as the *Publications (Sub-)Distribution Rule*, together with the *Publications Market Rule*, has the effect of prohibiting foreign-invested enterprises, including service suppliers of other Members, from engaging in the wholesale of imported electronic publications while like domestic service suppliers are not similarly prohibited.

7.1433 The Panel does not conclude that the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS in respect of the master wholesale of electronic publications, as the United States has not established that this measure prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale of any electronic publications as claimed.

7.1434 The requirements concerning registered capital and operating term for foreign-invested wholesalers, including service suppliers of other Members, respectively contained in paragraphs 4 and 5 of Article 7 of the *Publications Sub-Distribution Rule* are inconsistent with China's national treatment commitments under Article XVII of the GATS as they accord to service suppliers of other Members treatment less favourable than that accorded to like domestic suppliers.

(b) Electronic distribution of sound recordings

7.1435 The *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), are each inconsistent with China's national treatment commitments under Article XVII of the GATS as each prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the electronic distribution of sound recordings, while like domestic service suppliers are not similarly prohibited. For the same reasons, Article X:7 of the Catalogue of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with Article XVII of the GATS.

7.1436 The Panel does not conclude that the *Internet Culture Rule* is inconsistent with Article XVII of the GATS, as the United States has not established that this measure, as implemented, imposes the alleged prohibition on the electronic distribution of sound recordings by service suppliers of other Members.

(c) Distribution of AVHE products

7.1437 Article 8.4. of the *Audiovisual (Sub-)Distribution Rule* is inconsistent with China's market access commitments under Article XVI of the GATS as it contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, which falls within the scope of Article XVI:2(f). For the same reasons, Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, is inconsistent with China's market access commitments under Article XVI.

7.1438 The Panel concludes that Article 1 of the *Several Opinions* is not inconsistent with Article XVI of the GATS, as the United States has not established that this measure imposes a limitation that falls within the scope of Article XVI:2(f), as claimed by the United States.

7.1439 Article 1 of the *Several Opinions* and the operating term requirement provided for by Article 8.5 of the *Audiovisual (Sub-)Distribution Rule* each is inconsistent with China's national treatment commitments under Article XVII of the GATS as each accords to service suppliers of other Members treatment less favourable than that accorded to like domestic suppliers.

7.1440 Since the Panel has found that Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*, and Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment of the *Catalogue* in conjunction with the *Foreign Investment Regulation*, are inconsistent with Article XVI of the GATS, the Panel exercises judicial economy with respect to the US claim on the same measures under Article XVII of the GATS.

E. US CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994

1. Article III:4 of the GATT 1994

7.1441 Article III:4 of the GATT 1994 reads as follows:

> "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. (...)"

7.1442 The Appellate Body has clarified that three elements must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[749] For Article III:4 to apply two things are first required. First the domestic and imported products must be "like". Second, the law, regulation, or requirement must "affect" the internal sale, offering for sale, purchase, transportation, distribution, or use of the like products. Only once those two elements are established does the obligation to afford no less favourable treatment apply.[750]

7.1443 Therefore, for each of the three sets of measures challenged by the United States as violating Article III:4 of the GATT 1994 with respect to reading materials, sound recordings intended for electronic distribution and films for theatrical release we will first examine whether the United States has demonstrated that the products are like and whether the measures are laws, regulations, and requirements that affect one or all of the enumerated transactions, *i.e.*, internal sale, offering for sale, purchase, transportation, distribution or use of the identified products before we analyse whether the measures provide for less favourable treatment.

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[749] Appellate Body Report on *Korea – Various Measures on Beef*, para. 133.

[750] Panel Report on *China – Autos*, para. 7.231 *citing* the Appellate Body's reasoning *US – FSC (Article 21.5 EC)* that:

> "it is, therefore, not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which '*affect*' the specific transactions, activities, and uses mentioned in that provision. Thus the word 'affecting' assists in defining the types of measures that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4." (Appellate Body Report on *US – FSC (Article 21.5 – EC*), para. 208.)

(a) Like products

7.1444 The Appellate Body has confirmed that the analysis of whether imported and domestic products are "like" should be done on a case-by-case basis.[751]

7.1445 The approach for determining "likeness" has, in the main, consisted of employing four general criteria:[752] "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products."[753] A determination of "likeness" under Article III:4 of the GATT 1994 is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products."[754]

7.1446 We recall relevant WTO jurisprudence which supports the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of "likeness". Instead, when origin is the sole criterion distinguishing the products, it is sufficient for purposes of satisfying the "like product" requirement for a complaining party to demonstrate that there can or will be domestic and imported products that are "like".[755]

7.1447 Therefore, the United States may establish that the imported and domestic products are like either by demonstrating that they are "like" by applying the traditional criteria or by demonstrating that the measures at issue distinguish between imported and domestic products solely based on origin and that there can or will be imported products that are "like" domestic products.

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[751] Appellate Body Report on *EC – Asbestos*, para. 102.

[752] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 21, DSR 1996:I, 97, at 113 and, in particular, fn. 46; Panel Report on *US – Gasoline*, para. 6.8 (where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994).

[753] The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (*e.g.*, Panel Reports on *EEC – Animal Proteins*, para. 4.2; *Japan – Alcoholic Beverages I*, para. 5.6; *US – Gasoline;* Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 21-22, DSR 1996:I, 97, AT 114.

[754] Appellate Body Report on *EC – Asbestos*, para. 99; Panel Report on *India - Autos*, para. 7.174-7.176; Panel Report on *China – Autos*, para. 7.216.

[755] Panel Report on *Indonesia – Autos*, para. 14.113; Panel Report on *Argentina – Hides and Leather*, paras. 11.168 -11.170; Panel Report on *Canada – Autos*, para. 10.74; Panel Report on *India – Autos*, paras. 7.174-7.176. In these cases, the panels found that the "like products" requirement could be established if the measures distinguished between imported and domestic products solely based on origin. The Panel on *Canada – Wheat Exports and Grain Imports*, relying on the ruling by the panel in *Argentina – Hides and Leather* applied the same reasoning to "likeness" under Article III:4:

> In *Argentina – Hides and Leather*, in dealing with a claim under Article III:2 of the GATT 1994, the panel found that where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it is not necessary to examine the various likeness criteria. ...While this finding pertained to Article III:2, we consider that the same reasoning is applicable in this case *mutatis mutandis*."
> (Panel Report on *Canada – Wheat Exports and Grain Imports*, fn. 246 to para. 6.164)

We also recall the Panel Report on *China – Auto Parts*, paras. 7.234-7.235 where the panel reasoned that as the scope of "likeness" in Article III:4 is broader than that of Article III:2, if products are "like" under Article III:2 they are also "like" within the meaning of Article III:4. We also note that other panels have found that foreign origin cannot serve as a basis for a determination that imported products are "unlike" domestic ones. Panel Report on *US – FSC (Article 21.5 – EC II)*, para. 8.133.

(b) "[L]aws, regulations, or requirements affecting ... distribution"

(i) Laws, regulations, or requirements

7.1448 Panels have found that the term "regulations" includes "mandatory rules applying across-the-board".[756] However, a measure need not be mandatory and apply across-the-board to be subject to the obligations contained in Article III:4.[757] Article III:4 also applies to "requirements", a term which has been interpreted by previous panels to encompass commitments entered into on a voluntary basis by individual firms as a condition to obtaining an advantage[758] or a government action involving a demand, request or the imposition of a condition.[759]

(ii) "[A]ffecting"

7.1449 In *US – FSC (Article 21.5 – EC)*, the Appellate Body explained that the meaning of the word "affecting" is crucial because it assists in defining the scope of application of Article III:4.[760] Additionally, the word "affecting" "serves as a link between the identified forms of government action which are covered by the obligation, i.e. laws, regulations or requirements, and the specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')".[761]

7.1450 The term "affecting" in Article III:4 of the GATT 1994 has been interpreted to have a "broad scope of application,"[762] which is wider in scope than such terms as "regulating" or "governing".[763] The word "affecting" covers not only measures which directly regulate or govern the sale of domestic and imported like products, but also measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product "affect" those activities.[764]

(iii) Distribution

7.1451 The US claims under Article III:4 all raise the issue of whether China's measures affect the distribution of the imported products. The parties disagree about what constitutes "distribution" within the meaning of Article III:4 of the GATT 1994.

7.1452 The **United States** cites a dictionary definition of distribution as "the action of dealing out in portions or shares among a number of recipients; apportionment; allotment; or the dispersal of commodities among consumers effected by commerce."[765] Based on this definition the United States

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[756] GATT Panel Report on *Canada – FIRA*, para. 5.5, which was followed by Panel Report on *India—Autos*, para. 7.181.

[757] GATT Panel Report on *Canada – FIRA*, para. 5.5.

[758] GATT Panel Report on *Canada – FIRA*, para. 5.4; Panel Report on *India - Autos*, para. 7.174.

[759] Panel Report on *Canada – Autos*, para. 10.107.

[760] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 208.

[761] *Ibid.*

[762] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 210; Panel Report on *Canada – Autos*, para. 10.80; and Panel Report on *India – Autos*, para. 7.196.

[763] Appellate Body Report on *EC – Bananas III*, footnote 47, para. 220. Appellate Body Report on *Canada – Autos*, footnote 56, para. 150 (interpreting the word "affecting" in Article I:1 of the GATS). Although the provision at issue in *EC – Bananas III* was Article I:1 of the GATS, we note that the Appellate Body itself found the jurisprudence on the identical language in the GATT to be of relevance to its interpretation of the GATS and we see no reason why the inverse would not also be true.

[764] Panel Report on *EC – Bananas III*, para. 7.175; Panel Report on *India – Autos*, paras. 7.196-7.197; Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.267.

[765] United States' response to question No. 250 *citing New Shorter Oxford English Dictionary*, p. 709 (Exhibit US-68).

concludes that "the concept of 'distribution' encompasses the range of activities undertaken to move a product through the stream of commerce."[766]

7.1453 The United States goes on to argue that distribution should not be considered as an entirely discrete concept from the other transactions, activities, and uses identified in Article III:4. The United States maintains that these concepts often overlap and should be construed in recognition of this overlap. Specifically, the United States then posits that:

> "[D]istribution of a product may involve both purchase of that product and offering for sale of that product. A distributor may purchase the product from an upstream entity and offer it for sale to a downstream entity. Thus, distribution overlaps with purchase and offering for sale. Distribution of a product may also involve managing the logistics necessary to ensure that a product gets downstream. This particular distribution activity does not necessarily involve sale or purchase of the product, but it could overlap with transportation or use of the product."[767]

7.1454 **China**, for its part, cites to the panel report on *Canada – Wheat Exports and Grain Imports* which noted that:

> "The New Shorter Oxford English Dictionary defines 'distribution' to mean, inter alia, 'the dispersal of commodities among consumers effected by commerce'. We take this to mean that 'distribution' entails, *inter alia*, the supply of goods to consumers or to on-sellers."[768]

7.1455 China argues that this definition confirms that distribution within the context of Article III:4 of the GATT 1994 refers to the supply of goods to consumers or to on-sellers.[769]

7.1456 The **Panel** notes that the task before us is to determine the ordinary meaning of the term "distribution" pursuant to the Vienna Convention. Dictionaries are useful aids for determining the range of possible ordinary meanings of a word or phrase. We note that pursuant to the Vienna Convention, the relevant ordinary meaning is to be established in light of the context of the term and taking into account the object and purpose of the provision and the treaty as a whole. [770]

7.1457 We note that Article III:4 of the GATT 1994 deals with laws, regulations, or requirements affecting the distribution of products in the marketplace, therefore, the dictionary definitions which we think are relevant for our purposes are those which define "distribution" as that term is used in the marketplace. We note that the definition utilized by the panel in *Canada – Wheat Exports and Grain Imports* from the New Shorter Oxford English Dictionary, does define "distribution" in the commercial sense. That panel's understanding is confirmed by the American Heritage Dictionary which defines distribution as "the process of marketing and supplying goods, especially to retailers."[771] And the Random House Dictionary which lists as the "economics" definition of the term "the system of dispersing goods throughout a community."[772] Additionally, the Oxford English Dictionary defines distribution as "the dispersal among consumers of commodities produced: this

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[766] United States' response to question No. 250.
[767] United States' response to question No. 247(a).
[768] Panel Report on *Canada – Wheat Exports and Grain Imports* , para.6.171.
[769] China's response to question No. 138.
[770] Article 31, Vienna Convention.
[771] *American Heritage Dictionary*, 4th ed. (Houghton Mifflin 2000) available at http://www.bartleby.com/61.
[772] *Random House Unabridged Dictionary*, (Random House 1997) available at http://dictionary.infoplease.com/distribution.

being, as opposed to production, the business of commerce"[773] Finally, Webster's New Encyclopedic Dictionary defines distribution as "marketing or merchandising of commodities."[774]

7.1458 We also note that the New Shorter Oxford English Dictionary defines a "distributor" as "a person who distributes something; *spec.* an agent who markets goods esp. a wholesaler."[775] Additionally, BNET Business Network defines a 'distribution channel' as

> "[T]he route by which a product or service is moved from a producer or supplier to customers. A distribution channel usually consists of a chain of intermediaries, including wholesalers, retailers, and distributors, that is designed to transport goods from the point of production to the point of consumption in the most efficient way."[776]

7.1459 Based on the above dictionary definitions, we consider that the term "distribution" in Article III:4 can be understood as meaning a process or series of transactions necessary to market and supply goods, either directly or through intermediaries, from the producer to the consumer.[777]

7.1460 This understanding of "distribution" is confirmed by the context of Article III:4 of the GATT 1994 which deals with laws, regulations, or requirements which affect specific transactions or activities relating to products in the marketplace, namely, the internal sale, offering for sale, purchase, transportation, distribution or use.[778]

7.1461 We are also mindful that the Appellate Body has stated that "there must be consonance between the objective pursued by Article III, as enunciated in the "general principle" articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4."[779] Therefore, we find that the "general principle" set forth in Article III:1 is relevant context for our interpretation of the ordinary meaning of the term "distribution" as it is used in Article III:4. As the Appellate Body has explained, the "general principle" in Article III "seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the *marketplace*, between the domestic and imported products involved, 'so as to afford protection to domestic production.'"[780] The focus of Article III:1 on the competitive relationship between domestic and imported products in the marketplace confirms to us that the relevant ordinary meaning of "distribution" in Article III:4 is one which takes into account the use of the term in the marketplace.

7.1462 The object and purpose of Article III also demonstrates that the focus on competitive conditions in the marketplace is appropriate. The Appellate Body has explained that:

> "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic

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[773] *Oxford English Dictionary Online*, available at http://dictionary.oed.com/entrance.dtl.

[774] *Webster's New Encyclopedic Dictionary*, (Black Dog & Leventhal 1993), p. 293.

[775] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press 1993), Vol. I., p. 709.

[776] BNET Business Dictionary *available at* http://dictionary.bnet.com/definition/Distribution+Channel.html

[777] We note that the *New Shorter Oxford English Dictionary* defines a "consumer" as "a user of an article or commodity, a buyer of goods or services" (*New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press 1993) Vol. I, p. 490). *Webster's New Encyclopedic* defines a "consumer" as "one that buys and uses economic goods", (*Webster's New Encyclopedic Dictionary*, (Black Dog & Leventhal 1993), p. 215).

[778] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 208, 215, 221.

[779] Appellate Body Report on *EC – Asbestos*, para. 98.

[780] *Ibid.* (emphasis added); Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 208.

> products so as to afford protection to domestic production"'.[781] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[782] '[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given'.[783]"[784]

7.1463 The assurance of equal competitive opportunities is not solely the purpose of Article III but of the international trade regime in general. As the panel in *Korea – Alcoholic Beverages* explained

> "Trade law generally, and Article III in particular, focuses on the promotion of economic opportunities for importers through the elimination of discriminatory governmental measures which impair fair international trade. Thus, trade law addresses the issue of the potentiality to compete."[785]

7.1464 Therefore, given that the context and object and purpose of Article III:4 of the GATT 1994 is to govern the manner in which Members' laws, regulations or requirements affect the competitive relationship between imported and domestic like products and this competition takes place in the marketplace[786], we find that the context and object and purpose of Article III:4 confirm our understanding that the relevant ordinary meaning of the term "distribution" as it is used in Article III:4 is one with respect to activities in the marketplace.

7.1465 We note that Article III:4 of the GATT 1994 only governs laws, regulations, or requirements affecting the *internal* distribution of a product within the importing Member. As the Appellate Body noted in *China – Auto Parts*, for purposes of Article III, "internal" means something taking place inside the customs territory of the importing Member after importation.[787] We also note that "importation" has been understood, in the past, to mean "the act of bringing or causing any goods to be brought into a customs territory".[788] Therefore, for the purposes of Article III:4 of the GATT 1994 internal "distribution" is the portion of that process or series of transactions from the point of importation (i.e., the time when the goods enter the customs territory of the importing Member) until the good is received by the consumer.

(c) Less favourable treatment

7.1466 The Appellate Body in *Korea – Various Measures on Beef* stated:

> "Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the

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[781] *(footnote original)* Panel Report on *US – Section 337*, para. 5.10.

[782] *(footnote original)* Panel Reports on *US – Superfund*, para. 5.1.9; and *Japan – Alcoholic Beverages II*, para. 5.5(b).

[783] *(footnote original)* GATT Panel Report on *Italy – Agricultural Machinery*, para. 11.

[784] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97 at 109.

[785] Panel Report on *Korea – Alcoholic Beverages*, para. 10.81 (we note that this statement was made in the course of a discussion of the overlap between trade and competition (antitrust) law.).

[786] Appellate Body Report on *EC – Asbestos*, para. 98.

[787] Appellate Body Report on *China – Auto Parts*, paras. 161-163.

[788] Panel Report on *China – Auto Parts*, para. 7.155 *citing WCO, Glossary of International Customs Terms*, 2006, page 16; *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 759 ("the bringing of goods into a country from another country"); and *The Shorter Oxford English Dictionary*, 5th ed. (Clarendon Press 2002), Vol. I, p. 1331 ("action of importing or bringing in something, *spec*. goods from another country").

> *conditions of competition* in the relevant market to the detriment of imported products."[789] (emphasis original)

7.1467 The Appellate Body has explained that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 of the GATT 1994

> "[M]ust be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'. This examination cannot be rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace.[790]"[791]

7.1468 Essentially, therefore, Article III:4 calls for "effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[792]

7.1469 Not every form of differential treatment has an impact on competitive opportunities.[793] Therefore, the burden is on the United States to demonstrate, through supporting evidence, that a measure adversely affects the competitive opportunities of imported products in relation to their distribution. Mere assertion is not enough. At the same time it is necessary to note that although the United States must establish adverse impact on competitive opportunities, it is not required to demonstrate an existing adverse trade effect. The panel in *Canada – Autos* explained:

> "The idea that a measure which distinguishes between imported and domestic products can be considered to affect the internal sale or use of imported products only if such a measure is shown to have an impact under current circumstances on decisions of private firms with respect to the sourcing of products is difficult to reconcile with the concept of the 'no less favourable treatment' obligation in Article III:4 as an obligation addressed to governments to ensure effective equality of competitive opportunities between domestic and imported products, and with the principle that a showing of trade effects is not necessary to establish a violation of this obligation." [794]

7.1470 Additionally, the Appellate Body in *US – FSC (Article 21.5 – EC)* concluded that a measure could be inconsistent with Article III:4 even if unfavourable treatment did not arise in every instance.[795]

7.1471 Thus, the burden is on the United States to demonstrate that the challenged measures may reasonably be expected to adversely modify the conditions of competition, not necessarily that those measures have actually had an adverse effect or would have one in every instance.

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[789] Appellate Body Report on *Korea –Various Measures on Beef*, para. 137.

[790] *(footnote original)* Appellate Body Report on *Japan – Alcoholic Beverages II, supra*, footnote 116, at 110.

[791] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 215 and 221.

[792] Panel Report on *US – Gasoline*, para. 6.10 *citing* Panel Report on *US – Section 337*, para. 5.11.

[793] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 135-137 *citing* Panel Report on *US – Section 337*, para. 5.11.

[794] Panel Report on *Canada – Autos*, para. 10.84; *see also* Appellate Body Report on *Japan – Alcoholic Beverages II*, "[Article III] protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.") (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97 at 109.)

[795] Appellate Body Report on *US – FSC (Article 21.5 - EC)*, para. 221.

7.1472 Demonstrating "less favourable treatment" and thus a breach of Article III:4 implies a comparative analysis. To establish a violation a party must establish the treatment for *both* imported and domestic products. Less favourable treatment of imported like products may arise from laws, regulations, or requirements which provide domestic products *more* favourable treatment than imported products or from laws, regulations, or requirements which place additional burdens on imported products that are not placed on domestic products.

7.1473 Whichever the basis for the allegation, a complainant must specify the difference in treatment between imported and like domestic products and indicate why and how there is less favourable treatment of imported products.[796]

2. Reading materials

7.1474 The **United States** argues that two of China's measures, specifically, the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule* are inconsistent with Article III:4 of the GATT 1994, because they afford less favourable treatment than that accorded to like domestic products by significantly restricting the distributors, distribution channels, and the consumers that are available to imported reading materials.[797]

7.1475 **China** contends that the United States' claim with respect to the subscription system applying to the "restricted category" of reading materials and the subscription system applying to the non-restricted category of newspapers and periodicals should be rejected because the systems do not result in less favourable treatment for foreign products.

(a) Like products

7.1476 The **United States** argues that the imported and domestic products share the same physical characteristics and commercial uses. The United States goes on to argue, however, that because the measures at issue discriminate against imported reading materials on the basis of national origin it is correct to treat imported and domestic reading materials as like within the meaning of Article III:4.

7.1477 **China** provides no argumentation with respect to whether the imported and domestic products are "like" within the meaning of Article III:4.[798]

7.1478 The **Panel** recalls its explanation in paragraphs 7.1445-7.1447 above, that there are two ways in which a complaining party can demonstrate that the imported and domestic products are "like" within the meaning of Article III:4. First, they can establish that the products are like through the traditional analysis as explained by the Appellate Body in *EC – Asbestos* or they can demonstrate that the challenged measures differentiate between imported and domestic products exclusively based on origin and that there can or will be domestic and imported products that are like.

(i) Traditional analysis

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[796] Despite the requirement to demonstrate the differential treatment between domestic and imported products, we agree with the finding of the panel in *India—Autos*, that "the fact that the measure applies only to imported products need not [be], in itself, an obstacle to its falling within the purview of Article III." (Panel Report on *India – Autos*, para. 7.306.)

[797] We note that in its consultations and panel requests the United States refers to China's measures governing "publications," and in its submissions the United States refers to China's measures governing "reading materials". Based on the substantive explanation provided by the United States of what "publications" and "reading materials" are (i.e., newspapers, periodicals, books, and electronic publications) we understand that the two phrases have substantively the same content.

[798] We note that China maintains that there are no domestic publications which contain prohibited content as they cannot be published in China (China's response to question No. 130(c)).

7.1479 The **United States** argues that the imported and domestic products share the same physical characteristics and commercial uses. The United States provides no further elaboration on whether imported and domestic reading materials are "like" based on the four traditional criteria in its first written submission or in its subsequent submissions to the Panel.

7.1480 **China** provides no argumentation with respect to whether the imported and domestic products are "like" within the meaning of Article III:4.

7.1481 The **Panel** notes that other than its mere assertion in its first written submission that the imported and domestic products share the same physical characteristics and commercial uses the United States has not provided any argumentation or evidence to demonstrate that imported reading materials are "like" domestic reading materials. The United States has not established what the physical characteristics and commercial uses of reading materials are, nor has it addressed the other criteria. Therefore, we conclude that the United States has not established that imported reading materials are "like" domestic reading materials based on the traditional "like products" criteria.

7.1482 We note that the United States has also argued that the imported and domestic products are "like" because the challenged measures distinguish between them based on origin. Therefore, we will go on to determine whether the United States has established via this alternative route that the "like products" requirement is met.

(ii) The Imported Publications Subscription Rule

7.1483 According to the **United States** foreign origin is the sole criterion used by China in the decision to subject imported reading materials, but not domestically produced reading materials, to an onerous subscription-based regime for distribution. As such, imported and domestic publications satisfy the "like products" requirement of Article III:4.

7.1484 The United States points to Article 1 of the *Imported Publications Subscription Rule* as evidence that "on its face" the measure only applies to imported reading materials. The United States also cites Article 3 of the same rule as the provision which imposes the mandatory subscription regime for all imported newspapers and periodicals as well as for books and electronic publications in the "limited" category as the sole mechanism for their distribution within China.

7.1485 **China** provides no argumentation on this point.

7.1486 Article 1 of the *Imported Publications Subscription Rule* reads:

> "These Rules have been drawn up, on the basis of the Regulations on the Management of Publications and relevant laws and regulations, in order to satisfy the reading needs of domestic units and individuals, foreign organizations in China, foreign nationals of enterprises with foreign investment, and personages from Hong Kong, Macao and Taiwan for imported publications and reinforce the management of imported publications."

7.1487 The **Panel** notes, based on Article 1, that the *Imported Publications Subscription Rule* only applies to imported reading materials. However, Article 1 on its own does not set forth any rules or requirements that could be said to "distinguish" between imported and domestic products. Rather, it merely defines the scope of application of the subsequent provisions. Article 3 of the *Imported Publications Subscription Rule* contains the requirements which the United States argues apply different standards to imported reading materials based solely on their non-Chinese origin. Specifically, Article 3 explains that:

> "The state manages the distribution of imported publications by categories. In regard to imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, they shall be distributed under subscription to subscribers, and supplied by categories. Imported books and electronic publications in the non-limited distribution category shall be distributed by sales through the market.
>
> Imported newspapers and periodicals are divided into the two categories of limited distribution and non-limited distribution.
>
> Types of imported newspapers, periodicals, books and electronic publications in the limited distribution category shall be determined by the General Administration of Press and Publications."

7.1488 According to China, this means that there are two different subscription systems for imported reading materials (i.e., the one applicable to the limited category of reading materials and the one applicable to the non-limited category of newspapers and periodicals).

7.1489 The United States also asserts that China imposes no such regime on domestic publications.[799] In that regard, we take note of China's statement in its first written submission that its subscription rules for newspapers and periodicals as well as books in the limited category are "different from the rules applicable to domestic like products."[800]

7.1490 The **Panel** understands, as set forth in Article 3 of the *Imported Publications Subscription Rule*, that there are two categories of publications in China: the limited and non-limited. Newspapers and periodicals in the non-limited category are required, by virtue of Article 3, to be sold through subscriptions to subscribers. Additionally, newspapers, periodicals, *and* books in the limited category are also required to be sold through subscriptions to subscribers. Therefore, the subscription requirements set forth in Article 3 of the *Imported Publications Subscription Rule* apply to *all* imported newspapers and periodicals, whether in the "limited" or "non-limited" categories, whereas the subscription requirements only apply to books which are in the "limited" category. We also recall that China does not dispute that domestic newspapers and periodicals are not likewise regulated.

7.1491 The *Imported Publications Subscription Rule*, specifically Article 3 thus makes a distinction in treatment between imported and domestic newspapers and periodicals that is exclusively based on their origin. Thus, as a result of the origin-based distinction contained in Article 3, even domestic newspapers and periodicals that are identical to imported ones in all respects except for origin would not be subject to the requirements contained in Article 3. We note that China does not dispute that there will, or can, be domestic and imported newspapers and periodicals that are the same except for origin. Therefore, we consider that with regard to newspapers and periodicals the like products requirement in Article III:4 of the GATT 1994 is satisfied.

7.1492 For books, the situation is somewhat different, however. We note that Article 3 does not require that all imported books be subject to a subscription requirement, but rather only those books in the "limited" category are required to be sold through subscription. Books in the "non-limited" category are sold through the market sales system, which is the distribution system applicable to domestic books.

7.1493 **China** argues that the "limited" category is made up of reading materials with prohibited content. According to China, because of the nature of the content of reading materials within the

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[799] *See* e.g. United States' response to question No. 122(b).
[800] China's first written submission, para. 539.

"limited" category, subscription to such reading materials is limited to certain government agencies and institutions for research purposes. China argues that they are therefore not "distributed" within China.[801] China informs the Panel that there are approximately 1,000 titles of imported publications in the "limited" category.[802] China also informs us that there are no domestic publications in the "limited" category because "no domestic publication with prohibited content can be published in China and made available for distribution."[803]

7.1494 The **United States** argues that it cannot be correct that the "limited" category contains reading materials with prohibited content, as distribution of prohibited content is illegal in China.[804] The United States also notes that it is unclear what titles are in the "limited" category and whether titles can be released from this category.

7.1495 The **Panel** takes note that both parties agree that there is a difference in treatment between imported and domestic books. All domestic books may be distributed through the market sales system. Imported books, however, are divided into two categories, a "limited" category that is subject to the subscription requirements set forth in Article 3 of the *Imported Publications Subscription Rule* and a "non-limited" category which may be sold through the market sales system in the same manner as domestic books. This indicates to us that some imported books are treated differently from domestic books while others are not. Therefore, there is a factor other than the foreign origin of the books which is the basis of the differential treatment in the measure.

7.1496 We note the disagreement between the parties as to why a book might be designated by the GAPP to fall within the "limited" category and whether the provision of such a book to a limited group of subscribers approved by the GAPP constitutes "distribution" within China. China has explained, that the limited category contains publications with prohibited content and we see no reason to question China's explanation. The United States has not demonstrated any other basis for the distinction between limited and non-limited publications in Chinese law. Additionally, the US argument regarding the fact that distribution of prohibited content is illegal in China would appear to bolster, rather than detract from, China's explanation of the "limited" category. As China explains, it is precisely because of the general ban on the distribution of publications with prohibited content that the Chinese Government created an exception, via Article 3 of the *Imported Publications Subscription Rule*, so that certain entities – approved by GAPP – could have access to those publications.

7.1497 The United States, therefore, has identified in Article 3 of the *Imported Publications Subscription Rule* a difference in treatment between domestic and imported books with no prohibited content, on the one hand, and imported books with prohibited content on the other hand. For example, China has told the Panel that one title in the "limited" category is a book published in Hong Kong titled "World Sexual Customs" which China has concluded contains obscene material. This

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[801] China's first written submission, paras. 538-545; China's response to question No. 130(c).

[802] China, in response to question No. 130(b), explained that the EPOCH TIMES, a Falun Gong publication is the type of publication that is in the limited category. In response to question No. 264, China further explained:

GAPP determines whether a publication falls within the restricted distribution category on the basis of criteria set forth in Arts. 26 and 27 of [*Publications Regulation*]. For example, a book under the name "World Sexual Customs" published in Hong Kong was categorized into restricted category because it contains obscene content and only sexual cultural research institutions can be allowed to subscribe it. Another example is a book named "China: Friend or Foe" published by Icon Books in 2006 in Britain. It was categorized into restricted category because it contains contents related to Tibet which is considered to jeopardize the solidarity of the nationalities and territorial integrity of the nation.

[803] China's response to question No. 130(d).

[804] We note that both China and the United States agree that the same content requirements apply to both domestic and imported reading materials (see United States' response to question No. 139; China's response to question No. 139).

book is subjected to the subscription requirements in Article 3 of the *Imported Publications Subscription Rule*. By contrast, both an imported book with no obscene content – perhaps a children's book or cookbook – and domestic books which cannot contain prohibited content[805] would not be subject to the subscription requirement. As imported books without prohibited content are treated in the same way as domestic books, the difference in treatment between imported books in the "limited" category and domestic books in Article 3 of the *Imported Publications Subscription Rule* is not exclusively based on the foreign origin of the imported books, but rather is based on whether the imported book contains prohibited content.

7.1498 As the United States has not demonstrated that the challenged measure creates a distinction in treatment between imported and domestic books exclusively based on origin, we do not think that it would be appropriate, in the case of books, to use the above-mentioned simplified "likeness" analysis as an alternative to the traditional likeness analysis. We recall, our conclusion above that the United States has likewise not established through an analysis of the traditional criteria that imported and domestic books are "like." Therefore, the United States has not established that imported books are "like" domestic books. As such, the United States has not demonstrated that China's obligations under Article III:4 are engaged with respect to the regulation of books under the *Imported Publications Subscription Rule*.

(iii) Publications (Sub-)Distribution Rule

7.1499 The **United States** also argues that only imported reading materials find themselves blocked from distribution channels in China available through foreign-invested enterprises. According to the United States, Chinese reading materials can use both Chinese and foreign-invested enterprises for distribution within China. The United States contends that this distinction satisfies the requirement to demonstrate that the imported and domestic reading materials are "like" within the meaning of Article III:4.

7.1500 The United States argues that pursuant to Article 2 of the *Publications (Sub-)Distribution Rule*, the 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.[806]

7.1501 The **Panel** notes that Article 2 of the *Publications (Sub-)Distribution Rule* states:

> "These Rules are applicable to FIE inside China engaged in the sub-distribution of books, newspapers and periodicals.
>
> Books, newspapers and periodicals as mentioned in these Rules refer to books, newspapers and periodicals published by a publishing unit approved by the publishing administration under the State Council.
>
> Sub-distribution as mentioned in these rules refers to the wholesale and retail of books, newspapers and periodicals.

[805] We note that under China's measures governing publications books with prohibited content are not permitted to be published within China.

[806] United States' response to question No. 122(h).

> FIE for the sub-distribution of books, newspapers and periodicals as mentioned in these Rules refer to foreign enterprises, other economic organizations, or individuals (hereinafter referred to foreign investor for short) which, after being approved by relevant Chinese government departments according to law, together with Chinese enterprises or other economic organizations (hereinafter referred to as Chinese investor for short) set up inside China a Chinese-foreign equity or contractual joint venture for the sub-distribution of books, newspapers and periodicals on the basis of equality and mutual benefit, as well as book, newspaper and periodical sub-distribution enterprises set up by the foreign investor wholly with foreign capital inside China.
>
> Participation of a foreign investor by share holding or by merger and acquisition of a book, newspaper and periodical sub-distribution enterprise funded by Chinese investment is one way of setting up a foreign-invested enterprise for sub-distribution of books, newspapers and periodicals. When a foreign investor engages in share holding or merger and acquisition of a Chinese invested book, newspaper and periodical sub-distribution enterprise, the enterprise concerned shall process necessary procedures as contained in these Rules to change into a foreign-invested enterprise."

7.1502 We note that Article 2 of the *Publications (Sub-)Distribution Rule* sets forth that the Rule applies to foreign-invested enterprises in China engaged in the sub-distribution of books, newspapers and periodicals and that any references to books, newspapers and periodicals in subsequent provisions of that Rule refer to domestically published books, newspapers, and periodicals. Therefore, like Article 1 of the *Imported Publications Subscription Rule*, Article 2 simply sets forth the scope of the application of the rest of the provisions in the *Publications (Sub-)Distribution Rule*.

7.1503 The United States explains that reading this provision in the context of the other measures governing distribution of reading materials in China demonstrates that China only grants permission to foreign-invested enterprises to sub-distribute books, domestically published newspapers and periodicals.

7.1504 Specifically, the United States notes that the *Imported Publications Subscription Rule* only permits imported newspapers and periodicals as well as books and electronic publications in the limited category to be distributed via subscription. The United States also notes that the same rule explains that only enterprises designated by the GAPP to import reading materials – i.e., Chinese wholly state-owned enterprises pursuant to Article 42 of the *Publications Regulation* – can engage in the distribution, including both wholesale and retail, of these products.[807]

7.1505 The United States also cites to Article 16 of the *Publications Market Rule* which specifies that the *Publications (Sub-)Distribution Rule* governs foreign-invested enterprises seeking to engage in the sub-distribution – i.e., wholesale and retail – of books, newspapers and periodicals.[808] According to the United States, as China has promulgated no additional measures granting foreign-invested enterprises the right to engage in the distribution of reading materials in China, the *Publications (Sub-)Distribution Rule* represents the complete set of rights granted to foreign-invested enterprises.

7.1506 The Panel, reading the *Publications (Sub-)Distribution Rule* in the context of the other Chinese measures governing the distribution of publications, concludes that any foreign-invested enterprise ("FIE") which wishes to sub-distribute books, newspapers, and periodicals must comply with the *Publications (Sub-)Distribution Rule*. We note our finding above that Article 2 limits the

[807] United States' response to question No. 61.
[808] *Ibid.*

scope of the *Publications (Sub-)Distribution Rule* to domestically published books, newspapers and periodicals. Therefore, we find that the *Publications (Sub-)Distribution Rule* creates a difference in treatment between domestic and imported books, newspapers and periodicals in the sense of the types of enterprises that may distribute them, exclusively on the basis of the origin of the books, newspapers, and periodicals. Thus, as a result of the origin-specific nature of the *Publications (Sub-)Distribution Rule*, which is set forth in Article 2, even imported books, newspapers and periodicals that are identical to domestic ones in all respects except for origin could not be sub-distributed by foreign-invested enterprises. We also note that China does not dispute that there will, or can, be domestic and imported books, newspapers and periodicals that are the same, except for origin. Therefore, we consider that with regard to the US claim in respect of the inconsistency of the *Publications (Sub-)Distribution Rule* with Article III:4 of the GATT 1994, the "like products" requirement is satisfied.

(b) Laws, regulations, or requirements *affecting* ... distribution

(i) Laws, regulations, or requirements

7.1507 The **United States** maintains that both the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule* are "laws, regulations, or requirements" within the meaning of Article III:4 of the GATT 1994.

7.1508 In its first written submission, the United States argues that the *Imported Publications Subscription Rule* regulates and governs the internal sale, offering for sale, purchase, distribution or use of imported reading materials in China. The United States avers that the *Publications (Sub-)Distribution Rule* clarifies that only books newspapers and periodicals published in China may be sub-distributed by foreign-invested enterprises.

7.1509 The United States explains that within China's legal system the two measures are "departmental rules" which were promulgated by order signed by the head of the issuing agency.[809] The United States explains that "departmental rules are legally binding legal instruments issued by government agencies to enforce the laws, administrative regulations, decisions and orders of the State Council."[810]

7.1510 The United States argues that all the challenged measures constitute "regulations" as that term is used in Article III:4 of the GATT 1994. The United States also argues, relying on the panel report in *Canada – Autos*, that if the Panel were to find that they were not "regulations" they are nevertheless "requirements" because the challenged measures involve a demand, request or the imposition of a condition on imported products.[811]

7.1511 **China** provides no argumentation on this point.

7.1512 The **Panel** recalls that, the phrase "laws, regulations, or requirements" encompasses a variety of government measures, from mandatory rules which apply across the board to government action that creates voluntary incentives or disincentives.

7.1513 The *Imported Publications Subscription Rule* contains provisions which require that all imported newspapers and periodicals to be distributed through only one particular distribution

[809] United States' response to question No. 121 *citing* China's *Legislation Law*, 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).

[810] *Ibid citing* China's *Legislation Law*, Article 71 (Exhibit US-72).

[811] United States' response to question No. 121 *citing* Panel Report, *Canada – Autos*, para. 10.107; *also* United States' response to question No. 122(h).

channel. In this sense the provisions are mandatory and apply across the board to all importers and distributors of these reading materials. Therefore, regardless of its legal form within China, the *Imported Publications Subscription Rule*, fits squarely within the definition of the term "regulation" as used in Article III:4 of the GATT 1994.

7.1514 The *Publications (Sub-)Distribution Rule* sets forth mandatory rules applicable to foreign-invested enterprises that wish to sub-distribute domestically published reading materials. Therefore, for the same reasons as those we have mentioned in respect of the *Imported Publications Subscription Rule* above, the *Publications (Sub-)Distribution Rule* is a "regulation" within the meaning of Article III:4 of the GATT 1994.

(ii) Affecting ... distribution

7.1515 The **United States** argues that Articles 3-8 of the *Imported Publications Subscription Rule* have a direct impact on how these products are distributed. Specifically, the United States contends that Article 3 requires all imported publications, with the exception of imported books and electronic publications on the non-limited distribution list, to be distributed on a restrictive subscription basis; Article 4 establishes the limited set of entities permitted to engage in the distribution of these publications; and Articles 5 through 8 address who may subscribe to these publications.

7.1516 The **Panel** notes that with respect to books and electronic publications in the limited category, it has determined that the United States did not establish that books in the limited category are "like" domestic books (see paragraph 7.1497). Additionally, we also recall our finding in paragraph 7.147, that electronic publications are outside our terms of reference with respect to the claim under Article III:4 of the GATT 1994.

7.1517 With respect to the *Publications (Sub-)Distribution Rule* the United States argues that it fulfils the "affecting" requirement as it regulates and governs the distribution of domestic books, newspapers and periodicals by foreign-invested enterprises. Specifically, the United States alleges that, by imposing discriminatory limits on how imported books, newspapers and periodicals may be obtained, i.e., from only a sub-set of all those entities permitted to distribute domestic reading materials, the *Publications (Sub-)Distribution Rule* affects reading materials by implementing the regime that limits the channels through which the imported products may be acquired.

7.1518 **China** objects to the inclusion of the requirements on subscribers set forth in Articles 5 through 8 of the *Imported Publications Subscription Rule* in the Panel's terms of reference. The Panel dealt with this objection in Section VII.B.4(c) *supra*.

7.1519 China provides no argumentation about whether the two challenged measures "affect" the distribution of reading materials within the meaning of Article III:4 of the GATT 1994.

7.1520 The **Panel** recalls its determination in paragraph 7.1513, above that Article 3 of the *Imported Publications Subscription Rule* imposes mandatory subscription requirements on all imported newspapers and periodicals.

7.1521 Article 4 of the *Imported Publications Subscription Rule* requires that subscriptions placed by subscribers for imported newspapers and periodicals "shall be handled by publication import business units designated by the General Administration of Press and Publication." We note that for the definition of "publication import business units" Article 2 of the *Imported Publications Subscription Rule* refers to the *Publications Regulation*. In that regard, Article 41 of the *Publications Regulation* states that publication import entities established in compliance with those regulations and designated by the publication administration under the State Council (i.e. GAPP) may engage in the business of importing newspapers or periodicals. Article 42(2) of the *Publications Regulation* requires that to

establish a publication import entity the applicant be a wholly state-owned enterprise. Therefore, Article 4 of the *Imported Publications Subscription Rule* limits those who may handle subscriptions for imported newspapers and periodicals to wholly state-owned enterprises.

7.1522 As Articles 3 and 4 of the *Imported Publications Subscription Rule* directly govern the manner in which imported newspapers and periodicals may be distributed (i.e., subscription channel) and who may distribute them (i.e., wholly state-owned enterprises) they "affect" the distribution of imported newspapers and periodicals within the meaning of Article III:4 of the GATT 1994.

7.1523 With respect to the *Publications (Sub-)Distribution Rule*, we recall our conclusion that any FIE which wishes to sub-distribute books, newspapers, and periodicals within China must comply with the *Publications (Sub-)Distribution Rule*. Therefore, the *Publications (Sub-)Distribution Rule* directly governs who may distribute books, newspapers and periodicals within China. We also note that Article 2 of the *Publications (Sub-)Distribution Rule* limits the scope of the provisions in the Rule, including those with respect to foreign-invested enterprises receiving approval to sub-distribute reading materials, to domestically published books, newspapers and periodicals. As the *Publications (Sub-)Distribution Rule* sets forth rules which determine which enterprises may be available to sub-distribute imported books, newspapers, and periodicals, it "affects" the distribution of imported books, newspapers and periodicals within the meaning of Article III:4 of the GATT 1994.

7.1524 As we have concluded that there will, or can, be imported and domestic products that are like (newspapers and periodicals with respect to the US claim regarding the *Imported Publications Subscription Rule* and books, newspapers and periodicals with respect to the US claim regarding the *Publications (Sub-)Distribution Rule*) within the meaning of Article III:4 and that the challenged measures are "laws, regulations, or requirements" which affect the internal distribution of the like products China is obligated, pursuant to Article III:4 of the GATT 1994 to afford the imported products no less favourable treatment than that afforded to the domestic like products. Therefore, we will now turn our analysis to whether China has complied with this obligation.

(c) Less favourable treatment

7.1525 Article III:4 of the GATT 1994 requires China to provide "effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[812]

7.1526 The **United States** argues that imported reading materials cannot compete with domestic reading materials on an equal footing, because they face significantly reduced opportunities for distribution and for sale in the Chinese market.

7.1527 The United States maintains that the two measures confine most categories of imported reading materials to a single distribution channel and limit which enterprises are permitted to distribute imported reading materials. The United States points out that, domestic reading materials do not face these restrictions. According to the United States, these measures severely disadvantage imported reading materials *vis-à-vis* domestic like products and are thus inconsistent with Article III:4 of the GATT 1994.

7.1528 The United States also maintains that the two measures provide less favourable treatment by denying imported reading materials access to the wide array of distributors that are available to domestic reading materials. Specifically, the United States argues that the *Imported Publications Subscription Rule* restricts all imported newspapers and periodicals as well as books in the limited category to distribution by Chinese wholly state-owned distributors, while the *Publications*

[812] Panel Report on *US – Gasoline*, para. 6.10 *citing* Panel Report on *US – Section 337*, para. 5.11.

(Sub-)Distribution Rule restricts all imported books in the non-limited category to wholly Chinese-owned distributors.

7.1529 **China** maintains that its measures do not provide for less favourable treatment of imported reading materials. Specifically, China argues that subscription for non-limited newspapers and periodicals subscription is granted more or less automatically and that:

> "[T]he potential restrictions that such a subscription system could entail would not significantly alter the number of readers that would be likely to buy foreign newspapers, and thus do not actually affect the conditions of competition between foreign and domestic product.
>
> It follows that the subscription system applied for [non-limited] foreign newspapers and periodicals does not result in a less favourable treatment for foreign products."[813]

7.1530 China admits that, in China, there are two distribution systems for imported publications whereby imported newspapers and periodicals (whether in the limited category or in the non-limited category) and books and electronic publications in the limited category are subject to the subscription system and imported books and electronic publications in the non-limited category are subject to the market sales system.

7.1531 China does not deny that contrary to the systems for imported reading materials, domestic newspapers and periodicals are available through *both* the market sales and subscription systems. China also does not dispute that the choice of distributors for imported reading materials is limited by the measures. China's only argument seems to be that the formally different distribution channel for newspapers and periodicals (*i.e.*, subscription vs. any channel) does not *significantly* alter the competitive opportunities of imported reading materials.

7.1532 **The Panel** is mindful that the Appellate Body in *Korea – Various Measures on Beef* found that a "formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4."[814] The focus of the analysis must remain on the substantive question of whether a challenged measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[815]

7.1533 Following the Appellate Body's guidance, we will examine whether, in respect of the distribution of reading materials in China, the measures at issue modify the conditions of competition in China's market to the detriment of imported reading materials.

(i) Imported Publications Subscription Rule

7.1534 With respect to whether the restrictions in Articles 3 and 4 of the *Imported Publications Subscription Rule* result in China affording less favourable treatment to imported newspapers and periodicals we recall that it is undisputed that domestic newspapers and periodicals may be distributed through multiple channels to consumers, whereas their imported counterparts are limited to one channel – i.e., subscription. Moreover, imported newspapers and periodicals can only be moved along that single channel by Chinese wholly state-owned enterprises. Domestic newspapers and periodicals, however, reach consumers through a variety of distributors, including foreign-invested enterprises, Chinese privately-held enterprises and Chinese wholly state-owned enterprises. Thus,

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[813] China's first written submission, paras. 547-548; *also* China's responses to question Nos. 130(e), 131.

[814] Appellate Body Report on *Korea – Various Measures on Beef*, para. 137.

[815] *Ibid.*

Articles 3 and 4 of the *Imported Publications Subscription Rule* place restrictions on who may distribute imported newspapers and periodicals and the method in which they may be distributed that are not faced by like domestic products.

7.1535 With respect to the mandatory subscription requirements in Article 3 of the *Imported Publications Subscription Rule*, we note that this means that a distributor of domestic newspapers and periodicals can distribute individual issues to consumers via newsstands, bookstores, and other shops, as well as via subscription, while a distributor of imported newspapers and periodicals may only distribute its products through a subscription to every issue of that publication. Although both domestic and imported newspapers and periodicals may be subscribed to, distributors of domestic newspapers and periodicals also have the opportunity to distribute their products through other channels which enable them to reach a greater number of consumers. Additionally, distributors of imported newspapers and periodicals cannot distribute their products through channels that would place them in front of consumers in direct competition with domestic publications, for example an enterprise distributing imported newspapers and periodicals cannot distribute them to a newsstand or bookstore where they would be displayed alongside domestic newspapers and periodicals.

7.1536 In view of the preceding analysis, this limitation in the manner in which imported newspapers and periodicals may be distributed in our view not only constitutes formally different treatment, but also treatment which can reasonably be concluded to modify the conditions of competition to the detriment of imported newspapers and periodicals.

7.1537 We note China's argument that because consumers can easily buy non-limited newspapers and periodicals by subscription, the United States cannot establish that China affords less favourable treatment to imported newspapers and periodicals. However, we cannot agree with China that a lack of "significant" alteration in the conditions of competition would mean that China has fulfilled its obligation to treat the imported products no less favourably than the like domestic products. We note that the phrase "treatment no less favourable" is not qualified by a *de minimis* standard. Accordingly, *any* less favourable treatment of imported products via laws, regulations, or requirements which affect their internal sale, offer for sale, purchase, transportation, distribution or use is contrary to the obligation in Article III:4, provided such treatment modifies the conditions of competition to the detriment of imported products.[816]

7.1538 Additionally, Article 4 of the *Imported Publications Subscription Rule*, read in light of the definition of an import business unit provided in Article 2 of the same measure, limits who may handle subscriptions for imported newspapers and periodicals to wholly state-owned enterprises. Through this provision China has created a limitation on who may distribute imported newspapers and periodicals which does not exist for the domestic like products. This means that those wishing to distribute their newspapers and periodicals within China have different distributors available to them depending on the origin of their products. An enterprise wishing to distribute an imported newspaper or periodical must distribute its product through a wholly state-owned company regardless of whether a private enterprise might have been a more competitive distributor in terms of undertaking more or better efforts at marketing the newspaper or periodical. By contrast, an enterprise wishing to distribute a domestically published newspaper or periodical may select from any distributor it wishes, based on which distributor will provide the best competitive advantage for its products.

7.1539 Therefore, the restrictions on the distribution channels available set forth in Article 3 and the limitations on the type of distributors available set forth in Article 4 of the *Imported Publications Subscription Rule* may reasonably be expected to adversely modify the conditions of competition in the marketplace between imported and domestic like products. In our view, Articles 3 and 4 are thus

[816] In this respect, we find the reasoning of the Appellate Body in *Japan – Alcoholic Beverages II* instructive.

inconsistent with China's obligation in Article III:4 of the GATT 1994 to afford no less favourable treatment to the like imported products.

(ii) Publications (Sub-)Distribution Rule

7.1540 The United States has also identified the *Publications (Sub-)Distribution Rule* as a measure which gives rise to an inconsistency with Article III:4 of the GATT 1994. Although the United States refers to the measure as a whole in its submissions, the only provision specifically identified by the United States as giving rise to an inconsistency with Article III:4 is Article 2 of the *Publications (Sub-)Distribution Rule*.

7.1541 As noted above, Article 2 of the *Publications (Sub-)Distribution Rule* does not itself prohibit foreign-invested enterprises from engaging in wholesaling of any imported books, newspapers and periodicals. Rather, Article 2 establishes the scope of the *Publications (Sub-)Distribution Rule*. It makes clear that the Rule applies to foreign-invested enterprises engaged in the distribution of books, newspapers and periodicals published in China. It says nothing about whether foreign-invested enterprises may engage in distributing imported books, newspapers and periodicals. Therefore, we consider that Article 2 cannot, by itself, give rise to an inconsistency with WTO obligations.

7.1542 We also note that the United States has argued that the import of the provisions of the *Publications (Sub-) Distribution Rule* must be determined in light of the *Publications Regulation* and the *Publications Market Rule* which are China's other measures governing the distribution of books, newspapers and periodicals.

7.1543 In response to questions from the Panel, the United States specifically refers to Article 16 of the *Publications Market Rule*[817], which was drawn up on the basis of the *Publications Regulation*. Article 16 provides:

> "To set up a book, newspaper and periodical sub-distribution enterprise, a Chinese-foreign equity joint venture, contractual joint venture, or a foreign capital enterprise shall follow the [Publication (Sub-) Distribution Rule] jointly drawn up by the GAPP and the Ministry of Foreign Trade and Economic Cooperation".

7.1544 We note in this connection the US statement that no Chinese measures other than the *Publications (Sub-)Distribution Rule* authorize foreign-invested enterprises to engage in the distribution of reading materials. China does not contest the US statement. Therefore, the *Publications (Sub-)Distribution Rule* appears to be the sole regulation governing the establishment of foreign-invested enterprises engaging in the distribution of books, newspapers and periodicals. Reading the limitation of the scope of the *Publications (Sub-)Distribution Rule* to domestically published books, newspapers and periodicals which is set forth in Article 2 in conjunction with the requirement in Article 16 of the Publications Market Rule for foreign-invested enterprises seeking to distribute any books, newspapers or periodicals to follow the *Publications (Sub-)Distribution Rule* leads to the conclusion that foreign-invested enterprises are excluded from engaging in the distribution of any imported books, newspapers and periodicals. We also note that China confirms that, by virtue of Article 2 of the *Publications (Sub-)Distribution Rule*, foreign-invested enterprises are prevented from wholesaling imported reading materials.[818]

7.1545 Consequently, Article 2 of the *Publications (Sub-)Distribution Rule*, read in conjunction with Article 16 of the *Publications Market Rule*, limits the type of sub-distributors available to imported books, newspapers, and periodicals by excluding foreign-invested enterprises from the potential pool

[817] United States' responses to question Nos. 61, 74 and 122(h).
[818] China's response to question No. 78.

of sub-distributors. This means that domestic publications have a wider range of possible sub-distributors than their imported counterparts. An enterprise wishing to sub-distribute an imported book, newspaper or periodical may not distribute its product through a foreign-invested enterprise, regardless of whether the foreign-invested enterprise might have been a more competitive sub-distributor for the book, newspaper or periodical in question than the wholly Chinese-owned enterprise which is available. By contrast, an enterprise wishing to sub-distribute a domestically published book, newspaper or periodical may select from any sub-distributor it wishes based on which sub-distributor will provide the best competitive advantage for its products. Therefore the limitations set forth in Article 2 of the *Publications (Sub-)Distribution Rule* regarding the type of enterprises that may sub-distribute imported books, newspapers, and periodicals, together with the provisions of Article 16 of the *Publications Market Rule*, may reasonably be expected to adversely modify the conditions of competition in the marketplace between imported and like domestic products and are thus inconsistent with China's obligation in Article III:4 of the GATT 1994 to provide no less favourable treatment to the like imported products.

3. Sound recordings

7.1546 The **United States** also claims that China's measures which provide for a content review of imported hard-copy sound recordings before they can be digitalized and distributed electronically are inconsistent with China's obligations under Article III:4 of the GATT 1994. The United States maintains that these measures affect the distribution and use of the hard-copy sound recording in China and that the additional delays and burdens associated with the content review regime, which are not applicable to domestic products, provide less favourable treatment to the imports.

7.1547 The United States argues that contrary to the obligation set forth in Article III:4 of the GATT 1994 China's measures (both the *Network Music Opinions* and the *2001 Audiovisual Products Regulation*) impose a more onerous content-review regime on imported sound recordings intended for electronic distribution than for like domestic recordings. The United States also argues that the only criterion for determining whether a sound recording intended for electronic distribution must go through these more onerous content review process is the national origin of the product. According, to the United States, this means that China accords less favourable treatment to imports of these products than to domestic like products.

7.1548 **China** argues that contrary to what the United States is alleging, the distribution of sound recordings imported in hard copy, but intended for so-called "electronic distribution", cannot be scrutinized under the rules governing trade in goods. China maintains that so-called "electronic distribution" does not refer to distribution in the sense of Article III:4 of the GATT 1994 insofar as it does not involve the distribution of physical goods.

7.1549 China also argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are outside the Panel's terms of reference. In the alternative, China contends that the measures do not affect the so-called "electronic distribution" of the sound recordings. China maintains that the two measures govern the import of sound recordings in physical form and not their internal distribution.

7.1550 The United States, in its first oral statement and second written submission, argues that China misunderstands the US claim which only applies to measures affecting imported hard-copy media containing sound recordings that are intended for electronic distribution and does not include a challenge to any measure's treatment of services or service suppliers involved in the electronic distribution of sound recordings.

7.1551 China however, responds in its second written submission and second oral statement that a close reading of the US panel request and first written submission will demonstrate that what the

United States is actually targeting is electronic distribution. China maintains that the challenged measures provide for a content review to be applied to digitalized content (i.e., the digital data extracted from the hard copy and subsequently transformed into a format suitable for transmission over the Internet). Therefore, according to China, the measures identified by the United States do not affect the distribution of hard copies.

7.1552 Additionally, China argues that the formally different treatment identified by the United States does not affect the "distribution" of hard copies and can therefore not be scrutinized under Article III:4 of the GATT 1994. According to China, what the United States suggests should be compared is the allegedly different treatment applied to digitalized products. China believes that following the United States' logic would entail major systemic implications, insofar as it would amount to applying rules on trade in goods to services provided over the Internet. China also argues that by redefining the target of its claim as being the imported hard-copy sound recording, the United States is in fact arguing that the Chinese measures affecting the content of imported hard-copy sound recordings should also be considered as measures affecting "the internal sale, offering for sale, purchase, distribution or use of" hard-copy sound recordings and thus fall under Article III:4 of the GATT 1994. China contends that following this erroneous logic of the United States, would mean that GATT rules would apply to any measure regulating services related to – intangible – content as long as there exists a physical carrier capable of being traded, since such a measure would always have the alleged effect on its carrier.

(a) Like products

7.1553 The **United States** argues that all sound recordings, whether domestic or imported, are fundamentally the same in all relevant aspects: they can contain the same kinds of music, can appeal to the same audiences or target markets, and can be equally suitable for distribution digitally. The United States maintains that China's regulatory regime for sound recordings intended for electronic distribution uses purely nationality and origin-based criteria to determine which of the two sets of content review rules will apply.

7.1554 With respect to the *Internet Culture Rule*, the United States avers that while Article 16 of the *Internet Culture Rule* provides that imported internet cultural products "shall be reported to the Ministry of Culture for examination of their contents", the same provision only requires that companies circulating domestically produced Internet cultural products "shall file with the Ministry of Culture within 60 day of officially beginning circulation and shall display the Ministry of Culture filing number in a prominent place on the products." The United States also notes that Article 26 of the *Internet Culture Rule* which sets forth penalties for failure to comply with content review requirements maintains this distinction between imported products which are "approved" by and domestic products which are "filed" with the MOC.

7.1555 Specifically, the United States contends that the *Network Music Opinions* subjects imports of these products to a much more onerous content review regime than domestic products, which only need to be registered with MOC. Likewise, the United States contends that the *2001 Audiovisual Products 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.

7.1556 **China** does not present any argumentation on whether imported and domestic hard-copy sound recordings intended for electronic distribution are "like" within the meaning of Article III:4 of the GATT 1994.

7.1557 The **Panel** notes its finding, in para.7.82, that the *2001 Audiovisual Products Regulation* and *Audiovisual Products Importation Rule* are outside our terms of reference with respect to the US claim on whether China's treatment of hard copy sound recordings intended for electronic distribution

is consistent with Article III:4 of the GATT 1994. Therefore, we will make no finding as to whether these measures distinguish between domestic and imported products solely based on origin, or indeed whether they are laws, regulations, or requirements affecting the distribution of the products in a manner that affords the imported products less favourable treatment. Therefore, our analysis will be limited to the *Internet Culture Rule* and the *Network Music Opinions* which were properly identified in the US panel request.

(i) Traditional analysis

7.1558 The **United States** argues that all sound recordings, whether domestic or imported, are fundamentally the same in all relevant aspects: they can contain the same kinds of music, can appeal to the same audiences or target markets, and can be equally suitable for distribution digitally. The United States provides no further elaboration on whether imported and domestic sound recordings intended for electronic distribution are "like" based on the four traditional criteria in its first written submission or in its subsequent submissions to the Panel.

7.1559 **China** provides no argumentation with respect to whether the imported and domestic products are "like" within the meaning of Article III:4.

7.1560 The **Panel** notes that other than its assertion in its first written submission that the imported and domestic products are fundamentally the same in all relevant aspects the United States has not addressed through argumentation and evidence the properties, nature and quality of the products, the end-uses of the products, consumers' tastes and habits in respect of the products, and the tariff classification of the products. Therefore, we conclude that the United States has not established that imported hard-copy sound recordings intended for electronic distribution are "like" domestic hard-copy sound recordings intended for electronic distribution based on the traditional "like products" criteria.

7.1561 We note that the United States has also argued that the imported and domestic products are "like" because the challenged measures distinguish between them based on origin. Therefore, we will go on to determine whether the United States has established that the products are "like" via this route.

(ii) Internet Culture Rule

7.1562 With respect to the *Internet Culture Rule*, the **United States** has identified Article 16 as the provision which distinguishes between imported and domestic hard-copy sound recordings intended for electronic distribution exclusively based on origin.[819]

7.1563 Article 16 provides:

> "Importing of Internet cultural products shall be carried out by commercial Internet cultural units that have obtained a Network Cultural Business Licence, and the products shall be reported to the Ministry of Culture for examination of their contents.
>
> The Ministry of Culture shall, within 20 business days (not including the time required for specialist evaluation) of receipt of an application for examination of contents, make a decision on whether or not to approve the application. If the application is approved, an approval document shall be issued: if the application is not approved, the reasons shall be clearly stated.

[819] United States' response to question No. 252.

> Units that obtain approval for the import of Internet Culture products shall display the Ministry of Culture approval number in a prominent place on the products, and shall not alter program names or add to or delete program contents on their own. If a product is not put into circulation within one year of approval, the importing unit shall file with the Ministry of Commerce to file this fact and clearly state the reasons. When it is decided to end import of the product, the Ministry of Culture will cancel the approval number.
>
> Internet cultural units that circulate domestically produced Internet cultural products that need to be filed as required by relevant provisions shall file with the Ministry of Culture within 60 days of officially beginning circulation and shall display the Ministry of Culture filing number in a prominent place on the products."

7.1564 The United States contrasts the treatment of imported Internet cultural products in Article 16 with domestic ones in Article 19 of the *Internet Culture Rule*. Specifically, the United States notes that pursuant to Article 19 domestic Internet cultural products are to be reviewed by their domestic distributor's internal content examination system.

7.1565 **The Panel** notes that on its face, Article 16 sets forth a content review process for imported Internet cultural products which must be approved by the MOC. By contrast, Article 19 refers to a requirement for domestically produced Internet cultural products to be "filed" with the MOC which can happen after circulation of the product has already begun. The only distinction contained in the measure for determining which requirement must be followed, content review or filing, is the origin of the Internet cultural product. Therefore, the *Internet Culture Rule* establishes a difference in treatment between domestic and imported Internet cultural products. Thus, as a result of this difference in treatment, even imported Internet cultural products that are identical to domestic ones (except for origin) would be subject to government content review while their domestic counterpart would only need to be filed with the Ministry. In our view, it is clear that there will, or can, be domestic and imported Internet cultural products that are the same, except for origin.[820]

7.1566 However, we note that Article 16 does not refer to hard-copy sound recordings intended for electronic distribution, rather it refers to "Internet cultural products". Therefore, before we can determine whether Article 16 creates a difference in treatment between the imported and domestic products which are the subject of this dispute based exclusively on their origin we must determine whether Article 16 applies to the imported product identified by the United States, i.e., hard-copy sound recordings intended for electronic distribution.

7.1567 We note that Article 2 of the Internet Culture Rule states that the "Internet cultural products" as used in the Rule.

> "refer to the cultural products produced, disseminated, and circulated through the Internet, primarily consisting of:
>
> (1) Internet cultural products produced specially for dissemination over the Internet such as network audiovisual products (including VOD, DV), network games, network performances (drama), network works of ar, and animated cartoons (including FLASH); and

[820] For instance it is possible that both an imported and domestically produced Internet cultural product could contain the same recording of a song sung by a particular artist.

> (2) Audiovisual products, game products, performances (drama), works of art, animated cartoons, and other Internet cultural products produced or reproduced by the use of certain technological means to disseminate over the Internet."[821]

7.1568 The United States contends that Article 2(2) means that the *Internet Culture Rule* covers, *inter alia*, all audiovisual products including those in hard-copy format intended for electronic distribution. China, on the other hand, maintains that the challenged measures provide for a content review to be applied to digitalized content (i.e. the digital data extracted from the hard copy and subsequently transformed into a format suitable for transmission over the Internet) before its transmission over Internet.

7.1569 The United States is correct that Article 2(2) *Internet Culture Rule* refers to "audiovisual products" which, as defined in Article 2 of the *Audiovisual Products Importation Rule* would include audio and video CDs which have recorded contents. However, Article 2(2) of the *Internet Culture Rule* refers to audiovisual products "produced or reproduced by the use of certain technological means to disseminate over the Internet". It is not clear to us that these two groups of products are synonymous and the United States has provided no argumentation with respect to the meaning of this qualifying phrase. Likewise, China has not specifically addressed the US interpretation of Article 2(2), nor has it explained why subparagraph 1 of Article 2 refers to "network audiovisual products" and subparagraph 2 of Article 2 refers to audiovisual products "produced or reproduced by the use of certain technological means to disseminate over the Internet".

7.1570 Therefore, it is less than clear what types of products are governed by the *Internet Culture Rule*. Because the United States is arguing that the imported and domestic products are "like" because the *Internet Culture Rule* makes distinctions between the two groups of products exclusively based on origin, understanding whether Article 16 applies to hard-copy sound recordings intended for electronic distribution is essential to a determination of whether the imported product (i.e., the hard-copy sound recording intended for electronic distribution) is "like" the domestic product. If the Panel cannot determine whether the measure treats imported and domestic products differently exclusively based on origin, we cannot determine whether the imported and domestic products are "like" on the basis asserted by the United States.

7.1571 We note, however, that the "like products" requirement is only one of the elements which must be proven to establish an Article III:4 claim. A definitive determination on likeness is only necessary if the United States establishes that the measures affect the distribution of the imported products in a manner which affords less favourable treatment. Therefore, we will defer our analysis of the "like products" element and proceed with our analysis on the assumption that Article 16 applies to imported hard-copy sound recordings intended for electronic distribution. If we find that the United States has demonstrated that the measures affect the distribution of the imported hard-copy sound recordings intended for electronic distribution in a manner which affords less favourable treatment to the imported products then we will return to the question of whether the "like products" requirement is met because the measures establish different treatment for imported and domestic products exclusively based on their origin.

(iii) Network Music Opinions

7.1572 According to the **United States**, the *Network Music Opinions* implements and reinforces the same discriminatory content review regime set up by the *Internet Culture Rule*. According to the United States, the *Network Music Opinions* simply provides more detail regarding the content review regime set forth in the *Internet Culture Rule*.

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[821] Article 2, *Internet Culture Rule* (Exhibit – US 32).

7.1573 The United States identifies Article 9 as the provision which distinguishes between imported and domestic hard-copy sound recordings intended for electronic distribution exclusively based on origin.

7.1574 Article 9 provides:

> "(9) Instituting a system for examining the content of network music products. Network music products transmitted inside the People's Republic of China must be approved by the Ministry of Culture for importation or filed with the Ministry of Culture. Imported network music products can only be used after the Ministry of Culture examines their content. Imported music products transmitted over the network, even if the Ministry of Culture has already examined their content, should be processed according to law by internet cultural units (see appendices for related requirements). The business of importing network music can only be handled by internet cultural units approved by the Ministry of Culture. Anyone who transmits imported network music on its own will be investigated and punished accordingly by the Ministry of Culture according to law, while at the same time, it will be requested that telecommunications management departments deal with related websites according to law. Domestically produced music products that are to be exclusively transmitted over the network shall be filed with the Ministry of Culture."

7.1575 **The Panel** notes that, just as with the *Internet Culture Rule*, Article 9 sets up a content review process for imported network music products whereas domestically produced network music products are not subjected to the same procedures, but rather must be "filed" with the MOC. The only distinction contained in the measure for determining which requirement must be followed, content review or filing, is the origin of the network music product. Therefore, the *Network Music Opinions* establishes a difference in treatment between domestic and imported network music products, which include hard-copy sound recordings intended for electronic distribution. As a result of this difference, even an imported network music product which was identical in all respects to a domestic one would be subject to Government content review while its domestic counterpart would only need to be filed with the Ministry. In our view, it is clear that there will, or can, be domestic and imported network music products that are the same, except for origin.

7.1576 However, we note that the *Network Music Opinions*, which is based on the *Internet Culture Rule*, does not define "network music products". Therefore, before we can determine whether Article 9 creates a difference in treatment between the imported and domestic products which are the subject of this dispute based exclusively on their origin we must determine whether Article 9 applies to the imported product identified by the United States, i.e., hard-copy sound recordings intended for electronic distribution.

7.1577 The United States points out that the *Network Music Opinions* implements and is based on the *Internet Culture Rule*. The United States, therefore, concludes that the product coverage in both measures is the same. Essentially, the United States contends that the definition of "network music product" in the *Network Music Opinions* is the same as that of "audiovisual products" in the *Internet Culture Rule*, which it believes includes hard-copy sound recordings imported in physical form intended to be distributed in China for eventual transmission over a network, e.g., the Internet or a mobile telecommunications network.

7.1578 **China,** for its part, maintains that the content review provided for in the *Network Music Opinions* applies to the digitalized version of the music previously embedded on the imported hardcopy. According to China this content review is primarily aimed at verifying whether the content of the digitalized version remains the same as the hard-copy, therefore, it is the digitalized version

(that is ready to be put on-line) that is subject to content review, not the hard-copy format in which the sound recording is embedded.[822]

7.1579 China relies on Article I of Appendix 2 of the *Network Music Opinions* which sets forth the type of materials that should accompany the content examination application for "imported audiovisual products (including those officially published and distributed) whose content has already been examined by the Ministry of Culture and are to be transmitted over the information network." These materials are

> "1. Form for the Examination of Imported Network Music Products; 2. Duplicate or copy of letter of authorization to transmit over the Information network and a draft product circulation agency agreement (in Chinese and foreign language versions), and certificate of original copyright; 3. Ministry of Culture Letter of Approval for Import of Audiovisual Products; 4. Copies of the Network Culture Business Licence and Business Licence of the applying unit; 5. Applying unit's website, IP address, music product registration and recording account number and corresponding codes; and 6. Other documents as needed for content examination."

7.1580 The Article also notes that after receiving the application the MOC will make an approval decision within 20 business days.

7.1581 However, China does not refer to Article II of Appendix 2, which is cited by the United States as setting forth content review procedures applicable to imported hard-copy sound recordings intended for electronic distribution.[823] That article provides that:

> "[A]part from Article I of this attachment, commercial internet culture units which wish to import network music products for transmission through the information network shall apply to the Ministry of Culture and submit the following documents and materials:
>
> 1. Form for the Examination of Imported Network Music Products; 2. Drafts of the copyright trading agreement including transmission right or circulation agency agreement (Chinese and foreign language versions); original certificate of copyright; copy or duplicate of the Letter of Authorization to Transmit Over the Information Network; 3. CD of the program (including Chinese and English lyrics); 4. Copies of the Network Cultural Business Licence and Business Licence of the applying unit; 5. Applying unit's website, music product registration and recording account number and corresponding codes; and 6. Other documents as needed for content examination."

7.1582 The Article also notes that after receiving the application, the Examination Committee of the MOC shall examine the contents and draw up an opinion, and that the MOC, based on that opinion shall within 20 business days (not including the time for special evaluations) make an approval decision.

7.1583 The **Panel** notes that the United States relies on the *Internet Culture Rule* for its understanding that "network music products" referred to in the *Network Music Opinions* is equivalent to the definition of "audiovisual products" set forth in Article 2(2) of the *Internet Culture Rule*. However, we recall our finding in paragraph 7.1570, above that it is unclear whether the audiovisual

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[822] China's response to question No. 274(a).

[823] United States' response to question No. 245, *citing* United States' first written submission, paras. 190-195.

products described in that Article are synonymous with hard-copy sound recordings. We also note once again that, the United States' and China's explanations with respect to what is submitted to the MOC for content review have not left us with a sufficiently clear understanding of the factual situation.[824]

7.1584 Specifically, it is unclear from the argumentation presented by the United States and China what exactly the MOC reviews pursuant to the procedures in Article 9 and Appendix 2. China asserts that a digital copy is reviewed, but does not address the ambiguity raised by the terms in Article II of Appendix 2. The United States tells the Panel that it "understands" that the MOC reviews the imported hard-copy sound recording but provides no substantiation for this assertion. Because the United States is arguing that the imported and domestic products are "like" because the *Network Music Opinions* make distinctions between the two groups of products exclusively based on origin, understanding whether Article 9 and Appendix 2 apply to hard-copy sound recordings intended for electronic distribution is essential to a determination of whether the imported product (i.e., the hard-copy sound recording intended for electronic distribution) is "like" the domestic product. If the Panel cannot determine whether the measure treats imported and domestic products differently exclusively based on origin, we cannot determine whether the imported and domestic products are "like" on the basis asserted by the United States.

7.1585 We recall, that the "like products" requirement is only one element which must be proven to establish an Article III:4 claim. A definitive determination on likeness is only necessary if the United States establishes that the measures affect the distribution of the imported products in a manner which affords less favourable treatment. Therefore, we will defer our analysis of the "like products" element and proceed with our analysis on the assumption that the *Network Music Opinions* applies to imported hard-copy sound recordings intended for electronic distribution. If we find that the United States has demonstrated that the measures affect the distribution of the imported hard-copy sound recordings intended for electronic distribution in a manner which affords less favourable treatment to the imported products then we will return to the question of whether the imported and domestic products are "like products" requirement is met because the measure establishes different treatment for imported and domestic products exclusively based on their origin.

(b) Laws, regulations, or requirements *affecting* ... distribution

(i) Laws, regulations or requirements

7.1586 The **United States** argues that the *Network Music Opinions* governs the conditions that must be met in order to distribute sound recordings intended for electronic distribution by making content review and approval by MOC a prerequisite for the electronic distribution of imported sound recordings.

7.1587 With respect to the *Internet Culture Rule*, the United States contends that Article 2(2) provides that audiovisual products in hard copy that have been transformed in order to be disseminated over the Internet are within the purview of the Rule, while Article 3(1) lists the Internet cultural activities governed by the rule as including the wholesaling, retailing and renting of Internet cultural products.

7.1588 The United States goes on to argue that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*s regulate and govern the distribution of all audiovisual products in China, including sound recordings.

[824] United States' responses to question Nos. 262(d) and 274(a) and (b); China's response to question No. 274(a) and (b).

7.1589 In response to question No. 121 the United States identifies the *2001 Audiovisual Products Regulation* as an "administrative regulation", the *Internet Culture Rule* and the *Audiovisual Products Importation Rule* as "departmental rules", and the *Network Music Opinions* as "other regulatory documents".

7.1590 The United States maintains that each of these measures falls within the definition of "regulations" as that term is used in Article III:4 and that the departmental rules and other regulatory documents also fit within the scope of the term "requirements" in Article III:4 of the GATT 1994.

7.1591 **China** does not present argumentation on whether the *Internet Culture Rule* and the *Network Music Opinions* are "laws, regulations, or requirements".

7.1592 **The Panel** recalls that the phrase "laws, regulations, or requirements" encompasses a variety of government measures, from mandatory rules which apply across the board to government action that creates voluntary incentives or disincentives.

7.1593 With respect to the *Internet Culture Rule*, Article 16 of the *Internet Culture Rule* requires that the importing of internet cultural products shall be carried out by Internet cultural units which have obtained a Network Cultural Business Licence and that the products shall be reported to the MOC for examination of their contents. Article 16 also provides that the MOC will conduct an examination of the contents of the products and provides that Internet cultural units must display their MOC approval number in a prominent place on the products, and shall not alter the program names or add to or delete program contents on their own. We also note that Article 26 provides for monetary fines for non-compliance with the requirement to display the MOC approval or filing number, whichever is required.

7.1594 The *Network Music Opinions* states that it is "based" on the *Internet Culture Rule* and provides more detailed procedures for obtaining MOC content approval for imported internet cultural products. First, Article 9 reiterates that "[i]mported network music products can *only* be used after the Ministry of Culture examines their content." Additionally, Appendix 2 lists the materials that need to be provided to the MOC as part of the application for approval for such imported products.[825]

7.1595 The *Internet Culture Rule* and the *Network Music Opinions* together create the process by which imported sound recordings intended for electronic distribution are subjected to content review by the MOC. These procedures must be complied with if an Internet Culture Provider ("ICP") or /Mobile Content Provider ("MCP") wants to transmit the content on the imported hard-copy sound recording in digital format over a network or the Internet. If the procedures set forth are not followed, penalties can be imposed by the Government of China. We therefore, find that they are mandatory rules applying across the board and as such are "regulations" within the meaning of Article III:4 of the GATT 1994 regardless of their legal form within China.

(ii) Affecting ...

7.1596 **China** argues that in its answers to the Panel's questions and its second written submission the United States has impermissibly enlarged its claim under Article III:4 of GATT 1994. Specifically, China maintains that in the panel request the United States only identified an alleged inconsistency with respect to China's laws, regulations, or requirements affecting the *distribution* of imported sound

[825] Preamble, Article 9, Appendix 2:I and II, *Network Music Opinions* (Exhibit US-34).

recordings intended for electronic distribution. China, therefore, contends that any subsequent claims with respect to China's laws, regulations, or requirements affecting the *use* of those products are outside the Panel's terms of reference.

7.1597 The **United States** in its second oral statement and in response to a specific question from the Panel, maintains that it made a claim with respect to Article III:4 *in toto* and that any argumentation that the relevant measures affect the use of the imported products is covered by the US claim with respect to Article III:4.

7.1598 Part IV of the US panel request is entitled "Sound Recordings Distribution". The United States then provides a narrative description of its complaint:

> "The United States considers that China is acting inconsistently with its obligations under the GATT 1994 and the Accession Protocol by providing *distribution opportunities for sound recordings imported into China in physical form that are less favourable than the distribution opportunities for sound recordings produced in China*.
>
> China appears to require that sound recordings imported into China in physical form but intended for digital distribution must undergo content review by the Chinese Government prior to such distribution within China. However, domestically produced sound recordings appear not to be subject to this requirement, but can instead be digitally distributed immediately. It thus appears that sound recordings imported into China in physical form are treated less favourably than sound recordings produced in China in physical form." (emphasis added)

7.1599 The United States then identifies the specific measures it is concerned with and concludes that "the measures at issue therefore appear to be inconsistent with China's obligations under Article III:4 of the GATT 1994."[826]

7.1600 The United States' only arguments in its first written submission with respect to the consistency of China's measures governing sound recordings intended for electronic distribution with Article III:4 of the GATT are contained in a section entitled "China's Measures Regarding Product Distribution Are Inconsistent With China's Obligations Under Article III:4 of the GATT 1994". The title of the section indicates that the only inconsistency the United States is concerned with is in respect of China's measures regarding the *distribution* of hard-copy sound recordings intended for electronic distribution.

7.1601 In its first written submission, the United States does refer to the measures as laws, regulations or requirements "affecting the internal sale, offering for sale, purchase, distribution or use of sound recordings intended for electronic distribution within the meaning of Article III:4."[827] However, in its description of the measures the United States refers to the Network Music Opinion as governing "the conditions that must be met in order to distribute sound recordings intended for electronic distribution."[828] Likewise, with respect to the *Internet Culture Rule*, the United States asserts that it "regulates and governs the distribution of sound recordings intended for electronic distribution in China."[829] The United States, in its first written submission does not present any argumentation on any of the other various activities described in Article III:4 of the GATT 1994, such as sale, offer for sale, purchase, transportation or use.

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[826] United States' panel request, WT/DS363/5.
[827] United States' first written submission, paras. 379 - 380.
[828] *Ibid.*, para. 379.
[829] *Ibid.*, para. 380.

7.1602 In response to a question from the Panel asking the United States to explain how the challenged measures 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),[830] the United States restates Article III:4 of the GATT 1994 and then maintains that "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."[831] The United States then argues:

> "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."[832]

7.1603 We agree with China that in its response to the aforementioned question from the Panel, and through its subsequent submissions[833], the United States altered its focus from whether the measures affected the distribution of imported hard-copy sound recordings intended for electronic distribution to whether the measures affected their use. The issue then becomes whether this shift in focus amounts to the United States raising a new claim that is not within our terms of reference.

Is "use" within the Panel's terms of reference?

7.1604 The **United States** maintains in its response to the second set of Panel questions

> "[t]he c*laim* is that the relevant measures accord less favourable treatment to imported products in contravention of Article III:4. Whether the relevant measures affect the use or distribution of the imported product – or both – are *arguments* in support of the claim, not separate claims. Thus the US claim itself has not changed." (emphasis original)[834]

7.1605 The Appellate Body has clarified that a "claim" in the context of WTO dispute settlement is "a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement," which is to "be distinguished from arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[835] Arguments in support of a claim may be set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[836] However, a party may not use its submissions to "cure" a deficient panel request.[837]

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[830] question No. 126.
[831] United States' response to question No. 126.
[832] United States' response to question No. 126.
[833] United States' response to question No. 126; United States' second written submission, para. 195; United States' second oral statement, para. 61; United States' response to question No. 246; United States' response to question No. 247(a); United States' response to question No. 257.
[834] United States' response to question No. 246.
[835] Appellate Body Report on *Korea – Dairy*, para. 139. (emphasis original; internal citations omitted)
[836] Appellate Body Report on *EC – Bananas III*, para. 141.
[837] *Ibid*., para. 143; see also Appellate Body Report on *United States – Carbon Steel*, para. 127.

7.1606 Claims made in WTO dispute settlement must be explicit. Only in this way will a panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it.[838]

7.1607 As noted above, Article III:4 of the GATT 1994 requires Members to provide no less favourable treatment to imported like products in respect of measures affecting a variety of *specific transactions, activities, and uses* relating to products in the marketplace.[839]

7.1608 The reference to this variety of transactions, activities, and uses in Article III:4 was not an accident. We recognize that there could be overlap between the various transactions governed by Article III:4 of the GATT 1994, in the sense that a regulation affecting sale might in some circumstances also affect purchase. We note, however, that the information necessary to prove that a law, regulation, or requirement affects transportation might very well be different from that necessary to prove that the same measure also affected use. Therefore, a complainant, in its panel request, when making a claim of inconsistency with Article III:4 of the GATT 1994 must allege that a measure affects the identified transactions, activities, and uses and also provides less favourable treatment to the imported like products with respect to that transaction, activity, or use. A complainant could accomplish this task in three ways: first a complainant could simply reference Article III:4, second, a complainant could list all the various transactions, activities, and uses subject to the obligation in Article III:4, or a complainant could identify the specific one(s) which it is claiming the respondent Member's measures affect.

7.1609 The United States in its panel request did not make an allegation with respect to several of the various transactions, activities, and uses nor did it bring an allegation with respect to all of them. The United States, in its panel request, specifically mentioned distribution and distribution alone. To recall, the US panel request states in relevant part that "China is acting inconsistently with its obligations under the GATT 1994 and the Accession Protocol by providing distribution opportunities for sound recordings imported into China in physical form that are less favourable than the distribution opportunities for sound recordings produced in China". We find that this is a statement of a claim. As we see it, the United States claims that certain action taken by China – the provision of allegedly less favourable distribution opportunities – is inconsistent with the GATT 1994, and, more specifically, Article III:4. We do not find convincing the US contention that the reference to "distribution" is an argument in support of a claim. Indeed, if the reference to "distribution" were considered a mere argument, it would then be unclear from the panel request what measure, i.e. the action attributable to China is the subject of the US claim. Therefore, we cannot accept the United States' contention that its references to distribution in the panel request are not part of its claim. At any rate, even accepting, *arguendo*, that the reference to "distribution" constitutes an argument, we note that there is no indication in the text of the panel request that any other argument might possibly be pursued. For example, the panel request does not say that China is acting inconsistently with its WTO obligations "*inter alia* by providing distribution opportunities". Thus, in view of how the panel request is drafted, we think that China would reasonably infer in good faith that the United States was providing additional clarification and delimiting the scope of the case China would have to answer and, more particularly, that the United States would present a case before the Panel that relates exclusively to distribution.

7.1610 Therefore, we find that the United States, in its panel request, did not make a claim with respect to whether China's laws, regulations or requirements affecting the internal *use* of hard-copy sound recordings intended for electronic distribution afforded less favourable treatment to imported like products in a manner inconsistent with Article III:4 of the GATT 1994. Consequently, we will not consider the US claim with respect to the "use" of hard-copy sound recordings intended for

[838] Appellate Body Report on *Chile – Price Bands*, para. 164.
[839] Appellate Body Report on *US – FSC (Article 21.5-EC)*, para. 208.

electronic distribution in determining whether China has acted inconsistently with its obligations under Article III:4 of the GATT 1994.

7.1611 However, even though the United States shifted its argumentation to support a claim with respect to "use" we note that it did not drop the claim with respect to "distribution" and this is still before us. A claim with respect to whether China's challenged "laws, regulations, or requirements" affect the *distribution* of imported hard-copy sound recordings intended for electronic distribution within China is before us and, as we understand it, still being pursued by the United States. Therefore, we will proceed to determine whether the United States has established that the challenged measures affect the internal distribution of imported hard-copy sound recordings intended for electronic distribution.

Distribution

7.1612 The **United States** argues that "distribution" covers a wide variety of transactions, encompassing the broad range of activities involved in moving a product through the chain from production to consumption. According to the United States, this includes the transfer of hard-copy sound recordings from the importer to the ICP or MCP, submission of the sound recording for content review by the ICP or MCP, and conversion of the sound recording into a format suitable for electronic submission. According to the United States, distribution of a product may involve both purchase of that product and offering for sale of that product.

7.1613 The United States argues that the content review procedures in China's measures affect the internal distribution of hard-copy sound recordings intended for electronic distribution and provide for less favourable treatment of the imported products vis-à-vis their domestic competitors.

7.1614 Specifically, with respect to the *Internet Culture Rule*, the United States maintains that Article 2(2) and Article 3(1) demonstrate that it applies to the wholesaling, retailing, and renting of audiovisual products in hard-copy to be disseminated over the internet. The United States argues that the content review requirements, set forth in Article 16 of the *Internet Culture Rule* affect the distribution of the hard-copy sound recording and when read together with Article 19, which provides that domestic hard-copy sound recordings may be examined "in house" by an Internet Culture unit without waiting for MOC approval, provide less favourable treatment to imported hard-copy sound recordings.

7.1615 The United States, likewise argues that the *Network Music Opinions* only requires that domestic sound recordings be registered with the MOC and does not require any official content review and approval by MOC prior to any distribution. By contrast, pursuant to Article 9 of the *Network Music Opinions*, imported sound recordings must satisfy the burdensome requirements created by the MOC content review and approval process. The United States asserts that this content review process is set forth in Appendix 2, Articles I and II of the *Network Music Opinions*.

7.1616 The United States also argues that the *2001 Audiovisual Products Regulation* and *Audiovisual Products Importation Rule* "echo" this discriminatory content review requirement. Specifically, the United States notes that Article 16 of the *2001 Audiovisual Products Regulation* provides that a domestic sound recording is subject to its publisher's own internal editorial responsibility system; whereas Article 28 requires that both finished and unfinished imported sound recordings must be submitted to MOC for content review and approval. The United States contends that Article 16 of the *Audiovisual Products Importation Rule* confirms that that imported sound recordings intended for distribution over networks are subject to the same content review requirements as hard copy sound recordings.

7.1617 **China** argues that its measures do not affect the distribution of imported hard-copy sound recordings intended for electronic distribution. First, China contends that Article 28 of the *2001 Audiovisual Products Regulation* as well as Articles 14 and 16 of the *Audiovisual Products Importation Rule* establish a content review requirement at the importation stage and can therefore in no way be considered as affecting the distribution of products that have already been imported. China then goes on to argue that the distribution allegedly affected by the content review requirement does not relate to the hard-copy, which is the good actually being imported, but to the digitalized contents and can therefore not be scrutinized under Article III:4 of the GATT 1994.

7.1618 Finally, China contends that even should the broad definition of distribution provided by the United States be accepted, the product that the ICP's activities aim at moving downstream is not the hard copy, but the digitalized content.

7.1619 The **Panel** recalls that before any analysis of China's compliance with Article III:4 can be conducted, we must determine whether Article III:4 is applicable to the challenged measures. The Appellate Body has explained that the "fundamental structure and logic" of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement.[840] We also agree with the panel in *China – Auto Parts* that such an analysis is consistent with our duty under Article 11 of the DSU to determine the applicability of the provisions invoked by the complaining party as the basis for its claims with respect to the measures at issue.[841]

7.1620 As noted above, for Article III:4 to be applicable there must be (i) like imported and domestic products and (ii) laws, regulations, or requirements affecting one of the listed transactions in the "internal" market. Therefore, if the challenged laws, regulations, or requirements are not "internal" measures they are not subject to the obligation to provide national treatment contained in Article III:4 of the GATT 1994.

7.1621 As the United States has satisfied its burden with respect to whether the domestic and imported products are like, what remains for the United States to prove in order to satisfy its burden of proof that Article III:4 is applicable is that China's measures operate in such a way that they affect the internal distribution of the hard-copy sound recording intended for electronic distribution, which is the imported product that is the subject of the US claim. We believe the United States must, therefore, demonstrate that the challenged measures are "internal" measures within the meaning of Article III and that the measures in fact operate in a manner which affects the distribution of the imported hard-copy sound recordings within China. If the United States cannot so demonstrate, then it cannot show that the measures are subject to the national treatment obligation in Article III:4 of the GATT 1994.

Whether the measures are "internal" measures

7.1622 In response to the United States' claim that its measures requiring government content review of hard-copy electronic sound recordings prior to distribution in China are inconsistent with Article III:4 of the GATT 1994, **China** argues that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* apply prior to importation and therefore do not affect the *imported* hard-copy sound recordings or their distribution within China. China itself, however, notes that the *Internet Culture Rule* and the *Network Music Opinions*, which it contends review the digital content extracted from the hard-copies, apply after importation.

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[840] Appellate Body Report on *China – Auto Parts*, para. 139; *also* Appellate Body Report on *Canada – Autos*, para. 151 (quoting Appellate Body Report on *US – Shrimp*, para. 119); and Appellate Body Report on *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

[841] Panel Report on *China – Auto Parts*, footnote 270 to para. 7.105.

7.1623 The **United States** argues that, given the *ad Note* to Article III of the GATT 1994 the fact that the measures apply upon importation does not remove them from the ambit of Article III:4 of the GATT 1994 so long as they *affect* the internal distribution of the imported product. Specifically, the United States argues that the measures at issue impose content review-related legal requirements on both imported and domestic hard copy CDs that they must fulfil before distribution inside China. According to the United States the fact that the legal hurdles facing the imported hard-copy CDs are administered at the Chinese border, while domestic goods must meet their obligations prior to internal distribution does not transform the measure into a border measure.

7.1624 The **Panel** agrees with the United States that the *Ad Note* clarifies that merely because a measure is applied at the border does not mean that it is outside the scope of Article III of the GATT 1994. The *Ad Note* to Article III states that Article III shall apply to any law, regulation, or requirement affecting the internal sale, offer for sale, purchase, transportation, distribution, or use even if such law is enforced with respect to the imported product at the time or point of importation. We, therefore, concur with the ruling of the panel in *India – Autos* that "the fact that a requirement is imposed as a condition on importation is not necessarily in itself an obstacle to its falling within the scope of Article III:4."[842] However, we note that China's arguments with respect to the contested measures being "border measures" relate to the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, which are not within our terms of reference with respect to this claim.

7.1625 Therefore, the task before us is to determine whether the *Internet Culture Rule* and the *Network Music Opinions* are "internal measures" such that they are subject to the obligations in Article III of the GATT 1994. To that end, we note the Appellate Body's decision in *China – Auto Parts* that in determining whether a charge was "internal" and subject to Article III:2 or a border measure "a panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or core features of the measure at issue, those that define its 'centre of gravity' for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge."[843] We see no reason why such an analytical exercise would not also be appropriate in determining whether a law, regulation or requirement affects "internal" factors and is therefore subject to Article III:4. We also note the Appellate Body's reasoning that a charge is "internal" if the obligation to pay it accrues because of some internal factor that occurs after importation.[844] We find this instructive for purposes of an analysis of whether a "law, regulation, or requirement" relates to the internal distribution of a good. Therefore, we will analyse whether the *Internet Culture Rule* and the *Network Music Opinions* apply internally based on this guidance from the Appellate Body.

7.1626 Therefore, we now turn to identify the principal characteristics of the *Internet Culture Rule* and the *Network Music Opinions* to determine whether the obligation to comply with the content review requirements is triggered by some internal factor after the hard-copy sound recording intended for electronic distribution is imported into China.

7.1627 We note that Article 16 of the *Internet Culture Rule* refers to "the importing" of Internet cultural products, which suggests that the measure applies as part of the process of importation. However, unlike other measures which govern importation, such as the *2001 Audiovisual Products Regulation*, there is no reference in the *Internet Culture Rule* to a subsequent completion of customs procedures.[845] Additionally, Article 9 of the *Network Music Opinions* states that "[i]mported network

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[842] Panel Report on *India – Autos*, para. 7.306 (*internal citation omitted)*.

[843] Appellate Body Report on *China – Auto Parts*, para. 171.

[844] *Ibid.*

[845] For example, Article 28 of the *2001 Audiovisual Products Regulation* provides: "[a]n entity which imports audiovisual products for publishing and a business entity which imports finished audiovisual products

music products can only be *used* after the Ministry of Culture examines their content." (emphasis added). This indicates that the *Network Music Opinions* is interested in the use of the product once it is inside China rather than the process of approving the product for importation. Article 9 and Article I of Appendix 2 also explain that the content review requirement applies to imported music products "even if the Ministry of Culture has already examined their content". Indeed, Article I of Appendix 2 lists as one of the materials that should be submitted as part of the application for content examination the "Ministry of Culture Letter of Approval for Import of Audiovisual Products".

7.1628 The United States explains to the Panel that the general operation of the measures is that an:

> "[Internet Culture Provider] or [Mobile Content Provider] must submit the imported hard-copy sound recording for content review prior to converting the sound recording into a format that can be transmitted electronically. Accordingly, the United States understands that the imported hard-copy sound recording is submitted for content review after importation but before it is converted into a digitally transmittable format."[846]

7.1629 We note that China itself contends that the *Internet Culture Rule* and the *Network Music Opinions* apply after importation and are thus internal.[847] China maintains that the content review requirements in these two measures apply to the digitalized versions of the sound recordings and not to the imported hard-copies which have already undergone content review pursuant to the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*.[848] Indeed, China argues that the United States cannot prove that China's measures affect the process "from importation to consumption" of the hard-copy sound recordings because that process ends prior to the stage at which the measures apply.[849]

7.1630 In our assessment the principal characteristics of the measures are to require content review prior to transmission over the information network which is not specifically linked to the process of bringing the hard-copy sound recording into the customs territory of China. Indeed, what triggers the application of the *Internet Culture Rule* and the *Network Music Opinions* is the desire to distribute a digital version of an imported sound recording through transmission over the information network. The content review requirements in the measures apply even if the product has already been imported. Therefore, it seems that the application of these measures is triggered by an internal factor separate from importation.

7.1631 We, therefore, conclude that the United States has established that these measures apply internally. The burden of establishing the applicability of Article III:4 is not yet satisfied, as the United States must still establish precisely how the measures affect the internal distribution of the imported products.

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shall bring approval documents issued by the cultural administration under the State Council to process import procedures at Customs" (Exhibit US-17)

[846] United States' response to question No. 274(a).

[847] China's responses to question Nos. 274(a) and (b); China's comments on the United States' response to question Nos. 247(c), 262(a) and 274(b) ("What is challenged in this dispute (and targeted by the United States in its answer to this question) is the content review that takes place "after importation", i.e. the content review imposed by the *Network Music Opinions*.").

[848] China's response to question No. 274(a).

[849] China's comment on the United States' response to question No. 247(a).

Whether the *Internet Culture Rule* and the *Network Music Opinions* affect the distribution, within China, of the imported hard-copy sound recording

7.1632 The **United States** relies on the reasoning of the panel in *Mexico – Taxes on Soft Drinks* that the term "affecting" "covers not only laws or regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products."[850] According to the United States, the relevant Chinese measures adversely modify the conditions of competition in favour of domestic sound recordings intended for electronic distribution by exempting them from the content review requirement that is applicable to imported sound recordings intended for electronic distribution. The United States argues that a finding that a measure that accords less favourable treatment to imports does not "affect" the distribution of the imported like product merely because there is further processing of the product downstream would undermine the discipline of Article III:4 by allowing a loophole in the national treatment obligation.

7.1633 **China** argues that despite the broad interpretation of the term "affect" in previous WTO jurisprudence, the United States' attempt in this case to expand the meaning of the word "affect" so that measures regulating the digitalized product, i.e., content control applied prior to the uploading of the music on the Internet, "affect" the internal distribution of the hard-copy carrying the content to be uploaded on the Internet, is not acceptable and would lead to absurd implications.[851]

7.1634 The **Panel** does not disagree that measures might affect the distribution of an imported like product without directly governing it. We recall the finding of the panel in *India – Autos*, that "[t]he fact that a provision is not necessarily primarily aimed at regulating the offering for sale or use of the product on the domestic market is ... not an obstacle to its "affecting" them."[852] However, a complaining party would still have to demonstrate that the measure affected the internal distribution of the imported like product, e.g. by affecting who may distribute the imported like product or how it may be distributed.

7.1635 We recall that the ordinary meaning of "distribution" in the context of Article III:4 of the GATT 1994 and in light of its object and purpose includes a process or series of transactions, whose ultimate end is the marketing or supply of a good from producers to consumers, either directly or through intermediaries. Also, since Article III:4 applies to "internal" distribution, the "distribution" at issue in Article III:4 is the portion of that chain of transactions which occur from the time or point of importation to the receipt of the good by the consumer, i.e., all relevant transactions that take place within the customs territory of the importing Member.

7.1636 The United States confirms that its claim applies only to measures affecting imports of hard-copy sound recordings that are intended for electronic distribution after importation. The United States made clear that its claim is not challenging the measures at issue on the grounds that they affect the transmission of content over the Internet.[853]

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[850] Panel Report on *Mexico – Taxes on Soft Drinks*, paras. 8.107-8.113.

[851] China's response to question No. 270.

[852] Panel Report on *India – Autos*, para. 7.305; *also* Appellate Body Report on *China – Auto Parts*, para. 194.

[853] United States' responses to questions Nos. 247(b) and 262(a); United States' first oral statement, para. 78 ("the US claim applies only to measures affecting imports of hard-copy media containing sound recordings that are intended for electronic distribution after importation. The claim does not deal with the provision of electronic distribution services."); United States' second written submission, para. 188 ("China misunderstands the US claim, which only applies to measures affecting imported hard-copy media containing sound recordings that are intended for electronic distribution."); United States' second oral statement, para. 55.

7.1637 The United States maintains that "distribution" is a broad term and can encompass the broad range of activities involved in a moving a product through the chain from production to consumption. As noted above, we do not disagree that "distribution" can generally cover the range of transactions from production to consumption and in the context of Article III:4 of the GATT 1994 cover those transactions from the time or point of importation to consumption. Therefore, the United States must establish that the challenged measures affect the process or series of transactions through which the hard-copy sound recording intended for electronic distribution is moved from the time or point of importation to the consumer.

7.1638 The United States explains the process or series of transactions from importation to consumption, with respect to imported hard-copy sound recordings as follows:

> "[O]nce the hard-copy sound recording is imported, it is provided to the ICP or MCP, submits the hard-copy sound recording to the Ministry of Culture for content review, makes an additional copy of the hard-copy sound recording, and engages in a series of activities necessary to move the imported product downstream. After receiving content review approval, the ICP/MCP then uses the hard-copy sound recording to create a version of the sound recording that can be distributed electronically. Thus, the hard-copy sound recording moves downstream. The ultimate retail consumer may receive the sound recording distributed electronically. However, the hard-copy sound recording moves downstream in earlier stages of the stream of commerce."[854]

7.1639 The United States, in response to a specific question from the Panel about where the imported hard-copy sound recording intended for electronic distribution is "consumed", explained that:

> "[i]n the case of hard copy sound recordings intended for electronic distribution, when the Internet Culture Provider ("ICP") or Mobile Content Provider ("MCP") is supplied with the hard copy sound recording intended for electronic distribution, the ICP/MCP is acting as the consumer of that product. The ICP/MCP uses (i.e., consumes) the hard-copy sound recording as part of its process for moving the product downstream. The ICP/MCP may also be said to be acting as a distributor in moving the product further downstream."[855]

7.1640 The United States goes on to argue that the steps involved in moving the product from importation to the next stage (i.e., from importation to the ICP or MCP, then to the MOC for content review, and then back to the ICP or MCP) are part of the distribution of the product. According to the United States:

> "[T]he transfer of the sound recording from the importer to the ICP or MCP is one of the activities involved in the distribution of the product. Similarly, the ICP or MCP engages in certain activities – including submitting the sound recording for content review, and converting it into a format suitable for electronic transmission – to be

[854] United States' response to question No. 262(c).

[855] United States' response to Panel question No. 247(c). We note that in its response to question No. 247(c) the United States refers, on the one hand, to the hard-copy sound recording being "consumed" and, on the other hand, to that hard-copy sound recording being used as part of a process to move the "product" further downstream. We recall that the only "product" which is the subject of the United States' claim is the imported hard-copy sound recording. We also recall the United States' explanation in response to question No. 126 that "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." Reading these two responses together, we understand that the hard-copy sound recording is "consumed" in the process of making the electronic sound recording which according to the United States is what is subsequently moved downstream by the ICP/MCP.

> able to move the product further downstream. These activities are also part of the distribution process. Accordingly, by imposing an administrative hurdle on only the imported products before the ICP or MCP can move the product further downstream, the relevant Chinese measures adversely affect the conditions of competition for the imported product."[856]

7.1641 We cannot agree with the United States assessment of what is included in the distribution of the imported product. As noted above, the United States confirms that the hard-copy sound recording is consumed by the ICP or MCP. Thus, we consider that the distribution of the imported product at issue, i.e., the hard-copy sound recording intended for electronic distribution, ends when the ICP or MCP receives it. The United States, therefore, is required to demonstrate that the *Internet Culture Rule* and the *Network Music Opinions* affect the process or series of transactions from the time or point of importation to receipt by the "consumer", which the United States has confirmed is the ICP or MCP.

7.1642 The argumentation the United States presents to support its claim that the *Internet Culture Rule* and the *Network Music Opinions* affect the internal distribution of the imported like product, which is the subject of its claim, has not been focused on the distribution of the imported hard-copy sound recording from the time or point of importation to the ICP or MCP (i.e., the consumer). When the United States describes the "effects" of the measures, the United States does not clearly link these effects to the internal distribution of the imported hard-copy sound recording intended for electronic distribution. We note that, in its submissions, the United States seems to use the term "the product" interchangeably to refer both to the imported like product as defined in its claim as well as to what it refers to as the "downstream" or "further processed" product which is the electronic content. This lack of precision blurs the distinction between the hard-copy sound recording, which the United States argues is the subject of its claim, and electronic sound recordings. In response to a question from the Panel, the United States argues that the delay and administrative burden that the ICP or MCP must go through before distributing a sound recording electronically affects the movement of "these imports" through the process from importation to consumption.[857] In response to another question from the Panel the United States refers to the product being consumed by the ICP/MCP and then suggests that the same product is subsequently moved further downstream by the ICP/MCP.[858] The United States continues in the same vein when it states that the ICP/MCP engages in activities to move the imported hard-copy sound recording further downstream and that "China's discriminatory content review regime affects these activities, and therefore the product's distribution."[859]

7.1643 This creates some confusion as to why and how the United States believes the measures affect the internal distribution of the imported product, which we recall the United States has confirmed is the imported hard-copy sound recording intended for electronic distribution. To recall, it is only if the challenged measures affect the internal distribution of the imported hard-copy sound recordings at issue that they trigger the obligation in Article III:4 to provide no less favourable treatment to that product *vis-à-vis* the like domestic product.[860]

7.1644 The United States has argued that the requirement of mandatory government content review prior to electronic distribution "affects" the imported product. However, the effects described by the United States relate to the delay or administrative burden in distributing the electronic sound recording.

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[856] United States' second oral statement, para. 59.
[857] United States' responses to question No.126.
[858] United States' response to question No. 247(c).
[859] United States' response to question No. 250.
[860] Panel Report on *China – Autos*, para. 7.231 *citing* Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 208.

7.1645 For example, in its first written submission, the United States argues that the *Network Music Opinions* affects the internal sale, offering for sale, purchase, distribution or use of sound recordings intended for electronic distribution because it "makes content review and approval by MOC a prerequisite for the electronic distribution of imported sound recordings" while not requiring the same mandatory pre-condition for distribution for domestic sound recordings. [861]

7.1646 Furthermore, when specifically asked to explain how the challenged measures 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), the United States argued that the challenged measures affect the distribution of the imported product because, "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."[862] (emphasis added). This type of argumentation was repeated in various US submissions.[863] We note that in the immediately following sentence in its answer to the Panel's question, the United States stated that:

> "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".[864]

7.1647 We have already discussed whether the United States had properly raised a claim with respect to the "use" of the imported hard-copy sound recordings intended for electronic distribution in paragraphs 7.1604-7.1611, above and do not intend to repeat that analysis here. We only cite this response here to emphasize that the United States did not relate the effects the challenged measures have on the electronic distribution of sound recordings (such as delay and administrative burdens) to the "distribution" of the imported hard-copy sound recording. For instance, the United States has not demonstrated that these delays and administrative burdens with respect to the electronic distribution of sound recordings have an effect on how the imported hard-copies can be distributed or who can distribute them. Instead, when asked specifically to explain the relationship between the challenged measures and the "distribution" of the imported hard-copy sound recordings, the United States shifts its argumentation to another of the elements set forth in Article III:4.

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[861] United States' first written submission, para. 379.

[862] United States' response to question No. 126. This impression is reinforced by the US in its second oral statement when it argues that:

"In the case of hard-copy sound recordings intended for electronic distribution, the relevant measures affect the imported products within the meaning of Article III:4. Specifically, before the Internet Culture Provider (ICP) or Mobile Content Provider (MCP) can distribute an imported product electronically, it must submit the sound recording for content review, a requirement not faced by domestic sound recordings intended for electronic distribution. This requirement creates an extra administrative hurdle and delay for imported products before they may be distributed. These obstacles can be especially disadvantageous to imports in a hit-driven industry – such as the recording industry where speed to the market is critical. Accordingly, the relevant measures affect the sale, offering for sale, purchase, transportation, distribution, or use of the imported product." (United States' second oral statement, para. 58;

This is also consistent with the United States' second written submission, paras. 186-187.

[863] United States' first written submission, paras. 379, 390-391; United States' response to question No. 123(e); United States' second written submission, paras. 187, 195; United States' second oral statement, para. 58; United States' response to question No. 247(a).

[864] *Ibid.*

7.1648 The United States does argue that:

> "[A]n imported hard copy sound recording that is not submitted for content review and approved by the Ministry of Culture has no distribution opportunities in China, nor does such a product have opportunities for sale or use in China. Instead, an imported product that has not been through the required content review procedures cannot move anywhere in the chain from importation to consumption, is effectively stuck in some early stage of the chain of distribution, and has no real commercial opportunities in China's market."[865]

7.1649 However, as the United States has itself stated that it is the ICP or MCP that submits the imported hard-copy sound recording to MOC for content review, the limitations on the distribution of an imported product that has not been through the required content review process referred to by the United States relate to distribution *after* the ICP or MCP has received the product, not the distribution of the product from the time or point of importation to the ICP or MCP. Given that the ICP or MCP is the consumer of the hard-copy sound recording intended for electronic distribution and the end of the distribution chain, we infer that the restriction on distribution opportunities the United States is referring in the above-quoted statement are those concerning the electronic sound recording rather than the imported hard-copy sound recording intended for electronic distribution.

7.1650 Consistent with the findings of the panels in *India – Autos* and *Mexico – Taxes on Soft Drinks*, the fact that the Chinese measures at issue directly affect the distribution of electronic sound recordings does not preclude that they could also affect the distribution of the imported hard-copy sound recording. However, this is for the United States to establish. The United States has not argued, let alone demonstrated, that the measures have an effect on whether and how an importer can provide the hard-copy sound recording to the ICP or MCP.

7.1651 As noted above, the United States has focused its argumentation on the delay and administrative burden that the ICP or MCP might experience from the time it receives the hard-copy sound recording until it may electronically distribute a sound recording derived from the content that was embedded in the hard-copy. The United States has not offered an adequate and convincing explanation as to how this alleged delay impacts upon the "distribution" of the hard-copy sound recording intended for electronic distribution. We consider, therefore, that the United States has not satisfied its burden to establish, through evidence and argumentation, the elements of its claim.

7.1652 As the United States has not established that the *Internet Culture Rule* and the *Network Music Opinions* affect the distribution of the imported hard-copy sound recording intended for electronic distribution, it has likewise not established that Article III:4 is applicable to those measures. As the United States has not established that Article III:4 is applicable to the measures, it cannot establish that these measures are inconsistent with Article III:4.

7.1653 Finally, we recall our decision in paragraphs 7.1571 and 7.1585 above to defer a determination on whether the "like products" requirement is satisfied in the case of this claim because the *Internet Culture Rule* and the *Network Music Opinions* distinguish between imported and domestic products hard-copy sound recordings intended for electronic distribution exclusively on origin until we had determined that the other two constituent elements of a claim under Article III:4 of the GATT 1994 had been established. Given that we have found that the United States has not demonstrated that the *Internet Culture Rule* and the *Network Music Opinions* affect the distribution of imported hard-copy sound recordings intended for electronic distribution we see no reason to return to the analysis of whether the imported and domestic products are "like" within the meaning of Article III:4 of the GATT 1994.

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[865] United States response to question No. 247(a).

7.1654 Based on the above considerations, we therefore conclude that the United States has not established that the *Internet Culture Rule* and the *Network Music Opinions* are inconsistent with Article III:4 of the GATT 1994.

4. Films for theatrical release

7.1655 The **United States** argues that the *Film Regulation*, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule* together are laws, regulations or requirements affecting the distribution of films for theatrical release which provide less favourable treatment of imported films in a manner inconsistent with Article III:4 of the GATT 1994. Article III of the *Film Distribution and Exhibition 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 *Film Enterprise Rule* provide the legal framework that underpins China's dual distribution regime for films for theatrical release.

7.1656 **China** argues that the United States' claims lack any legal basis, since yet again they are based on the false assumption that motion pictures for theatrical release are goods. China goes on to say that, in the event the United States' claim were to be addressed under Article III:4 of the GATT 1994, the United States fails to establish the existence of a less favourable treatment of foreign motion pictures.

7.1657 Additionally, China presents an argument, which it describes as demonstrating that the measures do not provide less favourable treatment, which we believe goes more to the heart of whether the measures themselves are what "affects" the distribution of imported hard-copy cinematographic films. Specifically, China argues that the measures do not operate the way the United States believes and that they do not create the "duopoly" which the United States contends "affects" the distribution of the measures and provides for less favourable treatment to imported hard-copy cinematographic films.

7.1658 The Panel believes the points raised by China raise the question of whether the "duopoly" which the United States contends is adversely modifying the conditions of competition between imported and domestic films is attributable to China, such that it is a measure which can be brought before the panel under Article 3.3 of the DSU. As noted above in paragraph 7.170, whether what is before the Panel is a "measure" goes to the heart of our mandate and must be addressed regardless of whether the parties specifically raise the issue. Therefore, we will first analyse whether the "measure" identified by the United States is one within the meaning of Article 3.3 of the DSU.

(a) What creates the "duopoly" for the distribution of imported films for theatrical release?

7.1659 The **United States** argues that there is a film distribution "duopoly" in China which results in discriminatory treatment of imported films for theatrical release. Specifically, the United States maintains that the *Film Regulation*, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule* permit only two state-owned enterprises China Film Distribution Company and Huaxia Film Distribution Company to distribute imported films for theatrical release. In contrast, the United States contends that domestic films may be distributed by these two distributors as well as all other film distributors in China, including a film's domestic producer. In addition, the United States argues that the *Domestic Film Distribution and Exhibition Rule*, which post-dates the *Film Regulation*, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule*, confirms that China Film Group and Huaxia are the only two distributors of imported films in China.[866]

[866] United States' second written submission, para. 202 and United States' response to question No. 248 citing Articles III.1 and IV.II.1 of the *Domestic Film Distribution and Exhibition Rule*.

7.1660 **China** admits that the distribution of foreign motion pictures in Chinese movie theatres is carried out by companies approved by SARFT and that there are currently only two approved distributors, China Film Distribution Company and Huaxia Film Distribution Company. However, it maintains that "contrary to what the United States pretends, Chinese regulations do not establish a 'duopoly' and they do not in any way limit the number of companies that can be approved by SARFT."

7.1661 China contends that the small number of distributors of imported films is due to the limitation, set forth in its GATS schedule, that only 20 motion pictures may be imported on a revenue sharing basis. China argues that nothing in the measures identified by the United States creates this "duopoly".

7.1662 According to China, the *Film Regulation*s establish a licensing system for the activity of distribution of motion pictures for theatrical release, but do not provide any quantitative restriction on the companies that may be approved. In this respect, the number of distributors of imported films is not limited to two, neither by the Chinese laws and regulations nor by SARFT. China argues that the "the Domestic Film Distribution and Exhibition Rule" (Exhibit US-40), quoted by the United States to support its arguments, only reflects the fact that at the present time, only two companies have applied and been approved to become distributors of imported motion pictures. China maintains that nothing in the Chinese measures provides that only these two companies may be approved.

7.1663 In response to a specific question from the Panel on the process to become approved to be a distributor of imported films for theatrical release, China informs us that foreign-invested enterprises are prohibited from distributing films in China, but that "private wholly Chinese-owned companies and other state-owned companies can apply to be distributors of imported films and SARFT shall examine their application and make approval decisions based on Regulations on Film[867]"[868].

7.1664 China responded to the Panel's questioning that so far there have been no applications to become a distributor of imported films. China posits that the attendant costs and risks may deter distributors from attempting to enter the market of distributing imported films.[869]

7.1665 The **United States** argues that China's contention that there is no mandatory duopoly does not withstand scrutiny. According to the United States, the *Film Distribution and Exhibition Rule* expressly provides for such a duopoly.[870] The United States also argues that in reality, because only two entities are currently designated to distribute such films, regardless of whether this duopoly is mandatory, it is discriminatory nonetheless.

7.1666 Additionally, in response to a question from the Panel, the United States, argues that China's contention that any wholly Chinese-owned or state-owned companies may apply to distribute imported films and have simply been uninterested in doing so, is based on a flawed premise. The

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[867] (*footnote original)* Arts. 36 and 37 of the *Film Regulation* (Exhibit CN-11).

[868] China's response to question No, 273.

[869] In response to question No. 136, China stated:

"China is not aware of any interest on the part of Chinese motion picture distributors in becoming distributors of foreign motion pictures. However, we note that distribution of foreign motion pictures also involves significant financial input and market risks. Up to date, no Chinese distributors, other than the two currently approved ones, have ever applied for approval to become distributor of foreign motion pictures." (China's response to question No. 136).

[870] The United States relies upon Article III of the *Film Distribution and Exhibition Rule* (Exhibit US-21) which states that its purpose is to, "[o]pen up major channels owned by the State and establish two imported film distribution companies. Maintain the original China Film Group Imported Film Distribution Company while establishing another imported film distribution company based on the shareholding system."

United States argues that no other firms have applied to distribute imported films because they cannot.[871]

7.1667 In its comment on the US reply to that question, China maintains that the *Film Regulation*, which is higher in hierarchy than the *Film Distribution and Exhibition Rule* and the *Film Enterprise Rule* provide for the application requirements and procedures to establish a film distribution enterprise and these provisions do not limit to domestic produced motion pictures.

7.1668 The "measure" challenged by the United States in its Article III:4 claim with respect to films for theatrical release is the distribution "duopoly" which it claims provides for discriminatory and therefore less favourable treatment to imported films for theatrical release. The United States alleges that this duopoly is created through the operation of the three Chinese administrative acts it identified in its panel request, the *Film Regulation*, the *Film Enterprise Rule*, and the *Film Distribution and Exhibition Rule*. China however, argues that this "duopoly" is not created by the operation of its administrative acts but by the simple fact that no one other than the two currently approved companies has expressed an interest in becoming an approved distributor of imported films for theatrical release.

7.1669 The United States in response to the Panel's questions, maintains that regardless of whether the duopoly is "mandatory" it is nevertheless discriminatory. Specifically, the United States contends that even if the Panel were to find that there is no *de jure* duopoly, the United States has demonstrated, and China has verified, that a *de facto* duopoly exists which accords imported films less favourable treatment than that accorded to domestic films. Therefore, as they are applied, China's measures likewise would be inconsistent with Article III:4 of the GATT 1994.

7.1670 Therefore, the question before the **Panel** is whether the alleged "duopoly" is attributable to China, either on its face or through its application of those measures, such that it engages China's obligations in Article III:4 of the GATT 1994.

7.1671 As noted above in paragraph 7.166, Members may only challenges "measures" of another Member before the WTO dispute settlement system. A "measure" of another Member has been defined as an act or omission that is attributable to the government of a Member[872] that sets forth rules or norms that have general and prospective application.[873] Such acts or omissions are, "in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[874]"[875]

7.1672 In this case, the United States has alleged that an administrative regulation promulgated by the State Council as well as a "departmental rule" and an "other regulatory document" operate together to create a *de jure* distribution duopoly. In the alternative, the United States argues that China's measures create a *de facto* distribution duopoly. Given China's objections to the implication that its legal acts have created the alleged discriminatory distribution duopoly, we must first satisfy ourselves that what the United States seeks findings on is, in fact, a measure within the meaning of Article 3.3 of the DSU such that it is properly before this Panel. We believe the United States has presented two alternative understandings of how China's distribution duopoly is a measure. First, that China's regulation, departmental rule, and other regulatory document, governing the distribution of films for theatrical release create a *de jure* duopoly. Second, if the regulation, departmental rule, and

[871] United States' response to question No. 258.

[872] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[873] Appellate Body Report on *US – Corrosion Resistant Sunset Review*, para. 82 and footnote 87.

[874] (*footnote original*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

[875] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

other regulatory document do not create a *de jure* duopoly, that nevertheless China has created a *de facto* duopoly which is attributable to it. We address each contention in turn.

(i) Do China's rules and regulations create a de jure distribution duopoly?

7.1673 The original thrust of the US claim is that the *Film Regulation*, the *Film Enterprise Rule* and the *Film Distribution and Exhibition Rule* together establish a distribution duopoly, whereby only two companies are permitted to distribute imported films for theatrical release. China, on the other hand, argues that there is no *de jure* limitation on how many companies may be approved to distribute imported films. We therefore, must determine whether the three measures operating together limit the number of imported film distributors in China to two, namely China Film Group and Huaxia.

7.1674 The *Film Regulation*, which was promulgated in December 2001 by the State Council of the People's Republic of China and apply to "the production, import, export, distribution and screening of films within the territory of the People's Republic of China, including feature films, documentary films, science and educational films, animation films, and special topic films."[876]

7.1675 Chapter V of the *Film Regulation* deals with distribution and screening of films. Article 36 of the *Film Regulation* requires that companies which wish to establish a film distribution entity or film screening entity have: (i) a name and articles of association for the film distribution entity or film screening entity; (ii) a well-defined scope of business; (iii) an organization and specialized personnel suited to the needs of its scope of business; (iv) funding, sites, and equipment suited to the needs of its scope of business; and (v) other conditions stipulated in laws and administrative regulations.

7.1676 Article 37 of the same regulation provides that:

> "Applications to establish a film distribution entity shall be submitted to the film administration under the people's government in the province, autonomous region, or municipality directly under the Central Government where the applicant is located. The application for the establishment of a film distribution entity covering different provinces, autonomous regions or municipalities directly under the Central Government shall be submitted to the radio, film, and television administration. The film administration under the people's government in the province, autonomous region or municipality directly under the Central Government where the applicant is located, or the radio, film, and television administration under the State Council shall, within 60 days of receiving an application, make a decision on approval or rejection of the application and shall notify the applicant. If the application is approved, a Permit to Distribute Films shall be issued to the applicant, which shall register the Permit to Distribute Films with the administrative department for industry and commerce and obtain a business licence in compliance with the law. If the application is rejected, the reason for rejection shall be clearly stated."

7.1677 The provision refers to a Permit to Distribute Films being issued pursuant to approval of the application. There is no indication that the permit is limited to a particular type of film, i.e. domestic *versus* imported.

7.1678 The *Film Distribution and Exhibition Rule* was also issued in December 2001[877], this time jointly by the SARFT and the MOC. The purpose of the rule is to accomplish the reform of film distribution and projection mechanisms. As both China and the United States have explained to us,

[876] Article 2, *Film Regulation* (Exhibit US-20).

[877] The version of the rule supplied by the United States does not contain the exact date of issuance, instead listing just 2001, but the Chinese translation lists the date as 18 December 2001.

according to China's *Legislation Law*, both the *Film Distribution and Exhibition Rule* and the *Film Enterprise Rule* implement and are secondary to the *Film Regulation*.[878]

7.1679 Article III of the *Film Distribution and Exhibition Rule* states that the major state-owned channels be opened up and that two imported film distribution companies be established. The Article goes on to state that the latter goal will be accomplished by the maintenance of the original China Film Group Imported Film Distribution Company while the State establishes another imported film distribution company based on the shareholding system. Article III then describes how the imported film distribution companies will operate.

> "For the first year, the two imported film distribution companies shall separately distribute imported films they have acquired through a combination of allocation and competition (in principle each should comprise 50%). For subsequent years, the number of imported films distributed will be determined based on the previous year's achievements in distribution and projection of domestically produced films, especially that of domestically produced films recommended by the State. The regulations on distribution ratios between imported films and domestically produced films shall be conscientiously followed, and the production, distribution, and projection of domestically produced films shall be actively supported."[879]

7.1680 In 2004, the SARFT and the Ministry of Commerce (MOFCOM) issued the *Film Enterprise Rule*. As China has explained, as the rule issued later in time, the *Film Enterprise Rule*, to the extent that there is any conflict with the earlier *Film Distribution and Exhibition Rule*, would prevail.[880] Article 1 of the *Film Enterprise Rule* indicates that it was issued in accordance with the *Film Regulation*. Chapter III of the *Film Enterprise Rule* is entitled Film Distribution and Projection. Article 10 encourages companies, enterprises and other economic organizations inside China (excluding FIE) to establish companies exclusively for the distribution of domestically produced films. The Article also sets forth the following qualifications and procedures for applying:

> "(A) The registered capital shall be no less than ¥500,000;
> (B) The applicant has been authorized by a film production unit to distribute two films or has been authorized by a television show production unit to distribute two television dramas;.
> (C) The application, copy of the business licence issued by the industrial and commercial administration, notification of pre-approval of the company's name, and proof of being authorized to represent the distribution of films or television shows shall be submitted.
> (D) If an applicant meets the requirements in Items A, B, and C and applies to SARFT for establishing a company exclusively for distribution of domestically produced films, the SARFT shall, within 20 business days, issue the 'Licence to Distribute Films' which permits the distribution of domestically produced films throughout the country. When an applicant applies to the local film administration at the provincial level to establish a company exclusively for distribution of domestically-produced films, the local film administration shall, within 20 business days, issue the 'Licence to Distribute Films' in the province (autonomous region or municipality) which permits exclusive distribution of domestically produced films. The applicant shall take the approval document issued by the film administration to the local industrial and commercial administration and go through relevant

[878] United States' response to question No. 13, China's response to question No. 135.
[879] Article III, *Film Distribution and Projection Rule* (Exhibit US-21).
[880] China's response to question No. 135.

procedures. If approval is not granted, a written reply shall be made to explain the reasons."

7.1681 Meanwhile, Chapter IV of the *Film Enterprise Rule* is entitled "Film Import and Export" and contains Article 16 which states that "the distribution of imported films nationwide shall be carried out by distribution companies *that are approved by SARFT and have the right to distribute imported films nationwide*."[881] (emphasis added)

7.1682 Article 19 of the *Film Enterprise Rule*, in the Chapter entitled "Supplementary Provisions" provides that "[m]atters that are not covered by these Provisions shall be handled according to the "Regulations on the Management of Films" and relevant provisions."[882]

7.1683 We understand that the *Film Distribution and Exhibition Rule* establishes two enterprises to distribute imported films for theatrical release and implies that they will each be responsible for the total market of imported films. However, we also understand that to the extent that there is any inconsistency between it and the *Film Enterprise Rule*, which was issued three years later, the *Film Enterprise Rule* prevails. The Panel notes that the United States asserts that the *Domestic Film Distribution and Exhibition Rule* confirms the existence of the duopoly. The United States has, however, provided no specific submission as to how the *Domestic Film Distribution and Exhibition Rule* confirms the alleged duopoly. Instead the argumentation of the United States with respect to this measure has been focused on confirming the alleged discriminatory treatment given to imported films for theatrical release.

7.1684 We note that the *Domestic Film Distribution and Exhibition Rule* deals with the promotion of the distribution and exhibition of domestic movies and the evaluation and reward system SARFT had instituted to further that goal. The United States, without elaboration, cites to Articles III.1 and IV.II.1 of the *Domestic Film Distribution and Exhibition Rule* as those that "confirm" the alleged duopoly. These articles set forth the basis for the evaluation of China Film Group and Huaxia, specifically the number of domestic films and recommended titles the entities should distribute as well as the rewards to be granted for achieving certain levels of box office receipts for domestic films.[883] We also note that Article V.1 of the *Domestic Film Distribution and Exhibition Rule* lists as a penalty for either China Film Group and "the other entity" failing the evaluation the deduction of one import revenue-sharing film from their respective quotas.

7.1685 These three articles reflect the fact that China uses incentives and penalties to encourage China Film Group and Huaxia to distribute domestic films and that China can control the number of films China Film Group and Huaxia distribute. However, the United States has not demonstrated how this measure "confirms" that China would not permit any other entity to obtain a licence to distribute imported films Also we see nothing that prevents China from amending the *Domestic Film Distribution and Exhibition Rule* if and when additional entities were approved by SARFT to distribute imported films for theatrical release. As noted below in paragraph 7.1689 while this regulatory structure may be different from other systems, this is not sufficient to demonstrate that China has, through its actions, created an imported film distribution duopoly.

7.1686 The United States points out that the *Film Enterprise Rule*, in Article 10, provides for procedures to apply to become a distributor of domestic films. The United States reasons that the lack of any such specific procedures for distributors of imported films means that the companies approved by SARFT that have the right to distribute imported films nationwide referred to in Article 16 of the *Film Enterprise Rule* can only mean China Film Group and Huaxia. However, the Panel notes that,

[881] Article 16, *Provisional Film Rule* (Exhibit US-22).
[882] Article 19, *Provisional Film Rule* (Exhibit US-22).
[883] *Domestic Film Distribution and Exhibition Rule*, Articles III.1 and IV.II.1.

the United States neglects Article 19 of the *Film Enterprise Rule* which states that any matter not covered by these Provisions shall be handled according to the *Film Regulation*.

7.1687 Article 37 of the *Film Regulation* sets forth application procedures to become a distributor of films which makes no distinction between imported and domestic films. According to Article 19 of the *Film Enterprise Rule* this provision is still operative and would therefore permit applications from enterprises wishing to include within their scope of business the distribution of imported films. Therefore, contrary to the United States' arguments, China's measures do not "as such" establish a distribution duopoly that would prevent enterprises other than China Film Group and Huaxia from applying for and receiving a licence to distribute films which would include the right to distribute imported films.

7.1688 We note that the United States also argues that even if the duopoly is not mandatory it is nevertheless discriminatory and that "that a *de facto* duopoly exists which accords imported films less favourable treatment than that accorded to domestic films."[884] We therefore, turn to the question of whether through the operation of the *Film Regulation*, *Film Distribution and Exhibition Rule*, and *Film Enterprise Rule*, China has created a *de facto* distribution duopoly for imported films for theatrical release.

(ii) Do China's rules and regulations create a de facto distribution duopoly?

7.1689 We begin our analysis by recalling that for a measure to be subject to dispute settlement review it need not be in written form. Acts of a government whether pursuant to specific legislation or other authorization are nevertheless "measures" so long as they are attributable to the Member and set forth rules or norms of general and prospective application.

7.1690 We recall that the **United States**' claim is not with respect to a licensing regime, or about the prohibition on foreign investment in film distributorships in China, but rather that China's regulations and rules prevent any company other than those two designated in the *Film Distribution and Exhibition Rule*. Therefore, to sustain its claim the United States must demonstrate that China through the operation of its regulations and rules creates a *de facto* distribution duopoly by preventing distributors other than China Film Group and Huaxia from participating in the market.

7.1691 The United States asserts that China's explanation of how its regulations and rules work does not make sense. The United States poses some questions it believes demonstrate the inconsistency in China's argument that any wholly-owned Chinese entity (whether private or state-owned) can apply to be an distributor of imported films. First the United States wonders, why China has not designated every one of the distributors that is available for domestic films. Second, the United States asks why permission to distribute domestic films does not automatically entail permission to distribute imported ones. The United States asserts that China has no good answers to these questions. Additionally, the United States posits that the reason domestic distributors other than China Film Group and Huaxia have not applied to distribute the lucrative imported films, as China suggests, (*see* China's answers to the first set of Panel questions, question No. 136), is because they all recognize China Film Group and Huaxia are the exclusive distributors of imported films.

7.1692 Although China's regulatory structure may not seem logical to the United States and the United States' questions may point out inefficiencies in China's methods, the United States has not demonstrated that these rise to the level of China applying its regulations and rules in such a way as to prevent distributors other than China Film Group and Huaxia from entering the market of distributing imported films. The United States has submitted no evidence that China has a practice of rejecting requests for licences to distribute from businesses that intend to distribute imported films. Indeed the

[884] United States' response to question No. 258.

United States has not demonstrated that any enterprise has even attempted to apply for such a licence. Therefore, we find that the United States has not put forth a *prima facie* case that via the operation of the *Film Regulation, Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule*, China has created the "*de facto*" discriminatory duopoly its claim is concerned with.

7.1693 The United States has not been able to demonstrate that China's regulation and rules either *de jure* or *de facto* create the distribution duopoly. In other words, the United States has not established that the distribution duopoly is attributable to China. As the duopoly is not attributable to China it is not a "measure" of another Member that can be challenged before the WTO dispute settlement system.

7.1694 As we have no jurisdiction to rule on a challenge to anything other than a measure taken by another Member, we decline to make any findings with respect to the US claim on whether the alleged discriminatory distribution duopoly in China is inconsistent with Article III:4 of the GATT 1994.

5. Summary of conclusions

(a) Reading materials

7.1695 Articles 3 and 4 of the *Imported Publications Subscription Rule* as they are applied to newspapers and periodicals are inconsistent with China's obligations under Article III:4 of the GATT 1994 in that they apply to like products, affect the internal distribution of newspapers and periodicals, and provide less favourable treatment to imported newspapers and periodicals than to like domestic products.

7.1696 The United States has not established that Articles 3 and 4 of the *Imported Publications Subscription Rule* as they are applied to books in the limited category are inconsistent with China's obligations under Article III:4 of the GATT 1994 as it has not established that the domestic and imported products are "like".

7.1697 Article 2 of the *Publications (Sub-)Distribution Rule*, read in conjunction with Article 16 of the *Publications Market Rule*, affords less favourable treatment to imported books, newspapers, and periodicals than their domestic counterparts because it limits the type of enterprises that they can be sub-distributed through.

(b) Sound recordings

7.1698 The United States has not established that China has acted inconsistently with Article III:4 of the GATT 1994 as it has not demonstrated that the *Internet Culture Rule* and the *Network Music Opinions* affect the distribution, within China, of the hard-copy sound recording intended for electronic distribution.

(c) Films for theatrical release

7.1699 The United States has not established that the alleged discriminatory "duopoly" for film distribution within China is attributable to China. As such the United States has not demonstrated that the "duopoly" is a measure taken by another Member which could be subject to challenge under the Dispute Settlement Understanding.

F. THE US CLAIM ON PARAGRAPHS 5.1 AND 1.2 OF THE ACCESSION PROTOCOL

1. Whether China's measures are inconsistent with paragraphs 5.1 and 1.2 of the Accession Protocol

7.1700 The **United States** argues that in light of its demonstration that the *Imported Publications Subscription Rule*, the *Publications (Sub-)Distribution Rule*, the *Network Music Opinions*, the *Internet Culture Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the Films Regulation, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule* are inconsistent with Article III:4 of the GATT 1994 and that the three-year transition period in paragraph 5.1 has passed, they are also inconsistent with paragraph 5.1 of China's Accession Protocol.

7.1701 Additionally, the United States argues that an inconsistency with Article III:4 of the GATT 1994 of the above-referenced measures would also render them inconsistent with paragraph 1.2 of Part I of China's Accession Protocol to the extent that paragraph 1.2 incorporates commitments in paragraph 22 of the Working Party Report.

7.1702 **China** did not present argumentation on the consistency of the *Imported Publications Subscription Rule* or the *Publications (Sub-)Distribution Rule* with the Accession Protocol. With respect to the *Network Music Opinions*, the *Internet Culture Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the Films Regulation, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule* China reiterates its arguments that electronic sound recordings and films for theatrical release are not goods and are therefore not subject to China's commitments relating to trade in goods, including paragraphs 5.1 and 1.2 of the Accession Protocol.

7.1703 Paragraph 5.1 of the Accession Protocol reads in relevant part:

> "[W]ithin three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. *All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect to their internal sale, offering for sale, purchase, transportation, distribution or use, including of their direct access to end-users*. For those good listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period." (emphasis added)

7.1704 Paragraph 1.2 of the Accession Protocol provides:

> "The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

7.1705 Paragraph 342 of the Working Party Report includes the commitments contained in paragraph 22 of the Working Party Report. Paragraph 22 states:

> "The representative of China confirmed that the full respect of all laws, regulations and administrative requirements with the principle of non-discrimination between domestically produced and imported products would be ensured and enforced by the

> date of China's accession unless otherwise provided in the Draft Protocol or Report. The representative of China declared that, by accession, China would repeal and cease to apply all such existing laws, regulations and other measures whose effect was inconsistent with WTO rules on national treatment. This commitment was made in relation to final or interim laws, administrative measures, rules and notices, or any other form of stipulation or guideline.
>
> The Working Party took note of these commitments."

7.1706 The **Panel** notes that paragraphs 5.1 and 1.2 merely reiterate China's obligation to comply with the "no less favourable treatment" obligation it undertook when it became bound by the provisions of the GATT 1994 upon accession to the WTO. Therefore, a finding of inconsistency with Article III:4 is a necessary pre-requisite to a finding of inconsistency with either paragraph 5.1 or paragraph 1.2.

7.1707 To the extent that we have made findings in Section VII.E above that China's measures are inconsistent with its obligations in Article III:4 of GATT 1994, we consider that additional findings on paragraph 5.1 or paragraph 1.2 of the Accession Protocol are unnecessary for the resolution of the dispute raised by the United States. In particular, we note that bringing the measures into conformity with China's obligations pursuant to our findings under Article III:4 of the GATT 1994 also would remove any inconsistency of those measures with either paragraph 5.1 or paragraph 1.2 of the Accession Protocol. Therefore, with respect to the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule*, we exercise judicial economy with regard to the US claim that those measures are also inconsistent with paragraphs 5.1 and 1.2 of the Accession Protocol.

7.1708 To the extent that in Section VII.E above we have found that the United States has not established that China has acted inconsistently with the obligations in Article III:4 of the GATT 1994, the necessary pre-requisite for an inconsistency with either paragraph 5.1 or paragraph 1.2, namely that China had acted inconsistently with Article III:4, has not been satisfied. Therefore, we find that the United States has not established that the *Network Music Opinions*, the *Internet Culture Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*[885], the Films Regulation, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule* are inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol.

2. Summary of conclusions

7.1709 We exercise judicial economy with respect to the US claim that the *Imported Publications Subscription Rule* and the *Publications (Sub-)Distribution Rule* are inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol.

7.1710 We find that the United States has not established that the *Network Music Opinions*, the *Internet Culture Rule*, the *2001 Audiovisual Products Regulation*, the *Audiovisual Products Importation Rule*, the Films Regulation, the *Film Distribution and Exhibition Rule*, and the *Film Enterprise Rule* are inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol.

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[885] We note our finding in Section VII.B.2(b), that the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are outside the Panel's terms of reference with respect to the US claim under Article III:4 of the GATT 1994. Therefore, just as with the measures discussed in Section VII.E above, the US cannot establish an inconsistency with paragraphs 5.1 and 1.2 of the Accession Protocol with respect to these measures.

VIII. CONCLUSIONS AND RECOMMENDATIONS

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

1. China's terms of reference objections

(a) Measures China alleges are outside the Panel's terms of reference

(i) The *Film Distribution and Exhibition Rule* is outside the Panel's terms of reference with respect to the US claim that it is inconsistent with China's trading rights commitments in its Accession Protocol, because China did not receive adequate notice that it was a specific measure at issue, with respect to this claim, as required by Article 6.2 of the DSU.

(ii) The *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule* are outside the Panel's terms of reference with respect to the US claim that China's measures are inconsistent with Article III:4 of the GATT 1994 because the panel request did not adequately notify China that these were specific measures at issue, with respect to this claim, as required by Article 6.2 of the DSU.

(b) Certain requirements China alleges are outside the Panel's terms of reference

(i) The so-called "pre-establishment legal compliance" requirement, the approval process to engage in distribution of reading materials and audiovisual products and the "decision making criteria" that the MOC would apply in the approval of Chinese-foreign contractual joint ventures for the distribution of reading materials and audiovisual products are not within the Panel's terms of reference. When read as a whole, including the listing of the specific requirements that are the subject of its complaint, the US panel request did not notify China that these requirements were "specific measures at issue" within the meaning of Article 6.2 of the DSU.

(c) The US claim with respect to reading materials under Article III:4 of the GATT 1994

(i) The US claim that China's measures on reading materials are inconsistent with Article III:4 of the GATT 1994 is within the Panel's terms of reference, despite the lack of consultations.

(ii) The United States, through its description of its claim in the panel request, excluded electronic publications from its claim under Article III:4 of the GATT 1994. Therefore, the Panel's findings as to whether China's measures are inconsistent with Article III:4 of the GATT 1994 will relate only to whether books, newspapers, and periodicals are treated no less favourably than like domestic products.

(iii) The requirements set forth in Articles 3 and 4 of the *Imported Publications Subscription Rule*, that newspapers and periodicals, as well as books in the limited category may only be sold through subscription, are within the Panel's terms of reference as they are adequately identified in the US panel request.

(iv) The requirements on purchasers of imported newspapers and periodicals, as well as books in the limited category, embodied in Articles 5 through 8 of the

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

(d) 'Measures' China argues the Panel should not examine

(i) The *Several Opinions* is attributable to China and establishes rules or norms intended to have general and prospective application. It is therefore a "measure" within the meaning of Article 3.3 of the DSU and is a proper subject of these dispute settlement proceedings.

(ii) The *Importation Procedure* and the *Sub-Distribution Procedure* are attributable to China, but they do not establish rules or norms intended to have general and prospective application. Therefore, they are not "measures" within the meaning of Article 3.3 of the DSU. As such, they are not a proper subject of these dispute settlement proceedings.

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

(a) Measures relating to all the products

(i) Article X.2 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(ii) Article X.3 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(iii) The Panel has exercised judicial economy in respect of the US claims that Articles X.2 and X.3 of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, are inconsistent with paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises.

(iv) In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Articles X.2 and X.3, of the *Catalogue of Prohibited Foreign Investment Industries*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, result in China acting inconsistently with either paragraph 5.2 or 84(b).

(v) Article 4 of the *Several Opinions* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(vi) The Panel has exercised judicial economy in respect of the US claims that the *Several Opinions* is inconsistent with paragraphs 5.2 and 84(b) to the extent they relate to foreign-invested enterprises.

(vii) In respect of foreign individuals and foreign enterprises not registered in China, the United States has not established that Article 4 of the *Several*

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

(b) Reading materials

(i) The United States has not established that Article 43 of the *Publications Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(ii) In respect of three requirements contained in Article 42 of the *Publications Regulation*, Article 42, in conjunction with Article 41, results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2, except for audiovisual products.

(iii) In relation to five other requirements contained in Article 42 of the *Publications Regulation*, the United States has not established that Article 42 results in China acting inconsistently with paragraph 5.1, or paragraphs 83(d) or 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.

(iv) The United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with paragraph 5.2 as well as paragraph 84(b) (discrimination) in respect of foreign individuals and foreign enterprises not registered in China. Consequently, no inconsistency with paragraph 1.2 has been established either.

(v) To the extent that Article 42 of the *Publications Regulation* affects foreign-invested enterprises, the Panel has exercised judicial economy in respect of one US claim based on paragraph 5.2 or paragraph 84(b) (discrimination).

(vi) In respect of an another US claim based on paragraph 5.2 or paragraph 84(b) (discrimination), the United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with the aforementioned paragraphs. Consequently, no inconsistency with paragraph 1.2 has been established either.

(vii) The United States has not established that Article 42 of the *Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(viii) Article 41 of the *Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(ix) The Panel did not rule on the US claims in respect of the *Importation Procedure*.

(x) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xi) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 5.2 or paragraph 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xii) The United States has not established that Article 8 of the *1997 Electronic Publications Regulation* results in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xiii) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xiv) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xv) The United States has not established that Articles 50 and 51 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with the second sentence of paragraph 84(b) (requirements for obtaining trading rights). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xvi) The United States has not established that Articles 52 to 55 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraphs 5.2 or 84(b) (discrimination). Consequently, no inconsistency with paragraph 1.2 has been established either.

(xvii) The United States has not established that Articles 52 to 55 of the *1997 Electronic Publications Regulation* result in China acting inconsistently with paragraph 84(b) (discretion). Consequently, no inconsistency with paragraph 1.2 has been established either.

(c) Films for theatrical release

(i) The United States has not established that Article 5 of the *Film Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(ii) Article 30 of the *Film Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(iii) Article 30 of the *Film Regulation* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(iv) The United States has not established any inconsistency of the *Film Regulation* with paragraph 5.2.

(v) The United States has not established that Article 3 of the *Film Enterprise Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(vi) Article 16 of the *Film Enterprise Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(vii) Article 16 of the *Film Enterprise Rule* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence, paragraph 1.2.

(viii) The United States has not established any inconsistency of the *Film Enterprise Rule* with paragraph 5.2.

(ix) The Panel did not rule on the US claims in respect of the *Film Distribution and Exhibition Rule*.

(d) Audiovisual products

(i) Article 5 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(ii) Article 27 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(iii) The United States has not established that Article 28 of the *2001 Audiovisual Products Regulation* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(iv) The United States has not established any inconsistency of the *2001 Audiovisual Products Regulation* with paragraph 5.1, 83(d), 84(a) or 5.2. Consequently, no inconsistency with paragraph 1.2 has been established either.

(v) Article 7 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(vi) Article 8 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with paragraph 84(b) (discretion) and, hence, paragraph 1.2.

(vii) The United States has not established that Article 9 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(viii) The United States has not established that Article 10 of the *Audiovisual Products Importation Rule* results in China acting inconsistently with its trading rights commitments under the Accession Protocol.

(ix) The United States has not established any inconsistency of the *Audiovisual Products Importation Rule* with paragraph 5.1, 83(d), 84(a) or 5.2.

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

(x) Article 21 of the *Audiovisual (Sub-) Distribution Rule* results in China acting inconsistently with paragraph 5.1 as well as paragraphs 83(d) and 84(a) and, hence paragraph 1.2.

(xi) The United States has not established any inconsistency of the *Audiovisual (Sub-) Distribution Rule* with paragraph 5.2 or 84(b). Consequently, no inconsistency with paragraph 1.2 has been established either.

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

(a) China's Article XX(a) defence with respect to the measures identified in paragraph 8.2 and concerning reading materials (including electronic publications) and finished audiovisual products

(i) China has not demonstrated that any of the relevant measures are "necessary" to protect public morals, within the meaning of Article XX(a). As a result, China has not established that these measures are justified under Article XX(a).

(ii) Because China has in any event not established that the measures at issue satisfy the requirements of Article XX(a), the Panel did not determine whether Article XX(a) is available as a direct defence for breaches of China's trading rights commitments as set out in the Accession Protocol.

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

(a) Distribution of reading materials

(i) Article 4 of the *Imported Publications Subscription Rule* and Article 42 of the *Publications Regulation* are together inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the wholesale of imported reading materials subject to subscription.

(ii) Article 2 of the *Publications (Sub-)Distribution Rule*, in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the wholesale of imported reading materials subject to sales through the market.

(iii) Where master distribution involves wholesale or retail services, Article X:2 of the Catalogue of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article 4 of the *Several Opinions* is also inconsistent with Article XVII.

(iv) Article 62 of the *1997 Electronic Publications Regulation* is inconsistent with China's national treatment commitments under Article XVII of the GATS with respect to the master wholesale or wholesale of electronic publications.

(v) To the extent that it is applied to the wholesale of electronic publications, the *Publications (Sub-)Distribution Rule*, together with the *Publications Market Rule*, is inconsistent with China's national treatment commitments under Article XVII of the GATS.

(vi) The Panel did not find that the *Publications (Sub-)Distribution Rule* is inconsistent with Article XVII of the GATS in respect of the master wholesale of electronic publications, as the United States has not established that this measure prohibits foreign-invested enterprises, including service suppliers of other Members, from engaging in the master wholesale of any electronic publications as claimed.

(vii) The requirements concerning registered capital and operating term for foreign-invested wholesalers, including service suppliers of other Members, respectively contained in paragraphs 4 and 5 of Article 7 of the *Publications Sub-Distribution Rule* are inconsistent with China's national treatment commitments under Article XVII of the GATS.

(b) Electronic Distribution of Sound Recordings

(i) The *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4), each is inconsistent with China's national treatment commitments under Article XVII of the GATS. Article X:7 of the Catalogue of Prohibited Foreign Investment Industries of the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with Article XVII of the GATS.

(ii) The Panel did not find that the *Internet Culture Rule* is inconsistent with Article XVII of the GATS, as the United States has not established that this measure, as implemented, imposes the alleged prohibition on the electronic distribution of sound recordings by service suppliers of other Members.

(c) Distribution of AVHE products

(i) Article 8.4. of the *Audiovisual (Sub-)Distribution Rule* is inconsistent with China's market access commitments under Article XVI of the GATS as it contains a limitation on the participation of foreign capital in contractual joint ventures engaging in the distribution of AVHE products, which falls within the scope of Article XVI:2(f). For the same reasons, Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment in the *Catalogue*, in conjunction with Article 8 of the *Foreign Investment Regulation*, is inconsistent with China's market access commitments under Article XVI.

(ii) The Panel did not find that Article 1 of the *Several Opinions* is inconsistent with Article XVI of the GATS, as the United States has not established that this measure imposes a limitation that falls within the scope of Article XVI:2(f), as claimed by the United States.

(iii) Article 1 of the *Several Opinions* and the operating term requirement provided for by Article 8.5 of the *Audiovisual (Sub-)Distribution Rule* each is inconsistent with China's national treatment commitments under Article XVII of the GATS.

(iv) The Panel has exercised judicial economy with respect to the US claim under Article XVII of the GATS regarding Article 8.4 of the *Audiovisual (Sub-)Distribution Rule*, and Article VI:3 of the Catalogue of Industries with Restricted Foreign Investment of the *Catalogue* in conjunction with the *Foreign Investment Regulation*, because the Panel found the same measures to be inconsistent with Article XVI of the GATS.

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

(a) Reading materials

(i) Articles 3 and 4 of the *Imported Publications Subscription Rule*, as they are applied to newspapers and periodicals, are inconsistent with China's obligations under Article III:4 of the GATT 1994.

(ii) The United States has not established that Articles 3 and 4 of the *Imported Publications Subscription Rule*, as they are applied to books in the limited category, are inconsistent with China's obligations under Article III:4 of the GATT 1994.

(iii) Article 2 of the *Publications (Sub-)Distribution Rule*, read in conjunction with Article 16 of the *Publications Market Rule*, is inconsistent with China's obligations under Article III:4 of the GATT 1994.

(b) Sound recordings intended for electronic distribution

(i) The United States has not established that Article 16 of the *Internet Culture Rule* is inconsistent with China's obligations under Article III:4 of the GATT 1994.

(ii) The United States has not established that Article 9 and Appendix 2 of the *Network Music Opinions* are inconsistent with Article III:4 of the GATT 1994.

(c) Films for theatrical release

(i) The United States has not established that the alleged discriminatory "duopoly" for film distribution within China is a measure taken by another Member which could be subject to challenge under the Dispute Settlement Understanding. Therefore, the United States has not established that the *Film Regulation, Film Distribution and Exhibition Rule, and Film Enterprise Rule*, taken together, are inconsistent with Article III:4 of the GATT 1994.

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

(a) Reading materials

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

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

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

6. Nullification and impairment

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

7. Recommendations

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