

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

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US – Gambling (Panel)

Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R

I. INTRODUCTION

1. China's accession to the World Trade Organization ("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.

2. Unfortunately, China has failed to fulfill its WTO commitments in numerous respects. Chinese measures deny foreign enterprises and individuals, as well as private Chinese enterprises, trading rights – in particular, the right to import these products into China. China's measures also deny market access to, and discriminate against, foreign distributors in these sectors. Furthermore, they treat imported products far less favorably than Chinese products.

3. 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);¹ 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");² 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. For the purposes of this dispute, the United States considers that 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. China does not meet its obligations for the following reasons.

5. *First*, China's trading rights commitment under its Protocol of Accession to the WTO ("Accession Protocol")³ requires China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to import most products – including the right to import reading

¹ As discussed in detail below with respect to the *Administrative Regulation on Electronic Publications*, an electronic publication is a book, newspaper, or periodical that has been saved as digital codes on to magnetic, digital or electronic media, such as CD-ROMS and DVD-ROMS. Electronic publications also include audio books.

² "Ringtones" are segments of a recording played on a mobile phone to signal an incoming call. "Ringback tones" are segments of a recording heard by the caller when the recipient's phone is ringing.

³ *Accession of the People's Republic of China: Decision of 10 November 2001*, ("Accession Protocol"), WT/L/432, circulated on 23 November 2001, (Exhibit US-1).

materials, AVHE products, sound recordings and films for theatrical release. However, as the United States will show in this submission, specially selected Chinese state-owned enterprises are the only enterprises that are permitted to import these products. No foreign company, no foreign individual, and no private company inside China can import these products contrary to the negotiated terms of China's WTO accession, which recognized that in China, control of the supply chain – from production through importation to final distribution – is a central component of market access. Therefore, China's trading rights commitment was a central element of the agreement that allowed China to accede to the WTO.

6. *Second*, China made specific market access and national treatment commitments in its Services Schedule⁴ under the *General Agreement on Trade in Services* ("GATS") that open China's market both to foreign reading material wholesalers, and to Chinese-foreign AVHE product and sound recording distribution joint ventures. China's measures, however, do not comply with these commitments. Some measures prohibit foreign wholesalers from distributing any imported publications and limit the kinds of distribution activities they can undertake. Other measures impose majority Chinese control over AVHE product distribution joint ventures and set high, discriminatory hurdles for those interested in launching such a venture. Still other measures ban any foreign participation whatsoever in the electronic distribution of sound recordings within China.

7. *Third*, the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Accession Protocol both commit China to provide national treatment for imported reading materials, sound recordings, and films for theatrical release. This requires China to provide competitive conditions for these imported products that are no less favorable than the conditions facing domestically-produced goods. Notwithstanding these commitments, China has made a range of distribution and sales mechanisms unavailable to imported reading materials and imported films for theatrical release. Domestic products face none of these constraints, allowing them better access to, and prospects in, the Chinese market than their imported counterparts. Similarly, China imposes discriminatory content review requirements on imported sound recordings intended for electronic distribution within China that are far more onerous and time consuming than the regulatory requirements faced by domestic sound recordings.

8. China's measures at issue in these three areas deprive domestic and foreign producers, publishers, distributors and consumers of the full benefit of China's WTO commitments, constraining and eliminating promised commercial opportunities across a number of industries. These legal obstacles to foreign products, to Chinese and foreign traders, and to foreign service suppliers seriously hobble their competitive opportunities in China, rendering it more difficult for

⁴ *Report of the Working Party on the Accession of China, Addendum: Schedule CLII – The People's Republic of China* ("China's Services Schedule"), Part II: Specific Commitments, Sector 2D, Additional Commitments, WT/MIN(01)/3/Add.2 (circulated 10 November 2001), pp. 21 (Exhibit US-2).

Chinese consumers to gain access to high-quality foreign goods and for the Chinese marketplace to benefit from the competitive services offered by first-class traders and global distributors.

9. China's measures also provide enhanced opportunities for pirates in China's market. When legitimate books, newspapers, periodicals, DVDs, music, theatrical films and other copyright-intensive products face high market barriers, pirates can readily gain footholds in the protected marketplace, while legitimate goods are excluded from, or must come late to, this market. These constraints in turn have the added unfortunate effect of undermining intellectual property protection for the copyright-intensive goods being supplied.

10. The United States has engaged on these matters with China on an intensive basis over the past several years, but no resolution has yet emerged. In the absence of a mutually agreed solution, the United States has turned to the WTO dispute settlement system to seek a resolution to its concerns. The remainder of this submission provides details of the U.S. concerns.

II. PROCEDURAL BACKGROUND

11. On April 10, 2007, the United States requested consultations with China pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the GATT 1994, and Article XXII of the GATS with respect to certain measures that restrict trading rights pertaining to reading materials, AVHE products, sound recordings, and films for theatrical release, and that restrict market access for, or discriminate against, foreign suppliers of distribution services for reading materials, foreign suppliers of audiovisual services (including distribution services) for AVHE products, and foreign suppliers of distribution services for sound recordings.⁵

12. On July 10, 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 national treatment concerns related to sound recording distribution services, as well as to the distribution of sound recordings and films for theatrical release.⁶

13. The United States and China held consultations on June 5-6 and July 31, 2007. These consultations provided some helpful clarifications, but failed to resolve the dispute.

14. On October 10, 2007, the United States requested the establishment of a panel pursuant to Article 6.2 of the DSU.⁷ The Dispute Settlement Body ("DSB") considered this request at its meeting on October 22, 2007, at which time China objected to the establishment of a panel. On

⁵ WT/DS363/1 (16 April 2007).

⁶ WT/DS363/1/Add.1 (16 July 2007).

⁷ WT/DS363/5 (11 October 2007).

November 27, 2007, the United States renewed its request for the establishment of a panel. The DSB established the panel on November 27, 2007.⁸

15. The panel was constituted on March 27, 2008.⁹

III. FACTUAL BACKGROUND

A. Introduction to China’s Legal System

16. During its WTO accession negotiations, China explained the sources and hierarchy of Chinese law in the Report of the Working Party on the Accession of China (the “Working Party Report”):¹⁰

The representative of China informed members of the Working Party that in accordance with the Constitution and the Law on Legislation of the People’s Republic of China, the National People’s Congress was the highest organ of state power. Its permanent body was its Standing Committee. The National People’s Congress and its Standing Committee exercised the legislative power of the State. They had the power to formulate the Constitution and laws. The State Council, *i.e.*, the Central People’s Government of China, was the executive body of the highest organ of state power. The State Council, in accordance with the Constitution and relevant laws, was entrusted with the power to formulate administrative regulations. The ministries, commissions and other competent departments (collectively referred to as “departments”) of the State Council could issue departmental rules within the jurisdiction of their respective departments and in accordance with the laws and administrative regulations. The provincial people’s congresses and their standing committees could adopt local regulations. The provincial governments had the power to make local government rules. The National People’s Congress and its Standing Committee had the power to annul the administrative regulations that contradicted the Constitution and laws as well as the local regulations that contradicted the Constitution, laws and administrative regulations. The State Council had the power to annul departmental rules and local government rules that were inconsistent with the Constitution, laws or administrative regulations.

17. As China explained to the Working Party, the National People’s Congress (“NPC”) is the highest organ of state power. The NPC and its permanent body, the Standing Committee,

⁸ The DSB meeting held on November 19, 2007, was suspended and then resumed on November 27, 2007. The panel was established on November 27. *See Dispute Settlement Body: Minutes of the Meeting Held on 19 November 2007*, WT/DSB/M/242, 11 February 2008, para. 67.

⁹ *Constitution of the Panel Established at the Request of the United States: Note by the Secretariat*, WT/DS363/6, 28 March 2008.

¹⁰ *See Working Party Report*, para. 66 (Exhibit US-3).

exercise the legislative power of the State, which includes the power to formulate China's *laws*.¹¹ Likewise, executive power is vested in the State Council whose responsibilities include the formulation, adoption and enactment of *administrative regulations* and certain *laws*.¹² Ministries, commissions, and other regulatory agencies directly under the State Council have the authority to issue *departmental rules*.¹³

B. China's Measures Addressing Trading Rights

1. Introduction

18. 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.¹⁴ 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.

19. 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.

20. The broadly applicable measures include: the *Catalogue of Industries for Guiding Foreign Investment* (the "Catalogue"),¹⁵ the *Several Opinions on the Introduction of Foreign Investment into the Cultural Sector* (the "Several Opinions"),¹⁶ the *Regulations on the*

¹¹ *Trade Policy Review of the People's Republic of China, Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, paras. 7-9 (Exhibit US-4).

¹² *Trade Policy Review of the People's Republic of China, Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, paras. 10 and 21 (Exhibit US-4).

¹³ *Trade Policy Review of the People's Republic of China, Report by the Secretariat*, WT/TPR/S/161, circulated 28 February 2006, para. 22 and Chart II.1: Hierarchy of laws and regulations (Exhibit US-4).

¹⁴ For the purposes of this submission, "foreign-invested enterprises" include wholly foreign-owned enterprises and partially foreign-owned enterprises.

¹⁵ *Catalogue of Industries for Guiding Foreign Investment* (the "Catalogue"), Decree No. 57, jointly issued by the National Development and Reform Commission and the Ministry of Commerce, October 31, 2007; entry into force December 1, 2007 (Exhibit US-5).

¹⁶ *Several Opinions on the Introduction of Foreign Investment into the Cultural Sector* (the "Several Opinions"), Wen Ban Fa [2005] No. 19, jointly issued by the Ministry of Culture, the State Administration of Radio, Film and Television, the General Administration of Press and Publication, the National Development and Reform

Management of Publications (the “Management Regulation”),¹⁷ and the *Examination and Approval for Establishing a Publication Import Business Unit* (the “Importation Procedure”).¹⁸

21. In addition to these broadly applicable measures, more specific Chinese measures also create limits on who can import particular categories of Products. Moving from the general to the specific measures, the discussion below will first address the Several Opinions, the Catalogue, the Management Regulation, and the Importation Procedure and then turn to the measures that apply more specifically to the importation of specific categories of Products.

22. The table below indicates the general measures and specific measures that restrict trading rights with respect to each of the Products.

China Restricts Trading Rights for the Products		
Product	General Measure	Specific Measure
Reading Materials	Catalogue, Foreign Investment Regulation, Several Opinions, Management Regulation, and Importation Procedure	Electronic Publications Regulation
AVHE Products	Catalogue, Foreign Investment Regulation, Several Opinions, Management Regulation, and Importation Procedure	Audiovisual Regulation, Audiovisual Import Rule, and Audiovisual Sub-Distribution Rule
Sound Recordings	Catalogue, Foreign Investment Regulation, Several Opinions, Management Regulation, and Importation Procedure	Audiovisual Regulation, Audiovisual Import Rule, and Audiovisual Sub-Distribution Rule
Films for Theatrical Release	Catalogue, Foreign Investment Regulation, Several Opinions	Films Regulation, Provisional Film Rule, and Film Distribution and Projection Rule

2. General Measures Addressing the Importation of the Products

23. 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

¹⁶(...continued)

Commission, and the Ministry of Commerce, July 6, 2005 (Exhibit US-6).

¹⁷*Regulations on the Management of Publications* (the “Management Regulation”), State Council Order No. 343, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25, 2001 (Exhibit US-7).

¹⁸*Examination and Approval of Establishment of Publication Importation Entities* (the “Importation Procedure”), General Administration of Press and Publication, December 27, 2005 (Exhibit US-8).

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 Management 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.

Catalogue

24. The *Regulations Guiding the Orientation of Foreign Investment* (the “Foreign Investment Regulation”),¹⁹ which were promulgated by the State Council, require “encouraged, restricted and prohibited” foreign-invested projects to be listed in the Catalogue.²⁰ 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.”

25. The Catalogue forbids foreign-invested enterprises from engaging in the importation of any of the Products into China. 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.

26. Immediately thereafter, Article X.3 states that foreign investment in the business of importing audiovisual products and electronic publications is likewise not allowed. As discussed in detail below, China’s audiovisual regulatory regime covers sound recordings. The prohibition on foreign investment in the business of importation of audiovisual products contained in this provision, therefore, extends to sound recordings.

27. Films for theatrical release are not explicitly singled out as a separate category. Rather, they are included within the term “audiovisual products” as that term is used in the Catalogue. 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”. 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*)”.²¹ In contrast, Article X.3 provides that foreign investment is prohibited in enterprises engaging in the importation of “audiovisual products”, without any exclusion for motion pictures. Plainly, the exclusion of motion pictures in Article VI.3, but not in Article X.3, indicates that the term “audiovisual products” as used in

¹⁹ *Regulations on Guiding the Orientation of Foreign Investment* (the “Foreign Investment Regulation”), State Council Order No. 346, promulgated on February 11, 2002 (Exhibit US-9).

²⁰ Foreign Investment Regulation, Article 4 (Exhibit US-9).

²¹ Emphasis added.

the Catalogue includes motion pictures. Accordingly, 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. The Catalogue, therefore, prohibits foreign investment in the importation of all of the Products.²²

Several Opinions

28. The Several Opinions were promulgated in 2005 by the five authorities primarily responsible for regulating the Products, *i.e.*, the Ministry of Culture (“MOC”); the State Administration of Radio, Film and Television (“SARFT”); the General Administration of Press and Publications (“GAPP”); the National Development and Reform Commission (“NDRC”); and the Ministry of Commerce (“MOFCOM”).

29. Consistent with the Catalogue, the Several Opinions prohibit foreign-invested enterprises from engaging in the importation of the Products. 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 covers imported films for theatrical release.

30. The second sentence of Article 4 further provides, in relevant part:

Foreign investors are prohibited from engaging in the . . . import of books, newspapers and periodicals, and . . . import of audiovisual products and electronic publications.

31. This provision prohibits foreign-invested enterprises from engaging in the importation of reading materials, AVHE products, and sound recordings.

²² See *Measures for Reinforcing the Management of Imported Cultural Products* (the “Imported Cultural Products Measure”), Zhong Xuan Fa [2005] No. 15, Propaganda Department of the Central Committee of the Chinese Communist Party, Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, Ministry of Commerce, State Administration of Customs, April 28, 2005, Article 4 (stating that “[t]he business of importing cultural products such as books, newspapers, periodicals, electronic publications, audiovisual products, motion pictures, TV dramas, cartoons, and radio/TV programs shall be carried out by *state-owned cultural units designated or licensed* by the Ministry of Culture, [the State Administration of Radio, Film, and Television] SARFT, and the General Administration of Press and Publication.”) (emphasis added) (Exhibit US-10); and *Some Decisions of the State Council on the Entry of the Non-Public-Owned Capital into the Cultural Industry* (the “Decisions on Non-Public-Owned Capital”), (Gua Fa [2005] No. 10, promulgated by the State Council on April 13, 2005, Article 9 (providing that “non-public capital . . . may not engage in the import business of cultural products such as books, newspapers, periodicals, films, TV programs, and finished audiovisual products, etc.”) (Exhibit US-11).

Management Regulation

32. The Management Regulation, issued by the State Council, is the principal Chinese legal instrument governing explicitly, *inter alia*, the importation of reading materials, AVHE products and sound recordings in China.

33. Article 2 provides that this measure applies to “publishing activities”, which include the importation into China of “publications”. “Publications” is defined broadly in this measure to encompass newspapers, periodicals, books, electronic publications, and AVHE products, and sound recordings.²³

34. Chapter V (Articles 41-47) of the Management Regulation specifically addresses importation. Article 41 provides that no individual or entity may import any reading materials, AVHE products, or sound recordings without approval.

35. Article 42 sets forth the required conditions that enterprises must satisfy in order to import reading materials, AVHE products, and sound recordings into China. Among the seven conditions enumerated, Article 42 mandates that enterprises applying to import reading materials, AVHE products, and sound recordings “shall” be wholly state-owned enterprises. Accordingly, the Management Regulation permits neither privately-invested Chinese enterprises nor foreign-invested enterprises to be approved to import reading materials, AVHE products, and sound recordings into China.

36. Article 42 further circumscribes which wholly state-owned enterprises may import publications, providing that:

Approval to establish a publication [*i.e.*, reading materials, AVHE products, and sound recordings] 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.

37. Article 43 establishes application procedures for Chinese wholly state-owned enterprises seeking to import reading materials, AVHE products, and sound recordings into China. Applications for permits to import these products are to be submitted to 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 license in order to engage in importing.

38. In addition, with regard to newspapers and periodicals in particular, Article 41 of the Management Regulation creates special additional conditions – *i.e.*, only Chinese wholly state-owned enterprises “designated” by GAPP may import these products, and no entity or individual

²³ Management Regulation, Article 2 (Exhibit US-7).

may import them without such a designation. Thus, pursuant to the authority granted by the Management Regulation, GAPP selects, at its own discretion, the Chinese wholly state-owned enterprises that can engage in the importation of newspapers and periodicals.

Importation Procedure

39. The Importation Procedure, issued by GAPP, implements Article 43 of the Management Regulation. It confirms, and to some extent elaborates upon, the licensing requirements for the importation of reading materials, AVHE products, and sound recordings into China.

40. The Importation Procedure begins with the heading “Licensing Requirements”. As in the Management Regulation, the second condition for an enterprise to import these products is that it is a wholly state-owned enterprise. Likewise, licenses are limited based on “state plan regarding the total number, structure and deployment of publication import business units”.²⁴

41. Accordingly, 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.

3. Specific Measures Addressing the Importation of Reading Materials

42. As noted above, Chinese measures strictly control the importation of reading materials into China, with GAPP serving as the principal government agency responsible for regulating importation.²⁵ The Management Regulation and the Importation Procedure permit only wholly state-owned enterprises *approved* by GAPP to import reading materials,²⁶ and require a special further GAPP-*designation* before wholly state-owned enterprises can import newspapers and periodicals.

²⁴ Underscoring the finite supply of licenses for the importation of reading materials, AVHE products, and sound recordings, the heading “Quantity Restrictions”, which immediately follows the “Licensing Requirements” heading in the Importation Procedures, contains a single and unqualified entry – “Yes”.

²⁵ See Management Regulation, Article 41 (Exhibit US-7); and Imported Cultural Products Measure, Article 13 (Exhibit US-10). See also United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea”, June 2007, page 12. GAPP also supervises content review, distribution and other activities related to reading materials (Exhibit US-12).

²⁶ There are currently 42 enterprises that have been approved to import reading materials into China. See Wang Yumei, “Fourteen (Foreign Publications) Retailers Enter Chinese Mainland Market and Increasing Number of Book, Newspaper and Magazine Retailers,” *China News Publishing Newspaper*, January 22, 2008, page 2 (Exhibit US-13). See also China-Britain Business Council, “How to Read a Changing Market” *Sector Report*, 2005, pages 2-3 available at http://www.cbcc.org/the_review/review_archive/sectors/31.html (Exhibit US-14). China National Publication Import and Export Corporation (“CNPIEC”) is among the leading Chinese wholly state-owned importer of reading materials into China.

43. In addition to the Catalogue, the Several Opinions, the Management Regulation and the Importation Procedure, which cover all forms of reading materials, China maintains one additional measure focused on only one subset of reading materials – *i.e.*, the *Regulations on the Management of Electronic Publications* (the “Electronic Publications Regulation”) – which control the right to import certain reading materials known as electronic publications.²⁷

Electronic Publications Regulation

44. The Electronic Publications Regulation was promulgated by GAPP on the basis of the Management Regulation.²⁸ Article 2 of the Electronic Publications Regulations 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), photo-CD, DVD-ROM, IC cards and other forms as recognized by the General Administration of Press and Publication.²⁹

45. The Electronic Publications Regulation imposes a licensing system on the importation of electronic publications.³⁰ Article 8 of the Electronic Publications Regulation makes clear that no entity or individual may import electronic publications into China without a permit. Chapter V (Articles 50-60) of this measure establishes rules for the importation of electronic publications. Article 50, in particular, states that GAPP shall 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.³¹

46. Thus, the Electronic Publications Regulation implements the restrictive approval and licensing requirements contained in the Management Regulation and the Importation Procedure. In so doing, it reconfirms the prohibition on any foreign-invested enterprise or foreign individual,

²⁷ *Regulations on the Management of Electronic Publications* (the “Electronic Publications Regulation”) Order No. 11 of the General Administration of Press and Publication (December 30, 1997) (Exhibit US-15).

²⁸ Electronic Publications Regulation, Article 2 (Exhibit US-15).

²⁹ Despite the broad scope of this definition, 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.

³⁰ Electronic Publications Regulation, Article 8 (Exhibit US-15).

³¹ Electronic Publications Regulation, Articles 50-51 (Exhibit US-15).

or any privately-owned Chinese enterprise, engaging in the importation of electronic publications.

4. Specific Measures Addressing the Importation of AVHE Products

47. Chinese measures also strictly control the importation of AVHE products (including, videocassettes, VCDs, and DVDs), with the Ministry of Culture (MOC) serving as the principal government agency responsible for this oversight.³² As noted above, China’s broadly applicable measures require all imports of AVHE products to be imported by wholly state-owned enterprises,³³ and they prohibit foreign investment in businesses engaged in such importation.³⁴

48. In addition to the Catalogue, the Several Opinions, the Management Regulation and the Importation Procedure, however, several sector specific measures provide for trading rights restrictions on AVHE products: the *Regulations on the Management of Audiovisual Products* (the “Audiovisual Regulation”),³⁵ the *Rules for the Management of the Import of Audiovisual Products* (the “Audiovisual Import Rule”),³⁶ and the *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products* (the “Audiovisual Sub-Distribution Rule”).³⁷

49. 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.³⁸

³² See Audiovisual Regulation, Article 27 (Exhibit US-16). See United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea” (June 2007), page 11 (Exhibit US-12). MOC also supervises content review, distribution and other activities related to AVHE products.

³³ Management Regulation, Article 42.2 (Exhibit US-7); and Importation Procedure, Licensing Requirements (Exhibit US-8).

³⁴ Several Opinions, Article 4 (Exhibit US-6); and Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Article X.3 (Exhibit US-5).

³⁵ *Regulations on the Management of Audiovisual Products* (the “Audiovisual Regulation”), State Council Order No. 341, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25, 2001 (Exhibit US-16).

³⁶ *Rules for the Management of Import of Audiovisual Products* (the “Audiovisual Import Rule”), Decree No. 23 of the Ministry of Culture and the General Administration of Customs, April 17, 2002 (Exhibit US-17).

³⁷ *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products* (the “Audiovisual Sub-Distribution Rule”), promulgated by the Ministry of Culture and Ministry of Commerce on February 9, 2004 (superceding the measures notified by China in S/C/N/219) (Exhibit US-18).

³⁸ Audiovisual Regulation, Articles 27 and 28 (Exhibit US-16); Audiovisual Import Rule, Articles 8, 10, 13 and 14 (Exhibit US-17)

50. China has designated only one enterprise to import finished audiovisual products: CNPIEC, which is a wholly state-owned enterprise.³⁹ Likewise, with respect to unfinished audiovisual products, only Chinese wholly state-owned enterprises are permitted to engage in their importation.⁴⁰ A number of measures elaborate this regime.

Audiovisual Regulation

51. The Audiovisual Regulation, issued by the State Council, elaborates certain details about the trading rights restrictions set forth in the Catalogue, the Several Opinions, the Management Regulation, and the Importation Procedure for the importation of AVHE products. According to its terms, the Audiovisual Regulation applies to, *inter alia*, the importation of audiovisual products (including, audio and video tapes, records, and audio and video CD's) into China.⁴¹

52. With respect to licensing, for example, Article 5 of the Audiovisual Regulation reiterates that 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. Article 5 further elaborates on the confines of China's audiovisual product import regime by providing that permits and approval documents may not be rented, lent, sold or assigned.

53. Chapter IV (Articles 27-30) of this measure pertains specifically to the importation of audiovisual products. Regarding what enterprises may import *finished audiovisual products* into China, Article 27 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.

Thus, only enterprises designated by MOC may import finished audiovisual products into China.

54. Enterprises that import *unfinished audiovisual products* must be approved by MOC using a formal application process. Chapter II (Articles 8-10) establishes the application and approval

³⁹ Imported Cultural Products Measure, Article 5 (stating "Import of finished audiovisual products shall be exclusively handled by the China [National] Books Import and Export Corporation.") (Exhibit US-10) and *Supplementary Circular of the Ministry of Culture on Sticking a Uniform Anti-Fake Logo on Audiovisual Products*, Promulgated by the Ministry of Culture under WEN SHI FA [1997] No. 27, April 17, 1997, Article I (providing "According to the State Council, China National Publications Import and Export Corporation (CNPIEC) is the only entity that is approved by the State to engage in the importation of finished audiovisual products.") (Exhibit US-19).

⁴⁰ Management Regulation, Article 42 (Exhibit US-7); and Imported Cultural Products Measure, Article 4 (Exhibit US-10).

⁴¹ Audiovisual Regulation, Article 2 (Exhibit US-16).

procedures applicable to these enterprises. Article 28 provides, in relevant part, that importers of audiovisual products for publication must bring their MOC-issued approval documents “to process import procedures at Customs”.

Audiovisual Import Rule

55. The Audiovisual Import Rule, which was issued by MOC and the General Administration of Customs on the basis of the Audiovisual Regulation,⁴² also applies to the importation of both finished and unfinished audiovisual products into China.⁴³ Article 2 of this measure defines audiovisual products as “audio tapes, video tapes, records, audio and video CDs which have recorded contents”.

56. Article 7 of the Audiovisual Import Rules reiterates that the State shall maintain a licensing system for the importation of audiovisual products.⁴⁴ Article 8 further reaffirms that only those enterprises “designated” by the Ministry of Culture may import finished audiovisual products into China and that no entity or individual may import finished audiovisual products without such a designation. Article 10 provides that the importation of imported unfinished audiovisual products may be conducted by audiovisual publishers to the extent that they have been approved by MOC to do so.

Audiovisual Sub-Distribution Rule

57. The Audiovisual Sub-Distribution Rule, which also was promulgated pursuant to the Audiovisual Regulation,⁴⁵ contains one provision that underscores the restrictive regime governing the importation of AVHE products in China. While this measure is principally focused on the distribution of AVHE products (discussed in detail in section III.D.3 below), Article 21 provides that Chinese-foreign contractual enterprises, 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. Article 21, therefore, further reinforces the prohibition that China places on foreign enterprises engaging in the importation of AVHE products.

5. Specific Measures Addressing the Importation of Sound Recordings

58. 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 Management Regulation, the Importation

⁴² Audiovisual Import Rule, Article 1 (Exhibit US-17).

⁴³ Audiovisual Import Rule, Article 3 (Exhibit US-17).

⁴⁴ Audiovisual Import Rule, Article 7 (Exhibit US-17).

⁴⁵ Audiovisual Sub-Distribution Rule, Article 1 (Exhibit US-18).

Procedures, the Audiovisual Regulation, the Audiovisual Import Rule, and the Audiovisual Sub-Distribution Rule.

59. In all of these measures, China defines the term “audiovisual products” to encompass sound recordings – *e.g.*, recorded audio tapes, records, and audio CDs.⁴⁶ Thus, MOC regulates the importation of sound recordings into China, just as it does for AVHE products.⁴⁷

60. As has been discussed in sections III.B.2-4 above, the Catalogue and the Several Opinions forbid foreign investment in the importation of sound recordings. In addition, the Management 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 engaged 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.⁴⁸

6. Specific Measures Addressing the Importation of Films for Theatrical Release

61. SARFT serves as the responsible Chinese government agency for controlling the import into China of films for theatrical release.⁴⁹ 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 *Regulations on the Management of Films* (the “Films Regulation”),⁵⁰ the *Implementing Rules for the Reform of the Film Distribution and Projection*

⁴⁶ Management Regulation, Article 2 (Exhibit US-7); Catalogue, “Industries Prohibiting Foreign Investment”, Article X.3 (Exhibit US-5); Several Opinions, Article 4 (Exhibit US-6); Electronic Publications Regulation, Article 2 (Exhibit US-15); Audiovisual Regulation, Article 2 (defining audiovisual products as recorded audio and video tapes, records, and audio and video CD’s) (Exhibit US-16); Audiovisual Import Rule, Article 2 (defining audiovisual products as audio tapes, video tapes, records, and audio and video CDs which have recorded contents) (Exhibit US-17); and Audiovisual Sub-Distribution Rule, Article 2 (defining audiovisual products as audio tapes, video tapes, records, audio and video CDs with audiovisual recorded content.) (Exhibit US-18). Again, as the Importation Procedure was established pursuant to Article 43 of the Management Regulation, the full scope of the definition of “publication” – including reading materials, AVHE products, and sound recordings – contained in the Management Regulation is thereby incorporated into the Importation Procedure (Exhibit US-8).

⁴⁷ MOC also supervises content review, distribution and other activities related to sound recordings.

⁴⁸ Management Regulation, Article 42(2); and Imported Cultural Products Measure, Article 4 (Exhibit US-10).

⁴⁹ Films Regulation, Articles 4 and 30 (Exhibit US-20); Imported Cultural Products Measure, Article 10 (Exhibit US-10). See United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea” (June 2007), pages 6 and 11 (Exhibit US-12). SARFT also supervises content review, distribution and other activities related to films for theatrical release.

⁵⁰ *Regulations on the Management of Films* (the “Films Regulation”), State Council Order No. 342, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25,

(continued...)

Mechanisms (Trial Implementation) (the “Film Distribution and Projection Rule”),⁵¹ and the *Provisional Rules on Entry Criteria for Operating Film Enterprises* (the “Provisional Film Rule”).⁵²

62. Under this Chinese regime, only Chinese wholly state-owned enterprises have been allowed to engage in such importation. In fact, 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.⁵³ 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.

Films Regulation

63. The Films 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.⁵⁴ 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.

64. Article 30 further directs that only enterprises designated by SARFT may engage in the business of importing films. Confirming the strict controls on the importation of films, this Article further provides that no enterprise or individual can import films without having been

⁵⁰(...continued)

2001 (Exhibit US-20).

⁵¹ *Implementing Rules for the Reform of the Film Distribution and Projection Mechanisms (Trial Implementation)* (the “Film Distribution and Projection Rule”), Guang Fa Ban Zi [2001] No. 1519, jointly issued by the State Administration of Radio, Film and Television and the Ministry of Culture (December 18, 2001) (Exhibit US-21).

⁵² *Provisional Rules on Entry Criteria for Operating Film Enterprises* (the “Provisional Film Rule”), Decree No. 43, jointly issued by the State Administration of Radio, Film and Television and the Ministry of Commerce, promulgated on October 10, 2004 and effective as of November 10, 2004 (Exhibit US-26).

⁵³ See China Film Group homepage, available at http://www.chinafilm.com/gzzy/index_image/20070204/2100.html (providing that China Film Group “is the sole importer of foreign theatrical movies in China” (Exhibit US-23). See also United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea” (June 2007), page 32 (Exhibit US-12); Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China” (January 2007), pages 41-42 (Exhibit US-24); The Center for American Economic Studies, Chinese Academy of Social Sciences, “A Study of the Potential of the Chinese Film Industry” (July 2005), page 31 (Exhibit US-25); and China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, pages 40,65, 79, and 107 (Exhibit US-26).

⁵⁴ Films Regulation, Article 2 (Exhibit US-20).

designated. As noted above, “designation” means that SARFT exercises its discretion to decide who may import films. No application and approval procedures apply.

Film Distribution and Projection Rule

65. The Film Distribution and Projection Rule primarily addresses the distribution and projection of films for theatrical release in China.⁵⁵ Article II of this measure, however, 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. Article II further 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 . . .” Thus, the Films Distribution and Exhibition Rule clarifies how the requirements of the Films Regulation are to be fulfilled, *i.e.*, exactly one domestic enterprise, owned by the State to import films for theatrical release – a Chinese wholly state-owned enterprise called China Film Import and Export Corporation.

Provisional Film Rule

66. The Provisional Film Rule further regulates the importation of films for theatrical release into China. Article 2 of this measure limits its application to *domestic enterprises* involved in, *inter alia*, the importation and exportation of films.⁵⁶ Consistent with the Films Regulation, Article 3 reiterates that the State implements a licensing system with respect to the importation of films.

67. The Provisional Film Rule then devotes only a single sentence specifically to the importation of films into China. Consistent with the Film Regulation and the Film Distribution and Projection Rule, Article 16 states, “The business of importing films shall be exclusively conducted by film import enterprises that are approved by SARFT.” As the Film Distribution and Projection Rule indicates, only one such enterprise has been so approved – China Film Import and Export Corporation.

7. Conclusion

68. The various Chinese measures discussed above greatly constrain the right to import the Products into China. First and foremost, the measures prohibit foreign-invested enterprises from engaging in the importation of any of the Products. Second, 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. In particular, Chinese wholly state-owned enterprises engaging in the importation of books, electronic publications, unfinished AVHE

⁵⁵ Film Distribution and Projection Rule, Article I (Exhibit US-21).

⁵⁶ Article 2 applies, as well, to both domestic and foreign enterprises involved in the production and screening of films.

products, and unfinished sound recordings must have the Chinese Government’s “approval”, while Chinese wholly state-owned enterprises engaging in the importation of newspapers, periodicals, finished AVHE products and finished sound recordings are limited to those that have been “designated” by the Chinese Government. Third, with regard to films for theatrical release, the relevant measures “designate” only a single Chinese wholly state-owned enterprise to engage in their importation. Through these requirements, China limits the right to trade in the Products within its territory.

C. China’s Measures Addressing Distribution

1. Introduction

69. China’s regime governing the distribution of reading materials, AVHE products, and sound recordings is notable for its complexity. 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;⁵⁷
- *distribution (Fa Xing)*, which includes master distribution, wholesale, retail,⁵⁸ leasing,⁵⁹ and exhibition for sale;⁶⁰
- *sub-distribution (Fen Xiao)*, which includes wholesale and retail;⁶¹
- *master wholesale (Zong Pi Fa)*, which is synonymous with master distribution;⁶²

⁵⁷ *Administrative Rules for the Publication Market* (the “Publication Market Rule”), Promulgated by the General Administration Press and Publication on July 16, 2003, revised on June 16, 2004, Article 2, (Exhibit US-27). We understand from China that the exclusive distribution rights can be nationwide or within a region, and that it can include wholesale and/or direct sales to consumers. However, we understand that the entity engaged in master distribution (*Zong Fa Xing*) of certain teaching materials must handle the entire distribution chain.

⁵⁸ “Retail” is the sale of products directly to consumers. *See* Publication Market Rule, Article 2 (Exhibit US-27).

⁵⁹ “Leasing” is the provision of a product to a customer for a specified period of time in exchange for a rental fee. Publication Market Rule, Article 2 (Exhibit US-27).

⁶⁰ Publication Market Rule, Article 2 (Exhibit US-27).

⁶¹ *Rules for the Management of Foreign-Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals* (the “Foreign-Invested Sub-Distribution Rule”), Article 2, Order No. 18 of the General Administration Press and Publication and the Ministry of Foreign Trade and Economic Cooperation (March 17, 2003) (Exhibit US-28). We also understand from China that sub-distribution (*Fen Xiao*) in the context of AVHE products includes the rental of these products.

⁶² Publication Market Rule, Article 2 (Exhibit US-27).

- *wholesale (Pi Fa)*, i.e., the sale of products to businesses that are not ultimate consumers;⁶³ and
- *retail (Ling Shou)*, i.e., the sale of products to ultimate consumers.⁶⁴

70. China maintains measures that forbid foreign-invested service suppliers from engaging in various distribution activities related to reading materials, AVHE products, and sound recordings within China. Furthermore, where China permits foreign-invested service suppliers to engage in particular distribution activities, the measures at issue impose different and more burdensome requirements on foreign-invested service suppliers than they do on wholly Chinese-owned service suppliers.

2. China's Measures Addressing the Distribution of Reading Materials

71. The General Administration of Press and Publications (GAPP)⁶⁵ is the principal Chinese government authority responsible for regulating the distribution of reading materials – including books, periodicals, newspapers, and electronic publications – in China. GAPP exercises its authority through measures containing numerous prohibitions on foreign-invested distributors, such as prohibitions on certain types of distribution and on the distribution of certain types of reading materials, including certain imported reading materials.

72. As discussed in detail below, 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.

73. 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.⁶⁶

⁶³ Publication Market Rule, Article 2 (Exhibit US-27). We understand from China that an entity engaged in wholesale (*Pi Fa*) must purchase the goods from an entity engaged in master distribution (*Zong Fa Xing*), i.e., either from the publisher or a separate authorized party.

⁶⁴ Publication Market Rule, Article 2 (Exhibit US-27).

⁶⁵ Management Regulation, Articles 6 (Exhibit US-7) and Publication Market Rule, Article 4 (Exhibit US-27). See United Nations Educational, Scientific and Cultural Organization, "Trends in Audiovisual Markets: China, Mongolia & South Korea", June 2007, page 12 (Exhibit US-12).

⁶⁶ As demonstrated below, when compared with wholly-Chinese owned reading materials distributors, foreign-invested enterprises engaging in the distribution of reading materials are subjected to more onerous requirements, including with respect to capitalization, operating term, and record of legal compliance, as well as numerous additional layers in the examination and approval process.

74. China maintains its regime for the distribution of reading materials through measures including: the Management Regulation, the *Administrative Rules for the Publication Market* (the “Publication Market Rule”),⁶⁷ the *Rules on the Management of Foreign-Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals* (the “Foreign-Invested Sub-Distribution Rule”),⁶⁸ the *Examination and Approval of Established Chinese-Foreign Equity Joint Ventures, Contractual Joint Ventures, and Wholly Foreign-Owned Enterprises for the Sub-Distribution of Publications* (the “Sub-Distribution Procedure”),⁶⁹ the *Rules for the Management of Subscribers Placing Subscriptions for Imported Publications* (the “Imported Publications Subscription Rule”),⁷⁰ the Electronic Publications Regulation, the Several Opinions, the Foreign Investment Regulation, and the Catalogue.

75. The tables included below provide an overview of the measures and requirements that this section will discuss.

China Prohibits Foreign-Invested Enterprises from Engaging in the Following Forms of Reading Materials Distribution	
Form of Distribution	Measures
Master Distribution of Books, Newspapers, and Periodicals	Foreign Investment Regulation and Catalogue Several Opinions
Distribution of Imported Newspapers and Periodicals as well as Imported Books and Electronic Publications in the Limited Distribution Category	Imported Publication Subscription Rule Foreign-Invested Sub-Distribution Rule
Distribution of Imported Books and Electronic Publications in the Non-Limited Distribution Category	Publications Market Regulation Foreign-Invested Sub-Distribution Rule
Master Wholesale and Wholesale of Electronic Publications	Electronic Publications Regulation

⁶⁷ *Administrative Rules for the Publication Market* (the “Publication Market Rule”), promulgated by the General Administration Press and Publication on July 16, 2003, revised on June 16, 2004 (Exhibit US-27).

⁶⁸ *Rules for the Management of Foreign-Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals* (the “Foreign-Invested Sub-Distribution Rule”), Order No. 18 of the General Administration Press and Publication and the Ministry of Foreign Trade and Economic Cooperation, March 17, 2003 (Exhibit US-28).

⁶⁹ *Examination and Approval for Establishing Chinese-Foreign Equity Joint Ventures, Contractual Joint Ventures and Wholly Foreign-Owned Enterprises for the Sub-Distribution of Publications* (the “Sub-Distribution Procedure”), General Administration of Press and Publication, December 27, 2005 (Exhibit US-29).

⁷⁰ *Rules on the Management of Subscribers Placing Subscriptions for Imported Publications* (the “Imported Publications Subscription Rule”), Order No. 27 of the General Administration of Press and Publication (adopted at the fourth conference of the General Administration Press and Publication on September 9, 2004 and Published on December 31, 2004) (Exhibit US-30).

Requirements Applicable to Foreign-Invested and Wholly Chinese-Owned Enterprises Engaging in Sub-Distribution of Books, Newspapers and Periodicals Published in China		
Requirement	Foreign-Invested Enterprises	Wholly Chinese-Owned Enterprises
Operating Term	Not to exceed 30 years [Foreign-Invested Sub-Distribution Rule] [Publication Sub-Distribution Procedure]	No Equivalent Requirement
Pre-Establishment Legal Compliance	No record of violations of laws or regulations in the three years prior to establishment [Foreign-Invested Sub-Distribution Rule] [Publication Sub-Distribution Procedure] [Several Opinions]	No Equivalent Requirement
Registered Capital	Not less than RMB 30 million [Foreign-Invested Sub-Distribution Rule] [Publication Sub-Distribution Procedure]	Not less than RMB 2 million [Publications Market Regulation]
Examination and Approval Process	<p>A. Obtain PPA Approval Document</p> <p>1. GAPP (regional level) 2. GAPP (national level)</p> <p>B. Obtain Foreign Invested Enterprise Approval Certificate</p> <p>3. MOFCOM (regional level) 4. MOFCOM (national level)</p> <p>C. Obtain Publications Business Permit</p> <p>5. GAPP (regional level)</p> <p>D. Obtain Business License</p> <p>6. SAIC</p> <p>[Foreign-Invested Sub-Distribution Rule] [Publication Sub-Distribution Procedure]</p>	<p>A. Obtain Publications Business Permit</p> <p>1. GAPP (municipal level) 2. GAPP (regional level)</p> <p>B. Obtain Business License</p> <p>3. SAIC</p> <p>[Publications Market Regulation]</p>
GAPP Decision-Making Criteria	<p>1. Friendliness 2. Strong Capability 3. Standardized Management 4. Advanced Technologies 5. Equity or Contractual Joint Venture 6. Reliable Foreign Investment</p> <p>[Several Opinions]</p>	No Equivalent Requirement

a. Prohibitions on Foreign-Invested Distributors of Reading Materials

76. China’s measures prohibit foreign-invested enterprises from engaging in the distribution of reading materials in several ways. *First*, foreign-invested enterprises are forbidden from engaging in the master distribution of books, newspapers, and periodicals. The Foreign Investment Regulation and the Catalogue list the master distribution of books, newspapers and

periodicals as an activity in which foreign investment is prohibited.⁷¹ The second sentence of Article 4 of the Several Opinions likewise specifically articulates this prohibition.

77. *Second*, the Imported Publication Subscription Rule prohibits foreign-invested enterprises from distributing any imported newspapers or periodicals as well as certain types of imported books and electronic publications. This measure, issued pursuant to the Management Regulation, governs the distribution of imported reading materials within China.⁷²

78. GAPP officials have explained that the Imported Publication Subscription Rule:

ensure[s] that the *distribution* and sales of imported publications, after they are imported [into China], are all controlled by the *State-owned* Publication Import Operating Entities, and thus to prevent other companies, *domestic and foreign*, from meddling in this business.⁷³

79. Article 2 of the Imported Publication Subscription Rule defines “imported publications” in relevant part as books, newspapers (including outdated newspapers), periodicals (including outdated periodicals), and electronic publications published abroad . . . ” that are imported into China by “publication importing business units”.⁷⁴

80. Article 3 of the Imported Publication Subscription Rule provides that the State manages the distribution of imported books, newspapers, periodicals, and electronic publications “by categories”. Article 3 further states that reading materials can be classified into one of two distribution categories – the “limited distribution category” or the “non-limited distribution category” – which dictate how the particular reading material will be distributed, who may subscribe to the particular reading material, and under what conditions that subscription may be obtained. Article 3 also authorizes GAPP to determine which imported newspapers, periodicals, books and electronic publications are in the limited distribution category, although Article 3 fails to provide any criteria to be used in making this determination.

81. Moreover, Article 3 provides that all *imported newspapers and periodicals* must be distributed “under subscription to subscribers,” regardless of whether the product in question has been determined by GAPP to be in the limited or non-limited distribution category. *Imported books and electronic publications in the limited distribution category* likewise are required to be

⁷¹ Catalogue, Catalogue of Prohibited Foreign Investment Industries, Article X.2 (Exhibit US-5). As discussed in section III.B.2 above, the Foreign Investment Regulation operate in conjunction with the Catalogue.

⁷² Imported Publication Subscription Rule, Article 1 (Exhibit US-30).

⁷³ See China Press and Publication Journal, “Answers to Media Inquiry by the Person in Charge of the General Administration of Press and Publication Over the Implementation of the Rules for the Management of Subscribers Placing Subscriptions for Imported Publications”, February 2, 2005 (emphasis added), *available at* <http://www.shdf.gov.cn/newshtml?id+10373&newsType=92> (Exhibit US-31).

⁷⁴ Imported Publication Subscription Rule, Article 2 (Exhibit US-30).

distributed “under subscription to subscribers”. Thus, all imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, can only be obtained by subscription in China.⁷⁵ However, Article 3 states that *imported books and electronic publications in the non-limited distribution category* will be distributed “by sales through the market” *i.e.*, they are allowed to enter the retail market and do not require a subscription to be purchased.⁷⁶

82. Article 4 states that imported newspapers and periodicals shall only be distributed by “publication import business units” designated by GAPP. In the same vein, only GAPP-designated “publication import business units” that have an “approved scope of business” for this purpose may distribute imported books and electronic publications in the limited distribution category.

83. As discussed in section III.B.2 above, only Chinese wholly state-owned enterprises are permitted to import books, newspapers, periodicals, and electronic publications into China.⁷⁷ Thus, under the provisions of Article 4, foreign-invested enterprises may not engage in the distribution of any imported newspapers or periodicals, or in the distribution of any imported books and electronic publications in the limited distribution category.⁷⁸

84. Regarding *books in the non-limited distribution category*, other Chinese measures demonstrate that foreign-invested enterprises likewise may not distribute these products. Article 39 of the Management Regulation states that GAPP is responsible for promulgating measures governing foreign-invested enterprises engaging in the sub-distribution of books, newspapers,

⁷⁵ See Imported Cultural Products Measure, Article 14 (providing “Distribution of outside newspapers and periodicals in China shall strictly follow management by category and the subscriber subscription system. No unit or individual may sell outside newspapers or periodicals on the market on their own.”) (Exhibit US-10). See also China Press and Publication Journal, “Answers to Media Inquiry by the Person in Charge of the General Administration of Press and Publication Over the Implementation of the Rules for the Management of Subscribers Placing Subscriptions for Imported Publications”, February 2, 2005 (emphasis added), *available at* <http://www.shdf.gov.cn/newshtml?id+10373&newsType=92> (explaining that imported newspapers and periodicals, and imported books and electronic publications in the limited distribution category, “are not allowed to enter the retail market , [and] instead can only by subscribed to be subscribers.”) (Exhibit US-31)

⁷⁶ See China Press and Publication Journal, “Answers to Media Inquiry by the Person in Charge of the General Administration of Press and Publication Over the Implementation of the Rules for the Management of Subscribers Placing Subscriptions for Imported Publications”, February 2, 2005 (emphasis added), *available at* <http://www.shdf.gov.cn/newshtml?id+10373&newsType=92> (providing that imported books and electronic publications in the non-limited distribution category “are allowed to enter the retail market”) (Exhibit US-31)

⁷⁷ Management Regulation, Article 42.2 (Exhibit US-7).

⁷⁸ One Chinese state-owned enterprise – CNPIEC – has been granted a limited exception to the subscription regime, having been granted a monopoly right to sell imported newspapers and periodicals in certain limited venues. See Imported Cultural Products Measure, Article 14 (providing, “the China [National] Books Import and Export Corporation has the exclusive right to engage in the sale of original editions of imported newspapers and periodicals at places involving foreigners, the categories of newspapers and periodicals to be sold must be checked and approved by the General Administration of Press and Publications.”) (Exhibit US-10).

and periodicals. Article 16 of the Publications Market Rule specifies that the Foreign-Invested Sub-Distribution Rule is the measure governing foreign-invested enterprises seeking to engage in the sub-distribution of these reading materials. No other Chinese measures authorize foreign-invested enterprises to engage in the distribution of books, newspapers, and periodicals.

85. Article 2 of the Foreign-Invested Sub-Distribution Rule provides that Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, and wholly foreign-owned enterprises are permitted to engage in the sub-distribution of books, newspapers and periodicals “published by a publishing unit approved by the publishing administration under the State Council.” The “publishing unit[s] approved by the publishing administration under the State Council” are, of course, all within China. Accordingly, this authorization to foreign-invested enterprises is limited to the sub-distribution of books, newspapers and periodicals published *in China*.⁷⁹

86. Given that the Management Regulation and Publications Market Regulation require GAPP to promulgate measures to specifically define and authorize the book distribution activities in which foreign-invested enterprises may engage, and GAPP has not promulgated any additional measures in this regard, China does not, therefore, permit foreign-invested enterprises to engage in the distribution of imported books in the non-limited distribution category.

87. In short, China’s regime for the distribution of books prohibits foreign-invested enterprises from engaging in the master distribution of any books, and in the distribution of any *imported* books, whether they fall into the *limited distribution category* or the *non-limited distribution category*. China’s measures only authorize foreign-invested enterprises to engage in the sub-distribution of books published *in China*.

88. *Third*, with respect to *electronic publications*, these products are regulated by the Electronic Publication Regulation.

89. The Electronic Publications Regulation prohibits foreign-invested enterprises from engaging in the master wholesale or wholesale of any electronic publications. Specifically, Article 62 of this measure provides that no wholly foreign-owned enterprise, Chinese-foreign equity joint venture or Chinese-foreign contractual joint venture shall engage in the master

⁷⁹ Only wholly Chinese-owned enterprises may engage in publishing, with book publishing limited to Chinese wholly state-owned enterprises. See China-Britain Business Council, “How to Read a Changing Market” *Sector Report* (2005), p.2, available at http://www.cbbc.org/the_review/review_archive/sectors/31.html (stating, “All [publishers] are owned by state authorities”) (Exhibit US-14). Moreover, Chinese measures prohibit foreign-invested enterprises from engaging in publishing in China. See Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Article X.2 (providing that foreign investment is prohibited in enterprises engaging in the “[p]ublication . . . of books, newspapers and periodicals”) (Exhibit US-5); and Several Opinions, Article 4 (stating, “Foreign investors are prohibited from engaging in the publication . . . of books, newspapers and periodicals.”) (Exhibit US-5).

wholesale and wholesale of electronic publications. This prohibition applies to all electronic publications, whether they are imported or published in China and whether they are in the limited or non-limited distribution category.

90. *In sum*, China's measures prohibit foreign-invested enterprises from engaging in: (1) the master distribution of all books, newspapers and periodicals, whether imported or published in China; (2) the distribution, including sub-distribution, of imported books, newspapers and periodicals; and (3) the master wholesale and wholesale of all electronic publications, whether imported or published in China.

b. Chinese Requirements Imposed on Foreign-Invested Distributors of Reading Materials Published in China

91. 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-owned 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.

i. Foreign-Invested Enterprises May Only Engage in the Sub-Distribution of Books, Newspapers and Periodicals Published in China

92. Several Chinese measures provide that foreign-invested enterprises may engage in the sub-distribution of books, newspapers and periodicals, and one measure makes clear that such enterprises may only engage in these sub-distribution activities for books, newspapers and periodicals that have been published in China. These measures include: the Management Regulation, the Several Opinions, the Publication Market Rule, and the Foreign-Invested Sub-Distribution Rule.

Management Regulation

93. Article 39 of the Management Regulation provides that:

The State permits the establishment of Chinese-foreign joint ventures, Chinese-foreign cooperatives, and wholly foreign-owned enterprises to engage in the business of the sub-distribution of books, newspapers, and periodicals. 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 trade and economic cooperation in compliance with relevant provisions.

Article 39 only identifies the sub-distribution of books, newspapers or periodicals as an authorized distribution activity for foreign-invested enterprises. Notably, this measure authorizes neither the master distribution of any reading materials nor any type of distribution for electronic publications.

Several Opinions

94. The Several Opinions likewise state that foreign-invested enterprises are permitted to engage in the sub-distribution of books, newspapers and periodicals, making it clear by implication that no other distribution activities are permitted. Article 1 of the Several Opinions states, in pertinent part:

Foreign investors are permitted to set up enterprises in . . . sub-distributing books, newspapers and periodicals . . . in the form of wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures.

Publication Market Rule

95. The Publication Market Rule, which was established pursuant to the Management Regulation⁸⁰ to provide rules regarding the distribution of reading materials in China, only provides rules governing the operation of wholly Chinese-owned distribution enterprises.⁸¹ Article 16 states specifically that the Foreign-Invested Sub-Distribution Rule, not the Publication Market Rule, regulates the distribution activities of foreign-invested enterprises:

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 Rules for the Management of Foreign-Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals jointly drawn up by the General Administration of Press and Publication and the Ministry of Foreign Trade and Economic Cooperation [now MOFCOM].

Foreign-Invested Sub-Distribution Rule

96. The Foreign-Invested Sub-Distribution Rule, which implements the provisions of Article 39 of the Management Regulation, further specifies the parameters of permissible distribution

⁸⁰ Publication Market Rule, Article 1 (Exhibit US-27).

⁸¹ Publication Market Rule, Article 2 (Exhibit US-27). Article 2 further provides that “distribution” is defined as including master distribution, wholesale, retail and leasing, and exhibition for sale, etc. The term “master distribution” is defined as the “unified exclusive sale of publications by a publications master distribution work unit”. “Wholesale, which defined as the sale of publications to other publication business operators, is distinguished from “retail”, which is defined as the sale of publications direct to consumers.

activities by foreign-invested enterprises.⁸² By its terms, this measure applies to sub-distribution by foreign-invested enterprises of “books, newspapers and periodicals”.⁸³ Article 2 provides that “sub-distribution” covers wholesale and retail, and defines the enterprises that are covered by this measure as follows:

FIE [foreign-invested enterprises] for the sub-distribution of books, newspapers and periodicals as mentioned in these Measures refer to foreign enterprises, other economic organizations, or individuals (hereinafter referred to as 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.

97. Article 2 also defines “books, newspapers and periodicals”. As discussed above, the definition it supplies, however, addresses *where* these products are published rather than the intrinsic features of these products. This definition states that “books, newspapers and periodicals” are those that have been “published by a publishing unit approved by the publishing administration under the State Council”. Since the approved publishing units are all wholly Chinese-owned enterprises in China,⁸⁴ only books, newspapers and periodicals published in China are eligible for sub-distribution by foreign-invested enterprises. Article 2 makes clear, therefore, that foreign-investment in the sub-distribution of imported books, newspapers and periodicals is not authorized.

98. The Imported Publication Subscription Rule explicitly reiterates some of these limitations. It reserves distribution of all imported newspapers and imported periodicals as well as imported books and imported electronic publications in the limited distribution category to enterprises designated by the Chinese Government to import reading materials. As discussed in Section III.B.2 above, those enterprises designated to import reading materials into China must be wholly Chinese state-owned.⁸⁵

⁸² Foreign-Invested Sub-Distribution Rule, Article 1 (Exhibit US-28).

⁸³ Foreign-Invested Sub-Distribution Rule, Articles 1 and 2 (Exhibit US-28).

⁸⁴ See Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Article X.2 (providing that foreign investment is prohibited in enterprises engaging in the “[p]ublication . . . of books, newspapers and periodicals”) (Exhibit US-5); and Several Opinions, Article 4 (stating, “Foreign investors are prohibited from engaging in the publication . . . of books, newspapers and periodicals.”) (Exhibit US-5). See also China-Britain Business Council, “How to Read a Changing Market” *Sector Report* (2005), p.2, available at http://www.cbbc.org/the_review/review_archive/sectors/31.html (stating, “All [publishers] are owned by state authorities . . .”) (Exhibit US-14).

⁸⁵ Management Regulation, Article 42.2 (Exhibit US-7).

99. While Chinese measures permit foreign-invested enterprises to engage in the sub-distribution, including wholesale distribution, of books, newspapers and periodicals published in China, that permission is conditioned on the fulfillment of the following numerous requirements that wholly Chinese-owned enterprises either do not face or for whom they are less stringent:

ii. Operating Term Limitation

100. Foreign-invested enterprises engaging in the wholesale distribution of books, newspapers, and periodicals published in China face limits on the term of their operations. Article 7.5 of the Foreign-Invested Sub-Distribution Rule states that the term of operation for these enterprises cannot exceed 30 years. The Sub-Distribution Procedure, which was issued pursuant to the Foreign-Invested Sub-Distribution Rule,⁸⁶ also contains this 30-year maximum operating term.⁸⁷ Wholly Chinese-owned enterprises engaging in the wholesale distribution of books, newspapers, and periodicals published in China, however, do not face any operating term limitations.

iii. Pre-Establishment Legal Compliance

101. Foreign-invested enterprises seeking to engage in the wholesale distribution of books, newspapers and periodicals published in China must meet a further requirement related to compliance with Chinese laws and regulations. Article 7.1 of the Foreign-Invested Sub-Distribution Rule provides that the individual parties involved in a foreign-invested enterprise must “have no record of laws or regulations violations in the past three years.” The Sub-Distribution Procedure and the Several Opinions contain the same requirement.⁸⁸ Unlike their foreign-invested counterparts, wholly Chinese-owned wholesale distributors of books, newspapers and periodicals are not subject to this requirement.

iv. Registered Capital Requirement

102. In order to establish a foreign-invested enterprise engaged in the wholesale distribution of books, newspapers and periodicals published in China, the enterprise must have no less than RMB 30 million (approximately USD \$4 million)⁸⁹ in registered capital. This requirement is established pursuant to Article 7.4 of the Foreign-Invested Sub-Distribution Rule and is reiterated

⁸⁶ Sub-Distribution Procedure, heading “Laws, regulations and standardized documents which serve as the legal basis for this administrative license” (Exhibit US-29).

⁸⁷ Sub-Distribution Procedure, heading “Licensing Requirements”, para. 5 (Exhibit US-29).

⁸⁸ Sub-Distribution Procedure, heading “Licensing Requirements”, para. 1 (Exhibit US-29); and Several Opinions, Article 6 (Exhibit US-6).

⁸⁹ U.S. Dollar currency conversions throughout the First Submission of the United States are based upon a Chinese Yuan (RMB) to U.S. Dollar rate of 0.14331 that was reported on May 12, 2008.

by the Sub-Distribution Procedure. The Procedure’s “Licensing Requirements” provide, in relevant part: “Registered capital (for wholesale, no less than RMB 30 million)”.⁹⁰

103. In contrast, wholly Chinese-owned enterprises seeking to engage in the wholesale distribution of books, newspapers and periodicals published in China face far lower registered capital requirements. According to Article 8.4 of the Publication Market Rule, wholly Chinese-owned enterprises need to provide only RMB 2 million (approximately USD \$286,000) in registered capital.

v. Approval Process

104. Finally, China maintains different approval processes, and applies different criteria in the examination and approval process, for foreign invested enterprises and wholly Chinese-owned enterprises to engage in the sub-distribution of books, newspapers and periodicals published in China.⁹¹ The examination and approval process applicable to wholly Chinese-owned enterprises is considerably less elaborate.

Examination and Approval Process

105. The examination and approval process applicable to foreign-invested enterprises involves successive rounds of applications to, and approvals from, GAPP, the Ministry of Commerce (“MOFCOM”), and the State Administration for Industry and Commerce (“SAIC”).

106. Foreign-invested applicants first must submit a set of documents enumerated in Article 10 to the regional-level Press and Publishing Administrative (“PPA”), which is the regional department of GAPP, with jurisdiction over the applicant’s location. Within 15 working days of receiving the application, the GAPP regional-level PPA must provide an examination and verification opinion, which it must then supply, along with other documents specified in Article 11, to the national-level GAPP for examination and approval. The national-level GAPP then has 30 working days from the receipt of these materials to decide whether to approve the application. The regional-level PPA notifies the applicant in writing of the national-level GAPP’s decision (the “PPA Approval Document”).

107. If the applicant is approved under the PPA process, the applicant must then submit another application, consisting of documents identified in Article 12, to the regional-level Foreign Trade and Economic Relations Administration (“FTERA”), which is the regional department of MOFCOM. The regional-level FTERA is required to provide an examination and verification opinion within 15 working days of the receipt of the application documents and to

⁹⁰ Sub-Distribution Procedure, heading “Licensing Requirements”, para. 5 (Exhibit US-29).

⁹¹ Foreign-Invested Sub-Distribution Rule, Articles 10-14 (Exhibit US-28); and Several Opinions, Article 6 (Exhibit US-6)

submit that opinion to the national-level MOFCOM for examination and approval. Article 13 indicates the documents that the regional-level FTERA must forward the national-level MOFCOM and provides that the national-level MOFCOM shall render a written decision on whether to grant its approval within 30 days of receipt. Where the application is approved, the national level MOFCOM shall issue a Foreign Invested Enterprise Approval Certificate.

108. Article 14 requires that, within 90 days after being approved by the national-level MOFCOM, the applicant shall obtain a Publication Business Permit from the regional-level PPA “on the strength of” the PPA Approval Document and the Foreign-Invested Enterprise Approval Certificate. The foreign-invested enterprise then must obtain a Business License from the local SAIC “on the strength of” the Publication Business Permit and the Foreign-Invested Enterprise Approval Certificate. The sub-distribution of books, newspapers and periodicals by a foreign-invested enterprise is only possible when the enterprise has the Business License, Publication Business Permit and the Foreign-Invested Enterprise Approval Certificate in hand.

109. The examination and approval process applicable to wholly Chinese-owned enterprises seeking to engage in the distribution of reading materials is set out in the Publication Market Rule. Article 9 of that measure provides that the applicant must submit the materials specified in this Article to the municipal-level PPA. The municipal-level PPA then has 20 working days from the date the application is accepted to issue a decision. The municipal-level PPA then submits its decision along with the application materials to the regional-level PPA.

110. This regional-level PPA has 20 working days from the date the application is accepted to decide whether or not to approve the application and is required to notify the applicant in writing of its decision. If the application is approved by the regional-level PPA, the regional-level PPA shall issue a Publications Business License and shall file it with GAPP. The applicant is then required to obtain a Business License from SAIC.

GAPP Decision Making Criteria

111. Finally, the Several Opinions provide additional direction to GAPP officials involved in the examination and approval of foreign-invested enterprises engaged in, *inter alia*, the sub-distribution of books, newspapers and periodicals published in China. Article 6 states, in relevant part, that those officials:

shall 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*.

While Article 1 of the Several Opinions, provides generally that wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures are permitted to engage in the sub-distribution of books, newspapers and journals, Article 6

directs GAPP officials to give priority to equity and contractual joint ventures with certain characteristics. Article 6, therefore, creates additional conditions affecting which foreign-invested enterprises can engage in the sub-distribution of books, newspapers and periodicals published in China.

c. Conclusion

112. As a result of these measures, the ability of foreign-invested enterprises to engage in the distribution of reading materials is severely restricted. Foreign-invested enterprises are entirely prohibited from engaging in the master distribution of books, newspapers and periodicals as well as in the master wholesale and wholesale of electronic publications. Chinese measures likewise do not permit foreign-invested enterprises to engage in the distribution of any imported newspapers or periodicals, or any imported books or electronic publications, in either the limited or non-limited distribution category.

113. China only permits foreign-invested enterprises to engage in a limited sub-set of reading materials distribution – *i.e.*, the sub-distribution of books, newspapers, and periodicals published in China. In addition, China imposes numerous requirements on foreign-invested enterprises engaging in the sub-distribution of books, newspapers and periodicals published in China that are more burdensome than those requirements applicable to wholly Chinese-owned enterprises engaging in such sub-distribution.

3. China’s Measures Addressing the Distribution of AVHE Products

114. China’s regulatory regime governing the distribution of AVHE products in China⁹² 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.

115. 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.⁹³

116. The following table summarizes the measures and restrictions addressed in this section.

⁹² Audiovisual Regulation, Articles 4, 32 and 35 (Exhibit US-16). *See* United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea”, June 2007, pages 6 and 11 (Exhibit US-12).

⁹³ In addition, Article 4 of the Several Provision bans foreign-investment enterprises from engaging in the *master distribution* of AVHE products and sound recordings (providing that “[f]oreign investors are prohibited from engaging in . . . master distribution. . . of audiovisual products) (Exhibit US-6).

Requirements Applicable to Chinese-Foreign Contractual Joint Ventures Engaging in the Sub-Distribution of AVHE Products in China		
Requirement	Chinese-Foreign Contractual Joint Ventures	Wholly Chinese-Owned Enterprises
Equity Participation Limits	Foreign Party: maximum of 49 % of equity Chinese Party: minimum of 51 % of equity [Audiovisual Sub-Distribution Rule] [Several Opinions] [Foreign Investment Regulation and Catalogue]	No Equivalent Requirement
Operating Term	Not to exceed 15 years [Audiovisual Sub-Distribution Rule]	No Equivalent Requirement
Pre-Establishment Legal Compliance	No record of violations of laws or regulations in the three years prior to establishment [Audiovisual Sub-Distribution Rule] [Several Opinions]	No Equivalent Requirement
Examination and Approval Process	A. <u>Obtain MOC Approval Document</u> 1. MOC (regional level) 2. MOC (national level) B. <u>Obtain Foreign Invested Enterprise Approval Certificate</u> 3. MOFCOM (regional level) 4. MOFCOM (national level) C. <u>Obtain License for Operating Audiovisual Products</u> 5. MOC D. <u>Obtain Business License</u> 6. SAIC [Audiovisual Sub-Distribution Rule]	A. <u>Obtain Permit to do Business in Audiovisual Products</u> 1. MOC (regional level) B. <u>Obtain Business License</u> 2. SAIC [Audiovisual Regulation]
MOC Decision-Making Criteria	1. Friendliness 2. Great Capability 3. Standardized Management 4. Advanced Technologies 5. Reliable Foreign Investment [Several Opinions]	No Equivalent Requirement

a. Foreign-Invested Enterprises May Engage in the Sub-Distribution of AVHE Products in China Only Through Minority Interests in Chinese-Foreign Contractual Joint Ventures

117. 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

Audiovisual Regulation; (2) the Audiovisual Sub-Distribution Rule; (3) the Catalogue; and (4) the Several Opinions.

118. The first relevant measure is Article 35 of the Audiovisual Regulation provides:

The state permits the setting up of Chinese-foreign contractual enterprises to sub-distribute audiovisual products. Specific measures and steps shall be drawn up by the cultural administration [MOC] under the State Council in conjunction with the State Council's foreign trade and economic cooperation administration.

119. This measure only authorizes the establishment of "Chinese-foreign contractual enterprises", not equity joint ventures or wholly foreign-owned enterprises. Furthermore, foreign investment is only permitted in enterprises engaged in the sub-distribution of AVHE products.

120. In addition, Article 35 makes clear that the specific rules governing the distribution of AVHE products by foreign-invested enterprises will be stipulated in additional measures, rather than in the Audiovisual Regulation itself. Accordingly, the other requirements related to audiovisual distribution outlined in Chapter V of the Audiovisual Regulation apply only to wholly-Chinese owned enterprises engaging in the distribution of AVHE products in China.

121. The limited scope of the authorizing language in Article 35, in the absence of any other Chinese measure permitting foreign-invested enterprises to engage in the distribution of AVHE products, also confirms that neither foreign-invested equity joint ventures nor wholly foreign-owned enterprises may distribute AVHE products in China.⁹⁴

122. The second relevant measure is the Audiovisual Sub-Distribution Rule, promulgated under the authority of the Audiovisual Regulation.⁹⁵ It is the principal measure governing foreign-invested enterprises engaged in the sub-distribution of AVHE products.⁹⁶ According to its terms, Chinese-foreign contractual joint ventures that engage in audiovisual sub-distribution are:

foreign enterprises and other economic organizations or individuals (hereinafter designated as foreign cooperators for short) which, under the principle of equality and mutual benefit, set up cooperatively with Chinese enterprises or other economic organizations (hereinafter designated as Chinese cooperators for short) enterprises in

⁹⁴ In this connection, the contrasting language in one of the key Chinese measures governing the distribution of books, newspapers and periodicals is notable. Article 39 of the Management Regulation provides that *Chinese-foreign equity joint ventures* and *contractual joint ventures*, as well as *wholly foreign-owned enterprises*, all may engage in the sub-distribution of books, newspapers and periodicals.

⁹⁵ Audiovisual Sub-Distribution Rule, Article 1 (Exhibit US-18).

⁹⁶ Audiovisual Sub-Distribution Rule, Article 2, first sentence (Exhibit US-18).

China for the wholesale, retail or rental of audiovisual products with the approval of relevant departments of the Chinese government.⁹⁷

123. In other words, this measure does not authorize either foreign-invested equity joint ventures or wholly foreign-owned enterprises to engage in the sub-distribution of AVHE products in China. Foreign enterprises may only participate in contractual joint ventures with Chinese partners.

124. The Audiovisual Sub-Distribution Rule also limits the equity participation permitted to foreign parties to contractual joint ventures. Article 8.4 requires that the Chinese party to a contractual joint venture engaging in audiovisual sub-distribution hold at least 51 percent of the equity.

125. The third and fourth relevant measure, the Catalogue and the Several Opinions, reiterate the Audiovisual Sub-Distribution Rule's limitations on corporate form and on foreign participation in audiovisual product sub-distribution enterprises. The Catalogue states that foreign investment in this activity is restricted in the following way:

Sub-distribution of audiovisual products (excluding motion pictures) (limited to contractual joint ventures where the Chinese partner holds majority share).⁹⁸

126. The Several Opinions likewise provide that foreign-invested enterprises can only hold minority shares in contractual joint ventures:

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 a dominant position.⁹⁹

⁹⁷ Audiovisual Sub-Distribution Rule, Article 2, second sentence (Exhibit US-18).

⁹⁸ Catalogue, "Catalogue of Industries with Restricted Foreign Investment", Article VI.3 (Exhibit US-5). Article 8 of the Foreign Investment Regulation states that phrase "the Chinese party holds the majority share" as used in the Catalogue means "the total proportion of investment of the Chinese investor in the foreign-invested project is 51% and above."

⁹⁹ Several Opinions, Article 1 (Exhibit US-6).

b. Chinese-Foreign Contractual Joint Ventures Seeking to Engage in the Sub-Distribution of AVHE Products in China Face Different Legal Requirements Than Their Domestic Counterparts

127. 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.

i. Operating Term Limitation

128. Chinese-foreign contractual joint ventures may only engage in the sub-distribution of AVHE products for a fixed period of time. Pursuant to Article 8.5 of the Audiovisual Sub-Distribution Rule, these joint ventures may operate for no longer than 15 years. Wholly Chinese-owned enterprises engaged in the sub-distribution of AVHE products are not, however, subject to this fixed operating term.

ii. Pre-Establishment Legal Compliance

129. The Chinese and foreign parties involved in a contractual joint venture that is applying to engage in audiovisual sub-distribution must also satisfy a special pre-requisite with respect to their compliance records. According to Article 7 of the Audiovisual Sub-Distribution Rule, the joint venture parties “shall have no record of law offences” in the three years prior to their application. This requirement is reiterated in Article 6 of the Several Opinions. Like the operating term requirement, this pre-requisite is not imposed on wholly Chinese-owned enterprises engaged in audiovisual sub-distribution.

iii. Approval Process

130. All distributors of AVHE products in China must successfully complete a Chinese government approval process in order to engage in their distribution activities. The process Chinese-foreign contractual joint ventures must use to obtain that approval, however, is different from the process applicable to their wholly Chinese-owned counterparts. These differences occur in two areas: examination and approval processes and decision-making criteria.

Examination and Approval Process

131. China applies two separate and distinct examination and approval processes to Chinese-foreign contractual joint ventures and wholly Chinese-owned enterprises seeking to engage in the sub-distribution of AVHE products. In order to establish a Chinese-foreign contractual joint

venture engaging in audiovisual sub-distribution, a large number of approvals and licenses are required.¹⁰⁰

132. Pursuant to Article 11 of the Audiovisual Sub-Distribution Rule, the process begins with the applicant's Chinese party submitting an application to the regional-level MOC in the location where the enterprise is to be established. This MOC body then must decide whether to approve that application.¹⁰¹ No time limit is provided for this decision. If the regional-level MOC approves the application, it forwards its decision to the national-level MOC, which is required to make its decision within 30 days.

133. If the national-level MOC approves the application, the applicant's Chinese party must submit another application to the regional-level MOFCOM in the location where the enterprise is to be established, within six months of having received the MOC approval. The regional-level MOFCOM will then make a decision (in an unspecified period of time) and forward approved applications to the national-level MOFCOM, which has 30 days to render a decision. If the national-level MOFCOM approves an application, it grants a Certificate of Approval of Foreign-Invested Enterprises to the applicant.

134. Within 30 days of receiving the Certificate of Approval of Foreign-Invested Enterprises, the applicant's Chinese party must apply to the MOC for a License to Operate Audiovisual Products. There is no set time limit for a decision on this application. If a License to Operate Audiovisual Products is granted, the applicant's Chinese party must, within 30 days of its receipt, register with SAIC and obtain a Business License of Legal Entity from that agency.

135. Chapter V (Articles 31-36) of the Audiovisual Regulation contains the examination and approval process applicable to wholly Chinese-owned enterprises seeking to engage in the sub-distribution of AVHE products. Article 32 outlines the application procedures for obtaining Chinese Government approval and the relevant license.

136. To engage in audiovisual wholesale distribution, a wholly Chinese applicant must submit its application to the regional-level MOC where the applicant is located. The regional-level MOC has 30 days, from the date it receives the application, to decide whether to approve that application. If the application is approved, the applicant will be issued a Permit to do Business in Audiovisual Products, which indicates the scope of the applicant's approved business activity

¹⁰⁰ The Audiovisual Sub-Distribution Rule provides that only the Chinese party of a joint venture that is applying to engage in the sub-distribution of AVHE products is permitted to interact with the relevant authorities of the Chinese Government in the examination and approval process (Exhibit US-18).

¹⁰¹ See also Audiovisual Sub-Distribution Rule, Article 12.5 and 13.9 (providing that applicants are required to provide unspecified other documentation and materials required by MOC, in addition to several categories of enumerated documentation that must be submitted with an application to engage in audiovisual sub-distribution.) (Exhibit US-18).

with respect to the distribution of audiovisual products. The applicant is also required to obtain a Business License from SAIC.

MOC Decision-Making Criteria

137. In conducting the examination and approval of Chinese-foreign contractual joint ventures, MOC officials are directed to give priority to those foreign enterprises meeting certain criteria. As explained in section III.C.2.b.v above, Article 6 of the Several Opinions provides that these criteria include “friendliness”, “great capability”, standardized management, advanced technology, and reliable investment. However, no measures direct MOC to apply these criteria to wholly Chinese-owned enterprises seeking to obtain Chinese government approval to engage in the sub-distribution of AVHE products.

c. Conclusion

138. Foreign-invested enterprises may not engage in the sub-distribution of AVHE products in China through: equity joint ventures (whether through majority or minority interests); majority interests in contractual joint ventures; or wholly foreign-owned enterprises. China only permits foreign-invested enterprises to engage in the sub-distribution of AVHE products in China through minority interests in Chinese-foreign contractual joint ventures.

139. In addition, China imposes several types of restrictions on Chinese-foreign contractual joint ventures engaged in the sub-distribution of AVHE products. These measures apply more complex application procedures to Chinese-foreign contractual joint ventures, and impose more rigorous substantive requirements on these enterprises than on wholly Chinese-owned enterprises regarding enterprise operating terms and pre-establishment legal compliance records.

4. China’s Measures Addressing the Electronic Distribution of Sound Recordings

140. China greatly limits the ability of foreign-invested enterprises to engage in the distribution of sound recordings by prohibiting these enterprises from engaging in the distribution of sound recordings by prohibiting these enterprises from engaging in their electronic distribution.¹⁰² China maintains these restriction through three measures: (1) the *Interim Rules on the Management of Internet Culture* (the “Internet Culture Rules”);¹⁰³ (2) the *Notice of the Ministry of Culture on Some Issues Relating to Implementation of the “Interim Rules on the*

¹⁰² For the purpose of this submission, the electronic distribution of sound recordings refers to 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.

¹⁰³ *Interim Rules on Internet Culture Administration* (the “Internet Culture Rule”), Promulgated in Order No. 27 of the Ministry of Culture, May 10, 2003, amended by Order No. 32 of the Ministry of Culture, July 1, 2004 (Exhibit US-32).

Management of Internet Culture” (the “Internet Culture Notice”);¹⁰⁴ (3) and the *Several Opinions on the Development and Management of Network Music* (the “Network Music Opinions”).¹⁰⁵

141. The table below provides an overview of the measures and prohibitions discussed in this section.

China Prohibits Foreign-Invested Enterprises from Engaging in the Following Form of Sound Recording Distribution	
Form of Distribution	Measures
Electronic Distribution	Internet Culture Rule Internet Culture Notice Network Music Opinions Several Opinions

a. Foreign-Invested Enterprises May Not Engage in the Electronic Distribution of Sound Recordings

142. This first restriction is a prohibition on foreign-invested enterprises engaging in the electronic distribution of sound recordings and is contained in several measures: the Internet Culture Rule, the Internet Culture Notice, the Network Music Opinions, and the Several Opinions.

Internet Culture Rule

143. The Internet Culture Rule sets forth rules governing “Internet cultural units” engaging in “Internet cultural activities” with respect to “Internet cultural products”. Each of these terms is defined in turn. According to Article 4, Internet culture units are “Internet information service providers” that have been approved by the MOC and the Ministry of Information Industries (“MII”) to engage in Internet culture activities. The term “Internet information service provider” is not defined in the Internet Culture Rule, but is addressed in the *Regulations for the Management of Internet Information Services* (the “Internet Information Services Regulation”),¹⁰⁶ upon which the Internet Culture Rule is based.¹⁰⁷

¹⁰⁴ Notice of the Ministry of Culture on Some Issues Relating to Implementation of the “Interim Rules on the Management of Internet Culture” (the “Internet Culture Notice”), Wen Shi Fa [2003] No. 27, issued by the Ministry of Culture, July 4, 2003 (Exhibit US-33).

¹⁰⁵ *Several Opinions on the Development and Management of Network Music* (the “Network Music Opinions”), Ministry of Culture, November 20, 2006 (Exhibit US-34).

¹⁰⁶ *Regulations on the Management of Internet Information Services* (the “Internet Information Services Regulation”), Promulgated by the State Council, effective on September 25, 2000 (Exhibit US-35).

¹⁰⁷ Internet Culture Rule, Article 1 (Exhibit US-32).

144. Article 2 of the Internet Information Services Regulation provides that the term “Internet information services” means “the service activities which provide information services to on-line users through the Internet.” Thus, an Internet cultural unit is a provider of information services, including Internet cultural activities, through the Internet to Internet users.

145. Internet cultural activities are defined in the Internet Culture Rule to include, *inter alia*, the wholesale and retail of “Internet cultural products”.¹⁰⁸

146. Finally, “Internet cultural products” are defined to include:

cultural products produced, disseminated and circulated through the Internet, primarily consisting of:

Audiovisual products, game products, performances (drama) works of art, animated cartoons, and other Internet cultural products produced or reproduced by use of certain technological means to disseminate over the Internet.¹⁰⁹

Thus, as Internet cultural products include audiovisual products, and audiovisual products include sound recordings, sound recordings are included within the definition of Internet cultural products.

147. The Internet Culture Rule, therefore, establishes the general requirements for certain entities approved by MOC and MII to engage in, *inter alia*, the digital wholesale distribution of sound recordings. As with other Chinese measures, the details of the application of the Internet Culture Rule are elaborated in subsequent legal instruments.

Internet Culture Notice

148. The Internet Culture Notice was promulgated by MOC to implement the Internet Culture Rule.¹¹⁰ It confirms the requirements and procedures set forth in the Internet Culture Rule and expands on various rules, including the rules governing the content review of imported Internet cultural products.¹¹¹

149. Of particular relevance to this dispute, the Internet Culture Notice dictates which enterprises can engage in Internet culture activities. Article II provides, in relevant part, “[p]resently, all areas shall not accept applications to engage in Internet cultural activities from

¹⁰⁸ Internet Culture Rule, Article 3 (Exhibit US-32). Internet cultural entities engaged in “commercial” Internet cultural activities are required to apply for and receive a “Network Cultural Business License” from the MOC and go through the relevant procedures with MII, Internet Culture Rule, Articles 7-9 and 11.

¹⁰⁹ Internet Culture Rule, Article 2 (emphasis added) (Exhibit US-32).

¹¹⁰ Internet Culture Notice, *chapeau* (Exhibit US-33).

¹¹¹ Internet Culture Notice, Article IV-VI (Exhibit US-33).

Internet information service providers with foreign investment.”¹¹² Thus, China prohibits foreign-invested enterprises from engaging in, among other things, electronic distribution of sound recordings.

Network Music Opinions

150. The Network Music Opinions were promulgated by MOC in 2006 and address, *inter alia*, sound recordings that are “transmitted through such wired or wireless media, the Internet and mobile communications.”¹¹³ Transmission, as the conveyance of sound recordings from one entity to another, is a means of distribution pertaining specifically to electronic distribution.

151. The Network Music Opinions’ stated objectives include “[e]stablishing strict market entry rules and strengthening regulation over content.”¹¹⁴ In that regard, two provisions of this measure are of particular relevance. First, Article 8 prohibits the establishment of foreign-funded “network cultural business units”. While this term is not defined, the Internet Culture Rule provides essential insight into its meaning.¹¹⁵ As noted above, the Internet Culture Rule provides that an “Internet cultural entity” is an enterprise approved by MOC and MII to engage in, *inter alia*, the wholesale electronic distribution of sound recordings.

152. In light of the fact that the Network Music Opinions are established pursuant to the Internet Culture Rule, this definition means that a network cultural business unit is an enterprise approved by MOC and MII to engage in, *inter alia*, the electronic distribution of sound recordings. Foreign investment in this form of distribution of sound recordings is, therefore, prohibited.

Several Opinions

153. Finally, the Several Opinions confirms the prohibition on foreign-invested enterprises that is contained in the Internet Culture Rule, the Internet Culture Notice, and the Network Music Opinions. The first sentence of Article 4 of the Several Opinions states, “Foreign investors are prohibited from setting up and operating . . . business dealing with internet culture.” As discussed above, businesses dealing with internet culture are enterprises approved by MOC and MII to engage in, *inter alia*, the electronic distribution of sound recordings. Thus, Article 4 reiterates that foreign-invested enterprises are prohibited from engaging in the electronic distribution of sound recordings in China.

¹¹² Emphasis added.

¹¹³ Network Music Opinions, Article 1 (Exhibit US-34).

¹¹⁴ Network Music Opinions, Article 8 (Exhibit US-34).

¹¹⁵ Network Music Opinions, *chapeau* (providing that the Network Music Opinions were enacted pursuant to the Internet Culture Rule) (Exhibit US-34).

b. Conclusion

154. China prohibits foreign-invested enterprises from engaging in any electronic distribution of sound recordings. This prohibition does not extend to wholly Chinese-owned enterprises.

5. Conclusion

155. China strictly limits the scope of permitted activities by foreign-invested enterprises seeking to engage in the distribution of reading materials, AVHE products, or sound recordings. Numerous measures prohibit foreign-invested enterprises from engaging in particular forms of distribution. Further, in the limited instances where foreign-invested enterprises are permitted to engage in distribution activities, Chinese measures impose more stringent requirements on those foreign-invested enterprises that their wholly Chinese-owned counterparts must face.

D. China’s Treatment of Imported Products Compared to Domestic Products

1. Introduction

156. 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.
- 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.

157. The following table provides a summary of the measures and restrictions addressed in the section below.

China Disadvantages Imported Reading Materials, Sound Recordings Intended for Electronic Distribution, and Films for Theatrical Release Relative to Their Domestic Counterparts		
Products	Restrictions on Imported Products not Imposed on Domestic Products	Measures
Reading Materials	Restrictive Subscription Distribution Channel and Restricted Distributors	Imported Publication Subscription Rule and Foreign-Invested Sub-Distribution Rule
Sound Recordings Intended for Electronic Distribution	MOC Content Review Process for Sound Recordings Intended for Electronic Distribution	Audiovisual Regulation, Audiovisual Import Rule, Internet Culture Rule, Network Music Opinions, and Several Opinions
Films for Theatrical Release	Limited to Two State-Controlled Distributors	Film Regulation, Provisional Film Rule, and Film Distribution and Projection Rule

2. Measures Addressing Imported Reading Materials

158. 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. The Imported Publication Subscription Rule is a key measure implementing this restricted distribution system.

Imported Publication Subscription Rule

159. The Imported Publication Subscription Rule, promulgated by GAPP, which entered into force in 2005, states that it was designed to meet the reading demand for imported reading materials and to enhance the administration of imported reading materials.¹¹⁶ Article 2 formally states that the Imported Publication Subscription Rule applies to “imported publications” and that a subscription mechanism will apply to the distribution of these “publications”.

160. Article 2 defines “imported publications” as books, newspapers (including outdated newspapers), periodicals (including outdated periodicals), and electronic publications published abroad or in China’s Hong Kong or Macao Special Administrative Regions and Taiwan and that have been imported into China by “publication importing business units”.¹¹⁷

¹¹⁶ Imported Publication Subscription Rule, Article 1 (Exhibit US-30).

¹¹⁷ Imported Publication Subscription Rule, Article 2 (Exhibit US-30).

161. Article 2 defines “publication importing business units” as the enterprises established under the Management Regulation to engage in the importation of reading materials. As previously discussed, Article 42.2 of the Management Regulation provides that only Chinese wholly state-owned enterprises may import reading materials into China.

162. According to Article 2, “subscribers” are:

domestic units and individuals, foreign organizations in China, enterprises with foreign-investment, as well as foreign nationals who have worked, studied or lived in China for a long time and Hong Kong, Macao or Taiwan personages who subscribe to imported publications through publication importing business units.

Finally, “subscription” means, “subscriptions placed by subscribers at publication importing business units for imported publications to satisfy the reading needs of their work unites and themselves as individuals.”¹¹⁸

163. Article 3 outlines the basic regulatory regime for the importation of reading materials. It first states that the State “manages” the distribution of imported reading materials in China. Then it defines how different types of imported reading materials are to be distributed. As a threshold matter, the government administers imported reading materials distribution on a “by categories” basis. Article 3 provides for two categories of distribution – the “limited distribution category” and the “non-limited distribution category”. Depending on the particular type of reading material being distributed, these categories determine how the reading material will be distributed, who may subscribe to it, and the process required to apply for a subscription. Article 3 also states that GAPP is responsible for determining which imported newspapers, periodicals, books and electronic publications will fall into the limited and non-limited distribution categories, although Article 3 articulates no standards for making this determination.

164. Article 3 then provides that the distribution of all imported newspapers and periodicals, must be done “under subscription to subscribers”, regardless of whether the products fall into the limited or non-limited distribution category.

165. Distribution of imported books and electronic publications falling into the limited distribution category also requires distribution “under subscription to subscribers”. However, in contrast to newspapers and periodicals, Article 3 provides that the distribution of imported books and electronic publications in the *non*-limited distribution category will be distributed “by sales through the market”, *i.e.*, distribution is not limited to subscription to subscribers.

166. Article 4 covers which enterprises may distribute the imported reading materials subject to the subscription requirement – *i.e.*, all imported newspapers and periodicals, and imported

¹¹⁸ Imported Publication Subscription Rule, Article 2 (Exhibit US-30).

books and electronic publications in the limited distribution category. Article 4 provides that only “publication import operation units” designated by GAPP may distribute these imported reading materials.

167. Article 4 then further limits which of these units have the right to distribute imported books and electronic publications in the limited distribution category. It provides that only GAPP-designated “publication importing business units” “in compliance with their approved business scope” are authorized to distribute these particular reading materials in this category.

168. Article 4 also underscores the strict controls on who can distribute imported reading materials by stating that no enterprise or individual shall engage in business concerning imported newspapers and periodicals or imported books and electronic publications in the limited distribution category without being approved by GAPP. Moreover, Article 4 provides that GAPP-designated “publication importing business units” must obtain prior consent from GAPP before authorizing any publication importing business units to solicit subscriptions or to deliver imported reading materials on its behalf.

169. Articles 5 through 9 address another element of the subscription regime: the rules governing subscribers. Article 5 outlines the subscription procedures applicable to *domestic* (i.e., Chinese) subscribers to *imported newspapers and periodicals in the non-limited distribution category*. If a Chinese *enterprise* seeks to obtain a subscription to these reading materials, it must file a subscription application with the relevant GAPP-designated “publication importing business units” to obtain the subscription. Article 5 further provides that Chinese *individuals* are required to subscribe to imported newspapers and periodicals in the non-limited distribution category through their employers.

170. Articles 6 and 7 cover the subscription procedures for *domestic* (i.e., Chinese) enterprises seeking to subscribe to *imported newspapers, periodicals, books and electronic publications in the limited distribution category*. Article 6 establishes that GAPP is responsible for determining which Chinese enterprises may subscribe to imported publications in the limited distribution category, but provides no standards for this determination.

171. Article 7 sets forth the procedures governing applications by *domestic enterprises* for subscriptions to reading materials in the limited distribution category. Under this provision, the subscribers “belonging to the central-level” first must obtain approval by the “central ministry or commission to which they belong”, and then, if approved, the subscriber must submit the enterprises subscription application, together with approval documents, to the GAPP-designated “publication importing business unit” to obtain the subscription.

172. A subscriber “belonging to the local-level” must submit its subscription application to regional-level PPA of GAPP for examination and approval and then to the publicity department of the Communist Party “at the same level of the examination and approval” for its examination and approval. If and when an applicant enterprise has successfully completed this process and

has been approved, it must present its subscription application and approval documents to the GAPP-designated “publication importing business unit” to obtain a subscription.

173. Unlike the provisions in Article 5 that allow Chinese individuals to subscribe to reading materials in the non-limited distribution category through their workplace, Articles 6 and 7 do not authorize *Chinese individuals* to subscribe to imported newspapers, periodicals, books and electronic publications in the limited distribution category, either independently or through their employers.

174. Article 8 establishes a separate set of subscription procedures allowing certain *foreign* entities and individuals to subscribe to *all imported newspapers and periodicals*, whether in the limited or non-limited distribution categories. Specifically, Article 8 authorizes the following foreigners to subscribe to imported newspapers or periodicals:

a foreign organization in China, an enterprise with foreign investment, foreign nationals who have worked, studied or lived in China for a *long time*, or Hong Kong, Macao or Taiwan personages. (emphasis added)

The Imported Subscription Publication Rule provides no definition of the term “long-term basis”.

175. Article 8 then provides a brief outline of the rules these foreigners must follow to obtain a subscription to imported newspapers and periodicals: they must present a unit’s subscription application or an individual ID to the newspaper or periodical “publication importing business unit” designated by GAPP.

176. Note that no provisions in this Measure authorize *foreign* entities or individuals to subscribe to *imported books or electronic publications in the limited distribution category*.

177. Article 9 imposes certain examination and reporting requirements on “publication importing business units”. These units must review and verify the subscribers of imported newspapers, periodicals, books and electronic publications in the limited distribution category. In addition, these units must submit a list of subscribers who have passed their examination to GAPP for its approval. Likewise, the units must submit the categories and numbers of imported newspapers, periodicals, books and electronic publications that have been applied for by subscribers to GAPP for approval. Article 9 also provides that “publication importing business units” can only distribute imported publications to subscribers based on the GAPP-approved subscriber list and the names and volumes approved by GAPP.

178. In short, the Imported Publication Subscription Rule sets up comprehensive controls on the distribution of all imported newspapers and periodicals, and sets up similarly comprehensive controls on the distribution of imported books and electronic publications that GAPP decides fall into the limited distribution category. These controls include permitting only GAPP-designated Chinese state-owned enterprises to engage in distribution; requiring distribution to take place

solely via a subscription regime; restricting subscribers to those approved by or registered with GAPP; and sometimes requiring approvals from other government and Communist Party organizations as well. Imported books and electronic publications in the non-limited distribution category appear to be carved out of the state-run subscription regime, since they are permitted to be distributed “by sales through the market”.

179. Domestic reading materials, however, benefit from more advantageous distribution opportunities in China. The Management Regulation provides for application and approval procedures for Chinese-owned distributors of books, newspapers and periodicals that are not limited to wholly state-owned enterprises¹¹⁹ and permits these products to be distributed by their publishers.¹²⁰ The Publication Market Rule confirms and elaborates on these procedures for Chinese-owned distributors seeking to distribute reading materials.¹²¹ Absent in either of these two measures are any of the restrictions imposed on imported reading materials.

180. In further contrast to the distribution opportunities available to imported reading materials, the Foreign-Invested Sub-Distribution Rule authorizes foreign-invested enterprises to engage in the sub-distribution of books, newspapers and periodicals published *in China*.¹²² As explained above, 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. 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.

3. Measures Addressing Sound Recordings Intended for Electronic Distribution

181. 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.

182. 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,

¹¹⁹ Management Regulation, Articles 36-40 (Exhibit US-7).

¹²⁰ Management Regulation, Article 38 (Exhibit US-7).

¹²¹ Publication Market Rule, Articles 6-23 (Exhibit US-27).

¹²² Foreign-Invested Sub-Distribution Measure, Article 2 (Exhibit US-28).

they undergo internal company content review, and they simply are registered with the Ministry of Culture.¹²³ 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.

Audiovisual Regulation and Audiovisual Import Rule

183. Two Chinese measures regulating audiovisual products, the Audiovisual Regulation and the Audiovisual Import Rule, make clear that imported and domestic sound recordings are subject to different content review regimes. Article 16 of the Audiovisual Regulation, which regulates the full range of audiovisual products, including sound recordings,¹²⁴ provides that for domestic audiovisual products, the publisher itself conducts content review: an enterprise publishing domestic audiovisual products need only exercise an “editorial responsibility system” so that the contents conform with the Audiovisual Regulation. In contrast, Article 28 of the Audiovisual Regulation requires imported audiovisual products to be submitted to MOC for formal content review and approval.

184. The Audiovisual Import Rule, which was issued under the authority of the Audiovisual Regulation, provides more details concerning content review requirements that apply only to imported audiovisual products. Article 16 of the Audiovisual Import Rules also makes clear that these content review requirements governing how imported physical audiovisual products are to be distributed apply equally to imported audiovisual products to be distributed over information networks after importation.

Internet Culture Rule and Network Music Opinions

185. The Internet Culture Rule and the Network Music Opinions, which post-date the Audiovisual Import Rules, apply their differential content review rules for imported and domestic products specifically to sound recordings intended for electronic distribution.

186. The Internet Culture Rule governs all Internet cultural products. Article 2 of the Regulation defines the term “internet cultural products” to include, *inter alia*, “audiovisual products . . . produced or reproduced by the use of certain technological means to disseminate over the Internet.” Articles 16-21 outline the content review regime applicable to these products. Article 16 requires all imports to be subjected to content review and approval by MOC, while only requiring domestic products to be filed with MOC to the extent required by law.¹²⁵ The only

¹²³ Network Music Opinions, Article IX (Exhibit US-34).

¹²⁴ Audiovisual Regulation, Article 2 (providing that “audiovisual products” including audio tapes, records, and audio CDs) (Exhibit US-16).

¹²⁵ Internet Culture Rule, Article 16 (Exhibit US-32).

other requirement applicable to domestic Internet cultural products is the need to satisfy the internal “examination system” for the Internet cultural entity distributing that product.¹²⁶

187. The Network Music Opinions, promulgated on the authority of the Internet Culture Rule, provide more details on the specific content review regime for sound recordings intended for electronic distribution, which are labeled “network music products”.

188. The Network Music Opinions do not define the term “network music product”, but the Internet Culture Rule, which provides the legal authority for the Network Music Opinions,¹²⁷ clarifies the meaning of this term. As noted above, the Internet Culture Rule covers, *inter alia*, all audiovisual products in hard copy intended for electronic distribution. Since sound recordings are a form of audiovisual product, a “network music product” therefore includes 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.¹²⁸

189. Article 9 of the Network Music Opinions establishes the content review regime covering both imported and domestic “network music products”, stating the broad requirements that network music products must either be approved by MOC or filed with MOC. Article 9 then clarifies that MOC must review and approve the content of imported network music products before the imported music can be “used”, while domestic network music products simply must be filed with MOC.

190. Appendix 2 of the Network Music Opinions provides concrete details on the content review requirement imposed on imported network music products. For an imported sound recording already reviewed and approved by MOC and distributed, Paragraph I of Appendix 2 mandates a second MOC review and a second MOC approval before the sound recording can be distributed over a network. Paragraph I outlines the approval process as well as the documents that must accompany a content review application for these sound recordings. MOC has 20 business days, from its receipt of a content review application, to decide whether to approve the sound recordings. If MOC approves the application, it issues approval documents to the applicant. The applicant cannot engage in the electronic distribution of network music products until it has received the approval documents from MOC.

191. Paragraph II outlines the MOC content review rules applicable to the other category of imported sound recordings intended for electronic distribution – *i.e.*, those products that have not previously obtained MOC approval. Like Paragraph I procedures, Paragraph II sets out the

¹²⁶ Internet Culture Rule, Article 19 (Exhibit US-32).

¹²⁷ Network Musci Opinions, *chapeau* (Exhibit US-34).

¹²⁸ The scope of Paragraph 1 of Appendix 2 of the Network Music Opinions confirms that the term “network music product” covers sound recordings in physical form that will later be distributed digitally. Specifically, Paragraph 1 requires sound recordings already approved and distributed in China to be re-submitted to MOC for content approval if they are intended to be distributed over a network in non-physical form.

elements of the review and approval process, including the supply of specified documents, as well as “other documents as needed” should MOC so request.¹²⁹ Once an application is received, MOC’s Examination Committee undertakes the content review. While MOC has 20 days from the receipt of the application to make its approval decisions, this time frame excludes any time required for “special evaluations”, a process not subject to time limits. Where an application is approved, MOC must issue approval documents before the sound recordings can be digitally distributed.

192. Paragraph III covers product revisions. If the content of an imported network music product needs to be revised, the revision must occur in a “timely manner”. Failure to revise a sound recording in a timely manner will result in denial of the application.

193. Paragraph IV provides that the approved imported products must be labeled prominently with the approval number provided by MOC. In addition, once the approval is in place, neither the title nor the content of the imported sound recording can be changed without permission.

194. Paragraph V states that the content review regime for imported network music products is to be followed with respect to products from Hong Kong, Macau and Taiwan. It then provides that a range of other network music products – *i.e.*, those in which certain rights¹³⁰ are owned by wholly foreign-owned enterprises or joint ventures with foreign investment – also must follow the content review regime for imported products.

195. In short, Article 9 and Appendix 2 of the Network Music Opinions collectively mandate that all network music products, except domestic Chinese products whose copyrights are held by wholly Chinese-owned enterprises, must undergo the MOC multi-step content review and approval process. Domestic Chinese products with wholly Chinese-owned copyrights need only be filed with MOC.

196. Paragraphs VI and VII of Appendix 2 provide transitional measures for network music products already on the market at the time the Network Music Opinions became effective. These Paragraphs also create asymmetrical content review requirements for imported network music products as compared to those applied to eligible domestic network music products.

197. Where an enterprise still seeks to digitally distribute imported sound recordings that had been on a network at the time the Network Music Opinions were issued in November 2006, Paragraph VI subjects these products to the “make up” content review and approval procedures

¹²⁹ Network Music Opinions, Appendix 2, para. II.6 (Exhibit US-34).

¹³⁰ See Copyright Law of the People’s Republic of China, Adopted at the 15th Session of the Standing Committee of the Seventh National People’s Congress on September 7, 1990, and Amended according to the Decision on the Revision of the Copyright Law of the People’s Republic of China, Adopted at the 24th Session of the Standing Committee of the Ninth National People’s Congress on October 27, 2001; Article 41, first sentence. The Copyright Law is contained in WTO document IP/N/1/CHN/C/1 (Exhibit US-36).

set out in the measure. The deadline for submitting an application for these imported sound recordings was March 1, 2007. Paragraph VI provides that a failure to meet this deadline will result in penalties.

198. In contrast, Paragraph VII requires a much less demanding process for domestic products in a similar situation: these domestic products simply must be filed with MOC by March 1, 2007, in order to receive their registration numbers.

199. Thus, the Internet Culture Rule and the Network Music Opinions establish two separate and distinct content review regimes for sound recordings intended for electronic distribution. On the one hand, imported sound recordings are subject to a more onerous regime, requiring all such sound recordings – including those already approved by MOC for physical distribution, as well as those digitally distributed prior to the entry into force of this measure, to be submitted to MOC for content review, possible revision, and approval, before they can be digitally distributed.¹³¹ A domestic sound recording, however, is subject to far less burdensome requirements, as it may be reviewed “in-house” by its publisher and only needs to be recorded with MOC prior to its electronic distribution.

200. The more onerous burdens imposed by MOC content review on imported sound recordings have an acute commercial impact. In a hit-driven industry, where speed to the market is vitally important for revenues and copyright protection, delay can be extremely damaging, if not devastating, commercially. While legitimate imported sound recordings are waiting for MOC approval, pirated sound recordings capture potential customers. Moreover, imported sound recordings become frozen when and if MOC approval is granted; *i.e.*, once approved, the content of an imported sound recording must remain unchanged from the version MOC approved or must undergo MOC content review again. Domestic sound recordings, however, can easily be altered to adjust to demand.

4. Measures Addressing Films for Theatrical Release

201. 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 enterprises¹³² – China Film Distribution Company, a subsidiary of China Film Group, and Huaxia Film

¹³¹ Moreover, even if an imported sound recording is approved by MOC, that approval applies only with respect to the particular application. Thus, if an identical sound recording is imported for distribution over a network by 10 different enterprises, that sound recording will require 10 different approvals from MOC. This requirement does not apply to domestic sound recordings. Domestic sound recordings, including domestic ringtones, can be sold as many times as the publisher wants, with no prior external screening whatsoever.

¹³² See China eCapital Corporation “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, page 40 (providing, “With their guaranteed mandates, these state-owned companies have little incentive to offer any value-added services such as marketing support and promotional assistance.”) (Exhibit US-26).

Distribution Company (“Huaxia”).¹³³ 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.¹³⁴

202. 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.¹³⁵

203. The distribution regime governing imported films for theatrical release entails a number of adverse consequences for imported films. Foremost, among these is the very inability to select from a full range of distributors, and thus the inability to make a commercial decision of which distributor is best suited to marketing a particular film at a particular time and in a particular place. Moreover, among other problems, China’s distribution restriction curtail the opportunities available to imported films relative to domestic films by controlling several key elements of the distribution process. China Film Distribution Company and Huaxia, for example, dictate the date of release and duration of the screening of imported films and, as explained below, are required to give priority to domestic films.¹³⁶ These dates can create major differences in sales, which is why film producers work hard to be in a position to decide both of these issues.¹³⁷

¹³³ See Film Distribution and Projection Rule, Article III, discussed below (providing that “State capital from the domestic film industry shall have controlling share of the new imported film distribution company.”) (Exhibit US-21). See also Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, (January 2007), page 41 (Exhibit US-24). Huaxia Film Distribution, which was established on August 8, 2003, is state-controlled. Of its 19 investors, 52 percent of Huaxia’s shares are held by Chinese state-owned enterprises, including China Film Group, which holds 11 percent of the total shares. XX See also China eCapital Corporation “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, page 99 (Exhibit US-26). As a part owner, China Film Group is involved in Huaxia’s decision-making process.

¹³⁴ See China eCapital Corporation “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, page 79 (providing “[w]hile the idea was to promote competition through introduction of Huaxia, so far most foreign film companies have not experienced substantial improvement in the services they received from their Chinese distributor.”) (Exhibit US-26).

¹³⁵ As of December 2004, approximately 50 distributors were actively distributing domestic films for theatrical release on a significant scale. See Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, January 2007, page 42-43 (Exhibit US-24); and China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, page 76 (Exhibit US-26).

¹³⁶ Film Distribution and Projection Rule, Article III (Exhibit US-21); and *Measures on Further Improving the Evaluation and Rewarding of Distribution and Exhibition of Domestic Films (Revision)* (the “Distribution and Exhibition of Domestic Films Measure”), Issued by the Film Bureau of SARFT on June 21, 2006, File No. 284 (2006), Articles III.1, IV.II.1, and V.1 (Exhibit US-40).

¹³⁷ It is a common industry practice in nearly every major film market for foreign producers (or sales agents) and local distributors to work together to determine the marketing and the placement of a film. For example, Section I.C.2 of the IFTA® Multiple Rights Distribution Agreement, which is the model for international distribution

(continued...)

204. In China, the two state-controlled distributors also control the marketing and promotion of imported films, with marketing budgets that are generally too small to be effective, and no opportunity to negotiate these budgets.¹³⁸ This is a significant obstacle facing imported films in China, as marketing is a critical component to box office success not only in the Chinese market, but in surrounding markets with subsequent release dates. Films that are under-promoted risk reduced competitiveness and, ultimately, diminished box office revenues. Low box office revenues, particularly in the early part of a film’s release, can negatively impact viewer confidence in the film, in both the national market and in the market of neighboring countries.

205. In China, the two distributors likewise completely control the dubbing and subtitling of imported films. This contrasts sharply with the treatment of domestic films, where film producers maintain control over these critical processes.¹³⁹ The voices used in dubbing and language translation for both dubbing and subtitles can create major differences in how the film comes across and thus how well the film will sell.

206. The lack of competition in the distribution channels for imported films also result in one of two types of problematic financial arrangements being imposed for the imported film’s distribution – either revenue-sharing by fiat in unbalanced shares among the state-controlled distributor, the film producer and the exhibitor for at least 20 films per year,¹⁴⁰ or payment of a very low flat-fee to distribute any other films that may be imported.¹⁴¹ Both of these arrangements derive directly from the highly constrained distribution channels available for

¹³⁷(...continued)

agreements for independent films throughout the world, covers “First Release” in connection with theatrical rights in a film. *See* Section 6.3, IFTA® Multiple Rights Distribution Agreement: International Standard Terms (Exhibit US-39). Producers (or sales agents) and local distributors customarily negotiate the key matters involved with the first release of a film, as well as the date at which the film is first made available to the paying public via theatrical distribution. Section 12.2 on “Cinematic Exploitation Obligations” in the IFTA® Multiple Rights Distribution Agreement: International Standard Terms, provides for prior reasonable approval by the licensor on an on-going basis of all significant aspects of first run theatrical release throughout the Territory, including the initial release campaign and the marketing campaign. The collaboration between these parties as to release dates and other matters involved in theatrical exploitation, which are all open to commercial negotiations, helps to ensure the films generate maximum revenues.

¹³⁸ *See* Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, January 2007, page 43 (Exhibit US-24).

¹³⁹ While many dialects are spoken in China, the primary dialect is Mandarin. Frequently, Chinese films will be made in one of China’s many dialects and will need to be dubbed and/or subtitled into Mandarin.

¹⁴⁰ World Trade Organization, Report of the Working Party on the Accession of China, Addendum: Schedule CLII – The People’s Republic of China (“China’s Services Schedule”), Part II: Specific Commitments, Sector 2D, Additional Commitments, WT/MIN(01)/3/Add.2, circulated 10 November 2001, page. 21 (Exhibit US-2).

¹⁴¹ *See* Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, January 2007, page 41 (Exhibit US-24); China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, pages 98 and 107 (Exhibit US-26); and United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea” (June 2007), page 23 (Exhibit US-12).

imported films; domestic films do not face the same conditions. The uncompetitive financial terms for imported films also can constrain the opportunities for effective distribution of imported films through the below market levels of compensation allowed to the film producers.

207. Films that do not fall within the small annual number chosen by China for revenue sharing treatment can face significant financial discouragement to distribution in China. They can only be distributed pursuant to a non-negotiable flat-fee arrangement, in which either China Film Distribution Company or Huaxia provides the foreign producer with a single payment for the right to distribute that film in China. The amount paid is far below commercial terms, and it ends up eliminating major films from distribution in China.¹⁴² The flat fee barely covers the cost of trying to get an imported film to China in secure fashion to be vetted under the approval system set up by the Chinese authorities.¹⁴³

208. Even the revenue-sharing model, which is currently available for approximately 20 imported films per year, demonstrates the adverse consequences of the distribution limitation on imported films.¹⁴⁴ Unlike the unfavorable terms contained in the Master Contract, the terms for domestic films are set through commercial negotiation.¹⁴⁵ The adverse terms for imported films also give the imported film producers fewer resources to try, where they can, to enhance their film's prospects in China.

209. In contrast to the restrictive conditions imposed on imported films, at least 50 different distributors can distribute domestic films for theatrical release in China, including not only the two state-controlled distributors China Film Distribution Company and Huaxia, but also the

¹⁴² See Hy Hollinger, "The Going Rate: Estimated Prices for all rights to theatrical films in Overseas Markets," *The Hollywood Reporter*, November 2007 (Exhibit US-38).

¹⁴³ For example, in 2007, the average flat fee offered in China, for films budgeted between \$6 million and \$12 million ranged from \$15,000 to \$30,000. The cost to bring a film to China, however, can average \$250,000. See Hy Hollinger, "The Going Rate: Estimated Prices for all rights to theatrical films in Overseas Markets," *The Hollywood Reporter*, November 2007 (Exhibit US-38); and China eCapital Corporation, "Chinese Media & Entertainment Research: The Chinese Film Market", March 18, 2005, pages 98-99 (Exhibit US-26). See also Screen Digest and Nielsen NRG, "Cinema and Home Entertainment in China", January 2007, page 41 (Exhibit US-24).

¹⁴⁴ Foreign producers receive between only 13-15 percent of the total box office for imported films, while either China Film Distribution Company or Huaxia receives between 30 percent, and the exhibitor receives between 55-62 percent. These terms are far below the normal commercial revenue shares for domestic film producers and are not negotiable. Domestic producers typically receive between 30-40 percent of the total box office. See The Center for American Economic Studies, Chinese Academy of Social Sciences, "A Study of the Potential of the Chinese Film Industry" (July 2005), page 6 (Exhibit US-25); China eCapital Corporation, "Chinese Media & Entertainment Research: The Chinese Film Market", March 18, 2005, pages 83 and 98 (Exhibit US-26); and United Nations Educational, Scientific and Cultural Organization, "Trends in Audiovisual Markets: China, Mongolia & South Korea" (June 2007), pages 22 and 24 (Exhibit US-12); and Screen Digest and Nielsen NRG, "Cinema and Home Entertainment in China", (January 2007), page 41 (Exhibit US-24).

¹⁴⁵ See China Film Group, Agreement Regarding Theatrical Distribution ("Master Contract") (Exhibit US-37); and China eCapital Corporation, "Chinese Media & Entertainment Research: The Chinese Film Market", March 18, 2005, page 83 (Exhibit US-26);

film's producer and a variety of other national and sub-national distributors. Thus, unlike the situation for imported films, domestic film producers negotiate marketing and distribution conditions to maximize the film's opportunity for a successful run.¹⁴⁶ They can also choose film distributors with particular regional or local knowledge or other specialized expertise tailored to the nature of the film in question to ensure optimal distribution. As noted, domestic films can also be distributed by their producer,¹⁴⁷ and can make use of any dubbing and subtitling expertise that will best enhance their distribution prospects.

210. Moreover, given the normal commercial competition in the market for the distribution of domestic films, domestic film distributors have an incentive to specialize and to develop attractive and innovative distribution techniques in order to generate business and stay ahead of their competitors. One distributor, Huayi Brothers, for example, developed from an advertising company and stands out *vis-a-vis* other distributors in its use of particularly effective marketing and promotion methods for the films it distributes.¹⁴⁸

211. In sum, China maintains two very different distribution regimes for imported and domestic films for theatrical release. These different regimes in turn limit the distribution opportunities for imported films for theatrical release compared to their domestic Chinese counterparts. Several measures implement this dual distribution regime, including: the Film Regulation, the Provisional Film Rule, and the Film Distribution and Projection Rule.

Film Regulation

212. The Film Regulation applies to, *inter alia*, the distribution of “feature films, documentary films, science and educational films, animation films and special topic films”,¹⁴⁹ *i.e.*, a full range of films. To engage in the distribution of films, an enterprise must obtain a permit from SARFT.¹⁵⁰ The Film Regulation expressly forbids engaging in the distribution of films without permission, and likewise prohibits the leasing, lending, selling or assigning of any distribution permit or approval document.¹⁵¹

¹⁴⁶ See United Nations Educational, Scientific and Cultural Organization, “Trends in Audiovisual Markets: China, Mongolia & South Korea” (June 2007), page 22 (Exhibit US-12). China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, pages 56-62 and 81-83 (Exhibit US-26).

¹⁴⁷ See The Center for American Economic Studies, Chinese Academy of Social Sciences, “A Study of the Potential of the Chinese Film Industry” (July 2005), page 28 (Exhibit US-25).

¹⁴⁸ See Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, (January 2007), page 44 (Exhibit US-24); and China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, page 45 (Exhibit US-26).

¹⁴⁹ Film Regulation, Article 2 (Exhibit US-20).

¹⁵⁰ Film Regulation, Article 5 (Exhibit US-20).

¹⁵¹ Film Regulation, Article 5 (Exhibit US-20).

213. Article 13 contains a provision related specifically to domestic film distribution: it states that each film producer established in China has the right to engage in the distribution of the films it produces. The Film Regulation does not extend this right to producers of imported films.

214. Chapter V (Articles 36-45) of the Film Regulation further addresses the distribution and screening of films and sets forth general rules governing the establishment and operation of film distribution enterprises. Article 44, for example, limits the total showing time of imported films per year to no more than one-third of the total screening time of all films in China during that year.¹⁵²

Provisional Film Rule

215. The Provisional Film Rule, which implements the Film Regulation,¹⁵³ outlines more detailed rules on, *inter alia*, the distribution of films.¹⁵⁴ As with the Film Regulation, Article 3 of the Provisional Film Rule provides that film distributors are subject to a state-maintained licensing system.

216. Chapter III (Articles 10-15) establishes detailed rules, including with respect to application procedures and approval processes, for the establishment of enterprises engaging in, *inter alia*, the distribution of *domestic* films.¹⁵⁵ Chapter III does not address the distribution of *imported* films, however.

217. Instead, the Provisional Film Rule addresses the distribution of imported films with one brief reference in Chapter IV (Articles 16-17), which otherwise covers the import and export of films. Article 16 states, in relevant part, that the “[d]istribution of imported films nationwide shall be carried out by distribution companies that are approved by the SARFT and have the right to distribute imported films nationwide.” Unlike the Provisional Film Rule provisions governing the establishment of distributors of domestic films, Article 16 simply authorizes SARFT to approve the enterprises that can engage in the national distribution of imported films, without establishing any application procedures or criteria or offering any further details.

¹⁵² Article 44 of the Film Regulation states as follows:

Those engaging in film screening shall comply with the State-stipulated screening time ratio for domestically produced films to that of imported films. The amount of time that a screening entity shows domestically produced films during a year shall be no less than two thirds of the total amount of screening time for that year.

¹⁵³ Provisional Film Rule, Article 1 (Exhibit US-21).

¹⁵⁴ Provisional Film Rule, Article 2 (Exhibit US-21).

¹⁵⁵ Provisional Film Rule, Articles 10-11 (Exhibit US-21).

Film Distribution and Projection Rule

218. The Film Distribution and Projection Rule clarifies China’s basic goal for film distribution and provides more details on the arrangements for the distribution of imported films referred to in the Provisional Film Rule. Article III provides, in relevant part:

Open 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. State capital from the domestic film industry shall have controlling share of the new imported film distribution company, and non-State capital may through investment to gain shares in the company 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. (emphasis added)

219. These provisions clearly outline the legal foundation for China’s current imported film distribution duopoly. China Film Group and Huaxia are the exclusive distributors of imported films.

220. However, their mandate is not to undertake the distribution of imported films on commercial terms. Rather, the Film Distribution and Projection Rule specifically requires them to actively support the distribution of *domestic* films. The *Measures on Further Improving the Evaluation and Rewarding of Distribution and Exhibition of Domestic Films (Revision)* elaborates on Article III of the Film Distribution and Projection Rule, providing numerical requirements, incentives and penalties – *i.e.*, the deduction of imported revenue-sharing films from the two distributor’s quotas for such films – for China Film Group and Huaxia if they fail to meet standards in their distribution of domestic films.¹⁵⁶

221. Under both instruments, the number of domestic films – including those recommended by the Chinese government – distributed by these two enterprises will determine how many imported films can be distributed. A government-imposed screening ratio allowing imported films to account for no more than one-third of the total screening time of all films, places further

¹⁵⁶ Distribution and Exhibition of Domestic Films Measure, Article III.1 (providing evaluation criteria for China Film Group and Huaxia based on a minimum number of domestic films to be distributed annually and minimum box office revenues for such films), Article IV.II.1 (providing financial incentives for the distribution of SAFRT recommended domestic films), and Article V.1 (providing penalties for the failure of China Film Group or Huaxia to satisfy the criteria – *i.e.*, “one import revenue-sharing film if to be deducted from their quota.”) (Exhibit US-40).

constraints on imported film distribution.¹⁵⁷ Article III concludes with a general expression of industrial policy – *i.e.*, the requirement that China’s only two distributors of *imported* films shall actively support *domestic* film production, distribution and projection.

222. China’s measures render the distribution of imported films for theatrical release a fundamentally different business than not only the distribution of domestic films in China, but the distribution of films around the world. In fact, China’s measures treat domestic films in much the same way as imported films are treated in most other film markets – *e.g.*, films can be distributed by a wide range of distributors including their own producers; distribution terms are the subject of meaningful negotiation; and film owners have control over marketing, promotion, release dates, distribution, dubbing, subtitling, and exhibition. Imported films in China, however, face the prospect of only two distributors that offer neither meaningful price negotiation, nor control over the fundamental elements of distribution.

5. Conclusion

223. The measures at issue establish distinct distribution regimes with respect to imported and domestic publications, sound recordings, and films for theatrical release. In each instance, the imported product faces fewer distribution opportunities and greater regulatory burdens than its domestically-produced competitor. The specifics vary – China imposes a rigid subscription system and other restrictions on imported publications, an onerous content review system on imported sound recordings intended for electronic distribution, and China restricts the number of distributors and distribution terms for imported films for theatrical release – but in each case, the comparable domestic product enjoys significantly more advantageous distribution opportunities than the imported product can obtain.

IV. CHINA’S MEASURES REGARDING TRADING RIGHTS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER THE ACCESSION PROTOCOL AND THE WORKING PARTY REPORT

A. Introduction

224. 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, *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.

225. China’s trading partners pressed for these market opening commitments, because prior to its WTO accession, China had strictly limited the right to import and export goods. Allowing

¹⁵⁷ Film Regulation, Article 44 (Exhibit US-20).

private enterprises to freely import and export promised to increase market efficiencies in important respects, by reducing costs, delays and other bureaucratic barriers to the flow of commerce. A company's ability to maintain close control over every step in its supply chain, including the import of goods into China, also would help reduce the risk of intellectual property theft.

226. 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.

227. 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.

228. The Accession Protocol and the commitments by China referred to in paragraph 342 of the Working Party Report are integral parts of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") and are, therefore, enforceable in WTO dispute settlement pursuant to Article 1.1 of the DSU.¹⁵⁸ The second sentence of Article 1.2 of the Accession Protocol states, "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." Paragraph 342 of the Working Party Report provides, in pertinent part:

The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs . . . 83-84 . . . of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

Thus, paragraphs 83 and 84 of the Working Party Report are also integral parts of the WTO Agreement and enforceable in WTO dispute settlement, as they are listed in paragraph 342 of the Working Party Report as a commitment "given by China", which – pursuant to paragraph 1.2 of the Accession Protocol – shall be an integral part of the WTO Agreement.

¹⁵⁸ Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to "the consultations and the settlement of disputes between Members concerning their rights and obligations" under the provisions of the WTO Agreement and of the DSU "taken in isolation or in combination with any other covered agreement." And the WTO Agreement is a covered agreement as specified in Appendix 1 of the DSU.

B. China's Trading Rights Commitments

1. Paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report

229. Part I, Section 5 of the Accession Protocol contains binding commitments on China with respect to the right to trade. Part I, paragraph 5.1 of the Accession Protocol provides:

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 to 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.

230. Paragraph 5.2 of Part I of the Accession Protocol further states:

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.

231. Paragraph 1.2 of Part I of the Accession Protocol also states in pertinent part:

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.

232. Paragraph 83 of the Working Party Report, which is referred to in paragraph 342, explains, in relevant part:

(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.

233. Finally, paragraph 84, which likewise is referred to in paragraph 342 of the Working Party Report, states:

(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.

234. 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.

2. The Right to Trade for Foreign and Domestic Enterprises in China

235. 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. Paragraph 5.1 states three relevant elements to this obligation. China shall: (1) grant the "right to trade" to "all enterprises in China"; (2) grant the right to trade with respect to "all goods" except for those listed in Annexes 2A and 2B; and (3) "complete all necessary legislative procedures to implement" its trading rights commitments "within three years after accession". Each element is addressed in turn below.

236. With respect to the first element, the "right to trade" is defined in the second sentence of paragraph 5.1 as the "right to import and export goods". Paragraph 5.1 further specifies that the right to trade applies throughout the customs territory of China. Thus, the right to trade includes the right to bring goods from any country or customs territory into the entire customs territory of China.

237. The first element of paragraph 5.1 also identifies the entities to which China has committed to grant the right to trade, *i.e.*, “all enterprises in China”. Every enterprise throughout the entire customs territory of China, without exception, shall have the right to trade. 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.

238. Therefore, China may not reserve the right to trade to a sub-set of enterprises in China that are wholly state owned or wholly Chinese owned. Likewise, any limitations on who may exercise the right to trade, based on criteria such as sources of investment, would be inconsistent with China’s trading rights commitments.

239. The second element of the obligation contained in paragraph 5.1 provides that the right to trade applies to “all goods” except those listed in Annexes 2A and 2B. Annex 2A consists of two parts – Annex 2A1 entitled “Products Subject to State Trading (Import)” and Annex 2A2 entitled “Products Subject to State Trading (Export)”. As the U.S. claim of inconsistency regarding China’s obligations contained in paragraph 5.1 concerns the right to import, only Annex 2A1 is relevant here. 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.¹⁵⁹ None of the Products is covered by Annex 2A.

240. Annex 2B identifies a list of six product headings – natural rubber, timber, plywood, wool, acrylic, and steel – that are divided into 245 products according to their eight-digit HS number. Trading rights for all of these products were to be “liberalized within three years” following China’s accession to the WTO, *i.e.*, by December 11, 2004.¹⁶⁰ Annex 2B is not relevant to these proceedings for two reasons. First, none of the Products is covered by Annex 2B; second, this limitation is no longer applicable to China’s trading rights commitments, since it expired in 2004.

241. Moreover, China listed no additional products in the Accession Protocol that were to be excluded from its obligation regarding the right to import. Thus, all enterprises in China now should have the right to import into China *all* goods, except those falling under the eight product headings and 84 products contained in Annex 2A1 of the Accession Protocol, none of which includes any of the Products. To limit the right to import any goods not listed in that Annex, including the Products, would be inconsistent with China’s trading rights commitments.

242. The third element of paragraph 5.1 established that within three years after accession China was required to complete all necessary legislative procedures to implement its obligations

¹⁵⁹ Accession Protocol, WT/L/432, Annex 2A1, p. 20 (Exhibit US-1).

¹⁶⁰ Accession Protocol, WT/L/432, Annex 2B, p. 30 (Exhibit US-1).

with respect to the right to trade. This three-year period referred to in the first sentence of paragraph 5.1 expired on December 11, 2004, the third year anniversary of China's accession to the WTO.¹⁶¹

243. As of December 11, 2004, China was required not only to ensure the consistency of its existing measures with the WTO Agreement, but also to ensure going forward that any new measures adopted after December 11, 2004 are WTO-consistent. This obligation is re-affirmed in the first sentence of paragraph 5.1, which provides that while China has the "right to regulate trade", that right must be exercised in a manner "consistent with the WTO Agreement". Whether a WTO-inconsistent measure was left in place after the transition period expired, or such a measure was adopted subsequent to that expiry, a violation of China's commitment under paragraph 5.1 would result in either case.

244. 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. 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.

245. Paragraph 84(a) likewise confirms China's obligations with respect to trading rights, as set forth in paragraph 5.1 of the Accession Protocol. Paragraph 84(a) provides that China's trading rights obligations apply to all enterprises in China, as of December 11, 2004, with regard to all products outside Annex 2A. As noted above, reading materials, AVHE products, sound recordings, and films for theatrical release are not listed in Annex 2A and are, therefore, covered by the right to import.

3. The Right to Trade for All Foreign Enterprises and All Foreign Individuals

246. 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.

247. Thus, any measure that disadvantages foreign enterprises and foreign individuals relative to enterprises in China with respect to the right to import the Products is inconsistent with paragraph 5.2.

¹⁶¹ Membership of the World Trade Organization, WT/INF/43/Rev.8, circulated 18 July 2007 (Exhibit US-41).

248. 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. Thus, measures that only permit selected Chinese entities to engage in the importation of the Products, thereby depriving foreign enterprises and individuals of the right to import the Products, are inconsistent with paragraph 84(a). This inconsistency arises whether or not the foreign enterprises or foreign individuals are inside or outside of China.

249. 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. Accordingly, measures that make the right to import the Products available only to selected Chinese enterprises or that subject the availability of the right to import the Products to the Chinese government’s discretion, are inconsistent with paragraph 84(b).

C. Contrary to China’s Trading Rights Commitments, China Does Not Grant the Right to Trade to All Enterprises in China, All Foreign Enterprises and All Foreign Individuals

250. 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 into.

251. 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.

1. China’s General Measures Addressing the Importation of the Products are Inconsistent with China’s Trading Rights Commitments

252. As discussed above, there are four measures broadly applicable to the importation of the Products: (1) the Catalogue; (2) the Several Opinions; (3) the Management Regulation; and (4) the Importation Procedure.¹⁶² Each of these is inconsistent with China’s trading rights commitments.

¹⁶² As indicated above, the Management Regulation and the Importation Procedure do not apply to films for theatrical release.

253. 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.¹⁶³ Likewise, the Several Opinions definitively forbid foreign-invested enterprises, whether or not they are in China, from engaging in the importation of the Products.¹⁶⁴

254. 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. This discriminatory treatment is likewise inconsistent with China’s trading rights commitments.

255. The Management Regulation is similarly inconsistent with China’s trading rights commitments. First, Article 42 of the Management 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, giving rise to the same two inconsistencies with China’s trading rights commitments discussed above with regard to the Several Opinions and the Catalogue. This Article 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”.

256. 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 Management Regulation. 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.

257. Finally, 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 Management Regulation.¹⁶⁵ These restrictions on trading rights, like the same restrictions discussed above, are inconsistent with China’s WTO obligations.

¹⁶³ Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Articles X.2 and X.3 (Exhibit US-5).

¹⁶⁴ Several Opinions, Article 4, second sentence (Exhibit US-6).

¹⁶⁵ Importation Procedure, “Licensing Requirements”, paragraphs 2 and 8 (Exhibit US-8).

258. In addition to these Chinese measures that broadly restrict trading rights for the Products, a number of more targeted measures restrict trading rights for particular Product subsets.

2. China’s Specific Measures Addressing the Importation of Reading Materials are Inconsistent with China’s Trading Rights Commitments

259. The 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 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”.

3. China’s Specific Measures Addressing the Importation of AVHE Products are Inconsistent with China’s Trading Rights Commitments

260. 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. These additional restrictions are contained in the following measures: the Audiovisual Regulation, the Audiovisual Import Rules, and the Audiovisual Sub-Distribution Rule.

261. The Audiovisual Regulation provides 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.¹⁶⁶ These designation and approval requirements are more than mere administrative formalities. They serve a gate-keeping function to limit the number of enterprises selected by the Chinese Government to import audiovisual products into China. 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.

262. Because the designation requirements for finished audiovisual products and the approval requirements for unfinished audiovisual products under the Audiovisual Regulation inject qualifying criteria and government discretion into a process that China committed to be “non-discretionary,” they are inconsistent with China’s trading rights commitments.

¹⁶⁶ Audiovisual Regulation, Articles 8-9 and 27 (Exhibit US-16).

263. The Audiovisual Import Rules replicates the designation and approval requirements found in the Audiovisual Regulation for importers of finished audiovisual products.¹⁶⁷ As a result, this element of the Audiovisual Import Rules is inconsistent with China’s trading rights commitments in the same way as the Audiovisual Regulation.

264. Finally, 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.¹⁶⁸ Article 21 is therefore inconsistent with China’s trading rights commitments, because it denies these enterprises the right to import AVHE products.

4. China’s Specific Measures Addressing the Importation of Sound Recordings are Inconsistent with China’s Trading Rights Commitments

265. China’s trading rights regime with respect to sound recordings is also heavily restricted and is also inconsistent with China’s trading rights commitments. As discussed in section III.B.5 above, 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.

266. Accordingly, only Chinese state-owned enterprises are permitted to import sound recordings into China,¹⁶⁹ with foreign-invested enterprises and individuals explicitly banned from these activities.¹⁷⁰

267. Furthermore, only the state-owned enterprises specifically “designated” by the Chinese Government are allowed to import finished sound recordings.¹⁷¹ As for unfinished sound recordings, only enterprises that have been approved by the Chinese Government are permitted to import such products.¹⁷² In practice, as is the case with AVHE products, China reserves the exclusive right to import finished sound recordings to CNPIEC, while permitting only MOC-approved Chinese state-owned enterprises to import unfinished sound recordings into China.

¹⁶⁷ Audiovisual Import Rule, Articles 8 and 10 (Exhibit US-17).

¹⁶⁸ Audiovisual Sub-Distribution Rule, Article 21 (Exhibit US-18).

¹⁶⁹ Management Regulation, Article 42 (Exhibit US-7).

¹⁷⁰ Several Opinions, Article 4 (Exhibit US-6); and Catalogue, Catalogue of Prohibited Foreign Invested Industries, Article X.3 (Exhibit US-5).

¹⁷¹ Audiovisual Regulation, Article 27 (Exhibit US-16); and Audiovisual Import Rule, Article 8 (Exhibit US-17).

¹⁷² Audiovisual Regulation, Articles 8-9 (Exhibit US-16).

5. China’s Specific Measures Addressing the Importation of Films for Theatrical Release are Inconsistent with China’s Trading Rights Commitments

268. 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 Films Regulation, the Provisional Film Rule, the Film Distribution and Projection Rule.

269. The Film Distribution and Projection 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 Films 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 Provisional Film 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.

D. Conclusion

270. The 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 and 5.2 of the Accession Protocol as well as Part I, paragraph 1.2 of the Accession Protocol to the extent that it incorporates paragraphs 83 and 84 of the Working Party Report. The United States, therefore, respectfully 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.

V. CHINA’S MEASURES REGARDING DISTRIBUTION SERVICES ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER THE GATS

A. Introduction

271. 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, as outlined below, 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.

272. China’s Services Schedule is the result of negotiations between China and WTO Members¹⁷³ and is an integral part of the WTO Agreement.¹⁷⁴ Paragraph 1 of Part II of the Accession Protocol provides that “[t]he Schedules annexed to this Protocol shall become . . . the Schedule of Specific Commitments annexed to the GATS relating to China.”¹⁷⁵ China’s market access and national treatment obligations under the GATS, in turn, apply to those service sectors in which China has made commitments, which – as will be demonstrated below – include market access and national treatment commitments with respect to distribution services and audiovisual services performed by service suppliers distributing reading materials, AVHE products, and sound recordings.

B. China’s Measures Regulating Distribution Services with Respect to Reading Materials are Inconsistent with China’s Obligations Under Article XVII of the GATS

1. China’s Distribution Services Commitments with Respect to Reading Materials

273. 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)¹⁷⁶ of, *inter alia*, reading materials (including books, newspapers, periodicals and electronic publications).¹⁷⁷ Sector 4B of China’s Services Schedule provides, in relevant part:

¹⁷³ See China’s Services Schedule, WT/MIN(01)/3/Add.2, page 1 (Exhibit US-2).

¹⁷⁴ Paragraph 1.2 of the Accession Protocol provides, “This Protocol . . . shall be an integral part of the WTO Agreement.” (Exhibit US-1) Article XX:3 of the GATS states, “Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

¹⁷⁵ Accession Protocol, WT/L/432, circulated on 23 November 2001 (Exhibit US-1).

¹⁷⁶ The GATS divides the supply of services into four modes. As relevant here, mode 3 is defined as “the supply of services . . . by a service supplier of one Member, through commercial presence in the territory of another Member” (often referred to as the “commercial presence” mode). See Article I:2(a) and (c) of the GATS.

¹⁷⁷ China’s Services Schedule, Part II: Specific Commitments, WT/MIN(01)/3/Add.2, p. 24 (Exhibit US-2).

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
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) Within one year after China’s accession to the WTO, foreign services suppliers may establish joint ventures to engage in the . . . wholesale business of all imported and domestically produced products, except those products that immediately follow. For these products, foreign service suppliers will be permitted to engage in the distribution of books, newspapers, magazines, pharmaceutical products, pesticides and mulching films within three years after China’s accession, and to engage in the distribution of chemical fertilizers, precessed oil and crude oil within five years after China’s accession. Within two years after China’s accession to the WTO, foreign majority ownership will be permitted and no geographic or quantitative restrictions will apply. 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.

274. The first (*i.e.*, furthest-left) column of China’s Services Schedule sets out the sub-sectors in which China has made particular commitments. As indicated in Sector 4, the distribution services listed in this column are defined in Annex 2 of China’s Services Schedule. That Annex provides that “wholesaling”, which is one of the four main sub-sectors that make up distribution services, 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”.¹⁷⁸ Annex 2 also provides an illustrative list of related subordinate services, including:

inventory management; assembly, sorting and grading of bulk lots; breaking bulk lots and redistributing into small 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

¹⁷⁸ China’s Services Schedule, Annex 2, WT/MIN(01)/3/Add.2, p. 54 (Exhibit US-2).

275. The first column of Sector 4B also contains two general qualifications. First, China excluded salt and tobacco from the products within its wholesale trade services commitments under this sub-sector. Second, footnote 7 explains, “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.” Neither of these qualifications is relevant to the U.S. claims with respect to the GATS.

276. In the second column of Sector 4B, under the market access commitments for mode 3, China scheduled certain limitations that applied during the first three years after its accession, including with respect to the wholesaling of books, newspapers and magazines. However, China committed to permit foreign service suppliers to engage in wholesale trade services via mode 3 with respect to books, newspapers and magazines within three year after China’s accession. The third anniversary of China’s accession was December 11, 2004. 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.

277. The third column of China’s Services Schedule applies to China’s national treatment commitments. 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.

278. Certain horizontal commitments of China are also relevant. “Horizontal” commitments apply to all sectors included in a Member’s Services Schedule. China’s horizontal commitments with respect to market access and national treatment under mode 3 state, in pertinent part:¹⁷⁹

¹⁷⁹ China’s Services Schedule, Part I:Horizontal Commitments, WT/MIN(01)/3/Add.2, p. 2 (Exhibit US-2).

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
All Sectors Included in this Schedule	<p>(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. fn.2</p> <p>The proportion of foreign investment in the equity joint venture shall be no less than 25 percent of the registered capital of the joint venture.</p> <p>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.</p> <p>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 [legal services], 862 [accounting, auditing and book-keeping services], 863 [taxation services], 865 [management consulting services] in the sectoral specific commitments.</p>	(3) Unbound for all the existing subsidies to domestic services suppliers in the sectors of audiovisual, aviation and medical services.	

fn.2: 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.

279. 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. The terms, limitations, conditions, and qualifications scheduled in China’s horizontal commitments do not cover Chinese measures that prohibit foreign-invested enterprises from engaging in wholesaling of reading materials.

280. China’s inscriptions under mode 3 of its horizontal commitments likewise do not extend to, and thus cannot justify, the discriminatory restrictions imposed by the measures at issue on

the foreign-invested enterprises permitted to engage in one form of reading materials wholesale distribution in China.

2. Article XVII of the GATS

281. The discriminatory limitations imposed on foreign-invested reading materials wholesalers imposed by China's measures are inconsistent with Article XVII of the GATS. Article XVII provides as follows:

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. fn.10

2. A Member may meet the requirement of paragraph 1 by according to services and services 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 favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Fn.10: Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantage which result from the foreign character of the relevant services or service suppliers.

282. 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 favorable than that accorded to its own like service suppliers.¹⁸⁰ The United States demonstrates all of these elements below. 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 favorably than their domestic counterparts.

¹⁸⁰ See, e.g., *EC – Bananas III (Panel)*, para. 7.314.

a. China Made Extensive Market Access and National Treatment Commitments Regarding Mode 3 Wholesaling of Reading Materials

283. As discussed above, China made both market access and national treatment commitments under mode 3 of Sector 4B of its Services Schedule with respect to the wholesale distribution of reading materials. These commitments are no longer subject to any terms, limitations, conditions or qualifications in China’s Services Schedule. Thus, China committed to provide national treatment within the meaning of Article XVII to foreign-invested enterprises engaged in wholesaling reading materials through commercial presence. However, as discussed below, China’s measures are inconsistent with this commitment.

b. China’s Measures Affect the Supply of Reading Material Wholesaling under Mode 3

284. China maintains numerous measures affecting the supply of reading material wholesaling services under mode 3.¹⁸¹ These measures include the Management Regulation, the Publication Market Rule, the Foreign-Invested Sub-Distribution Rule, the Sub-Distribution Procedure, the Imported Publication Subscription Rule, the Electronic Publications Regulation, the Catalogue, the Foreign Investment Regulation and the Several Opinions.

285. As a threshold matter, the terms “affecting” and “supply of services” have been construed broadly. The Appellate Body in *EC – Bananas III* explained that:

[i]n our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to 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”. We also note that Article I:3(b) of the GATS provides that “‘services’ includes *any service in any sector* except services supplied in the exercise of governmental authority” (emphasis added), and that Article XXVIII(b) of the GATS provides that the “‘supply of a service’ includes the production, distribution, marketing, sale and delivery of a service”. There is nothing at all in these provisions to suggest a limited scope of application for the GATS.¹⁸²

286. As described above, the Management Regulation, the Publication Market Rule, the Foreign-Invested Sub-Distribution Rule, the Sub-Distribution Procedure, the Imported Publications Subscription Measure, the Electronic Publications Regulation, the Catalogue, the

¹⁸¹ See section III.D.2 above.

¹⁸² *EC – Bananas III (AB)*, para. 220 (footnote omitted).

Foreign Investment Regulation, and the Several Opinions 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.

c. China’s Measures Treat Reading Material Wholesalers of Other Members Less Favorably than China’s Like Wholesalers

287. On their face, the measures at issue treat foreign-invested wholesalers of reading materials operating under mode 3 less favorably 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, magazines and newspapers published in China, foreign service suppliers are subjected to requirements more onerous than those applicable to their wholly Chinese-owned competitors. This treatment is less favorable because it modifies the conditions of competition in favor of wholly Chinese-owned reading material wholesalers compared to like foreign-invested reading material wholesalers.

i. Discriminatory Prohibitions

288. 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.¹⁸³ Article 4 of the Several Opinions expressly prohibits foreign-invested enterprises from engaging in the master distribution of books, newspapers, journals and electronic publications. This measure, promulgated jointly by five separate government agencies – MOC, SARFT, GAPP, MOFCOM and the National Development and Reform Commission (NDRC) – states that it was approved by the State Council and that it was “given” in order to, *inter alia*, “further standardize the work of bringing foreign capital into the cultural sector.”¹⁸⁴

289. The Imported Publication Subscription Rule and the Foreign-Invested Sub-Distribution Measure effectuate China’s prohibition on foreign invested suppliers engaging in the distribution of imported books, newspapers and periodicals, while the Imported Publication Subscription Rule also provides that no foreign-invested enterprises may distribute imported electronic publications in the limited distribution category. Pursuant to the Imported Publication Subscription Rule, only publications importers – which Article 42 of the Management Regulation makes clear can only be wholly state-owned enterprises – are permitted to distribute

¹⁸³ Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Articles X.2.

¹⁸⁴ Several Opinions, *chapeau* (Exhibit US-6).

imported reading materials, other than imported books and electronic publications in the non-limited distribution category.¹⁸⁵

290. The Foreign-Invested Sub-Distribution Rule confirms and expands on the prohibitions affecting foreign distributors of books, newspapers and periodicals by limiting the distribution activities of foreign-invested enterprises exclusively to the sub-distribution of books, newspapers and periodicals that are *published in China*.¹⁸⁶ Accordingly, foreign-invested enterprises both have no right to engage in any other form of reading material distribution beyond sub-distribution, and have no right to distribute any *imported* books, newspapers or periodicals.

291. Moreover, Article 62 of the Electronic Publications Regulation expands on the prohibitions on electronic publication distribution contained in the Imported Publication Subscription Rule. Article 62 states plainly that foreign-invested enterprises may not engage in the master wholesale or wholesale of *any* electronic publications.

292. In short, when a foreign-invested enterprise seeks to engage in reading material distribution at the wholesale level in China, it finds at least three areas entirely closed to it: (1) the master distribution of all reading materials; (2) the distribution of all imported books, newspapers and periodicals; and (3) the master wholesale and wholesale of all electronic publications. However, these three areas are open to like wholly Chinese-owned competitors.

293. Moreover, because foreign-invested enterprises are prohibited from offering a complete range of reading material wholesale distribution services, the services provided by a foreign-invested enterprise are inherently less attractive than the broader range of services offered by their wholly Chinese-owned counterparts.

294. Indeed, wholly Chinese-owned suppliers engaging in the master distribution of reading materials; the distribution of imported books, newspapers, and periodicals, as well as imported electronic publications in the limited distribution category; and the master wholesale and wholesale of all electronic publications, operate in an environment entirely devoid of foreign competition.

295. By prohibiting foreign-invested reading material wholesale distributors from engaging in these services under mode 3, China has radically modified the conditions of competition in favor of wholly Chinese-owned reading material wholesalers. Foreign-invested reading material wholesalers are prohibited from competing when it comes to most forms of distribution, and they are less attractive than their Chinese counterparts to purchasers when it comes to the few forms of distribution where they are permitted to compete. Consequently, the measures maintaining these discriminatory prohibitions are inconsistent with GATS Article XVII; they deprive foreign-

¹⁸⁵ Imported Publication Subscription Rule, Article 4 (Exhibit US-29).

¹⁸⁶ Foreign-Invested Sub-Distribution Rule, Article 2 (Exhibit US-28).

invested reading material wholesalers of the benefit of the national treatment commitment China made under mode 3 in Sector 4B of its Services Schedule.

ii. Discriminatory Requirements

296. Furthermore, foreign-invested reading materials wholesalers do not enjoy national treatment even when they are allowed access to some portions of China’s services market, as they are with regard to the sub-distribution of books, newspapers and periodicals published in China. China has modified the conditions of competition in favor of wholly Chinese-owned reading materials wholesalers by way of several measures that impose numerous and more onerous restrictions on their foreign competitors. These measures discriminate against foreign-invested reading material wholesalers with respect to requirements governing registered capital, operating terms, pre-establishment violations, and examination and approval procedures.

297. The Publications Market Regulation requires wholly Chinese-owned reading material wholesalers to have a minimum of only RMB 2 million (approximately USD \$286,000) in registered capital,¹⁸⁷ while the Foreign-Invested Sub-Distribution Rule and the Foreign-Invested Sub-Distribution Procedure require foreign-invested wholesale distributors of books, newspapers and periodicals published in China to have no less than RMB 30 million (approximately USD \$4 million) in registered capital.¹⁸⁸ Thus, under China’s measures, 15 wholly Chinese-owned reading materials wholesalers could establish their businesses using the amount of capital required to establish a single foreign-invested wholesale distributor of books, newspapers and periodicals published in China.

298. China’s operating term requirements similarly prevent foreign-invested enterprises from engaging in the wholesale distribution of books, newspapers and periodicals published in China on an equal footing with their domestic counterparts. The Foreign-Invested Sub-Distribution Rule and the Publication Sub-Distribution Procedure mandate that the operating term for foreign-invested wholesale distributors of books, newspapers and periodicals shall not exceed 30 years.¹⁸⁹ The Publications Market Regulation, however, imposes no limitation on the operating term of wholly Chinese-owned reading materials wholesalers in China.

299. Furthermore, foreign-invested wholesale distributors of books, newspapers and periodicals published in China may not have any record of violating Chinese laws or regulations

¹⁸⁷ Publications Market Regulation, Article 8 (Exhibit US-27).

¹⁸⁸ Foreign-Invested Sub-Distribution Rule, Article 7.4 (Exhibit US-28); Publication Sub-Distribution Procedure, “Licensing Requirements” para. 4 (Exhibit US-29).

¹⁸⁹ Foreign-Invested Sub-Distribution Rule, Article 7.5 (Exhibit US-28); Publication Sub-Distribution Procedure (Exhibit US-29), “Licensing Requirements” para. 5.

for the three years prior to establishment.¹⁹⁰ Wholly Chinese-owned publications wholesalers are not subject to such a requirement under the Publication Market Rule.

300. The administrative procedures required of enterprises applying to become wholesale distributors of books, newspapers and periodicals published in China further epitomize how China has modified the conditions of competition in favor of wholly Chinese-owned service suppliers.

301. First, the application process imposes discriminatory administrative burdens, since foreign-invested enterprises seeking to wholesale books, newspapers, and periodicals published in China must complete a six-step examination and approval process – involving three levels of GAPP approvals/licenses, two MOFCOM approvals/licenses, and one SAIC approval/license.¹⁹¹ In contrast, wholly Chinese-owned reading materials wholesale distributors only need to complete a three-step examination and approval process.¹⁹²

302. Second, the applications of foreign invested enterprises, but not domestic enterprises, are evaluated on the basis of specified discretionary criteria, including friendliness, capability, reliability, management standardization, and technological advancement.¹⁹³ In short, China permits wholly Chinese-owned reading materials wholesale distributors to go through a far more streamlined and less burdensome examination and approval process.¹⁹⁴

303. As a result of these differential examination and approval requirements, if a foreign-invested wholesale distributor and wholly Chinese-owned wholesale distributor filed applications for examination and approval on the same day, China's regime provides at least 90 days for officials to grant the foreign wholesaler the necessary approvals and licenses, while the system can provide the Chinese wholesaler its required approvals and licenses in only 40 days.¹⁹⁵

304. Not only would it take the foreign-invested wholesale distributor more than twice as long to complete the examination and approval process under perfect conditions, these minimums do not take into account the time the foreign invested distributor requires to obtain a Publications Business Permit from GAPP.¹⁹⁶

¹⁹⁰ Foreign-Invested Sub-Distribution Rule, Article 7.1 (Exhibit US-28); Publication Sub-Distribution Procedure, "Licensing Requirements" para. 1 (Exhibit US-29); Several Opinions, Article 6 (Exhibit US-6).

¹⁹¹ Foreign-Invested Sub-Distribution Rule, Articles 10-14 (Exhibit US-28).

¹⁹² Publication Market Rule, Article 9 (Exhibit US-27).

¹⁹³ Several Opinions, Article 6 (Exhibit US-6).

¹⁹⁴ Publications Market Regulation, Article 9 (Exhibit US-27).

¹⁹⁵ See section III.D.2 above (discussing Articles 10-14 of the Foreign-Invested Sub-Distribution Rule and Article 9 of the Publications Market Regulation).

¹⁹⁶ See Several Opinions, Article 5 (Exhibit US-6); Foreign-Invested Sub-Distribution Rule, Article 14 (Exhibit US-28).

305. In sum, even when foreign invested enterprises are permitted to engage in certain forms of wholesale distribution of books, newspapers and periodicals published in China, they are disadvantaged from the outset and throughout the duration of their finite operating term. The restrictions imposed by the measures at issue empty much of the substance out of the limited right granted to these foreign-invested wholesalers. China therefore accords less favorable treatment to foreign-invested reading materials wholesalers than to their wholly Chinese-owned competitors.

3. Conclusion

306. In its Services Schedule, China undertook market access and national treatment commitments with respect to wholesale trade services under mode 3 for all forms of reading materials. The measures at issue directly regulate reading materials' wholesale distribution under mode 3 in China and, therefore, affect the supply of these services through commercial presence. In addition, the measures at issue regulate like services and like services suppliers (*i.e.*, wholesale distributors of reading materials). They treat commercial presences differently based exclusively on the nationality of their owners or investors. Furthermore, by imposing discriminatory prohibitions and requirements on foreign-invested reading material wholesalers, the measures at issue modify the conditions of competition in favor of wholly Chinese-owned reading material wholesalers.

307. Thus, in spite of market access and national treatment commitments made under mode 3 of Sector 4B of its Services Schedule, China accords services and service suppliers of other WTO Members treatment that is less favorable than what its own like services and service suppliers receive. Moreover, the 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 of the GATS.

C. China's Measures Regarding Audiovisual Services are Inconsistent with China's Obligations Under Articles XVI and XVII of the GATS

1. China's Audiovisual Services Commitments

308. 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.¹⁹⁷ Specifically, Sector 2D provides, in relevant part:

¹⁹⁷ China's Services Schedule, Part II: Specific Commitments, WT/MIN(01)/3/Add.2, p. 21 (Exhibit US-2).

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
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). ¹⁹⁸	(3) None	Without prejudice to compliance with China's regulations on the administration of films, upon accession, 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.

fn.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.

309. In the first column of Sector 2D, China inscribed "Videos, including entertainment software and (CPC 83202), distribution services" under "audiovisual services". In this context, the meaning of the term "video" includes "a film etc. recorded on videotape; *colloq.* = video cassette" as well as "videodisc" and "video game".¹⁹⁹ "Videodisc" is defined as "a metal-coated disc on which visual material is recorded for subsequent reproduction on a television screen",²⁰⁰ with "digital video disc" being further defined as "a type of compact disc with enlarged data storage capacity, which can store both video and audio data and was introduced as a replacement

¹⁹⁸ Footnote 1 of document WT/MIN(01)/3/Add.2 states, "This document reprints the document distributed as WT/ACC/CHN/49/Add.2 on 1 October 2001." However, footnote 1 of document WT/ACC/CHN/49/Add.2, which is identical to footnote 2 in WT/MIN(01)/3/Add.2), provides, "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." When footnote 1 of document WT/MIN(01)/3/Add.2 was added to cross-reference document WT/ACC/CHN/49/Add.2, it altered the footnote numbering in document WT/MIN(01)/3/Add.2 so that the footnote numbers in the two documents do not match. Therefore, the reference to "footnote 1" in the market access column of Sector 2D of document WT/MIN(01)/3/Add.2 is to the text of footnote 1 of document WT/ACC/CHN/49/Add.2 or footnote 2 of document WT/MIN(01)/3/Add.2.

¹⁹⁹ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 3534 (Exhibit US-42).

²⁰⁰ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 3534 (Exhibit US-42).

for videotape (abbreviation *DVD*)”.²⁰¹ “Video game” is defined as “a game played by electronically manipulating computer-generated images displayed on a television screen”.²⁰²

310. “Entertainment software” and CPC 83202 are then included as among the types of videos that are covered by China’s Sector 2D commitment with respect to audiovisual distribution services. “Entertainment software”, as a composite of “software” and “entertainment”, literally means the “programs and other operating information used by a computer”²⁰³ that “occup[y] a person’s attention agreeably; [with] amusement”.²⁰⁴ In combination and in common usage, entertainment software refers to video games for computer and television use.²⁰⁵

311. “CPC 83202” is a classification code of the United Nations’ Provisional Central Product Classification (“CPC”), which covers “leasing or renting services concerning video tape”.²⁰⁶ The explanatory note to subclass 83202 provides, “renting or hiring services concerning pre-recorded video cassettes for use in home entertainment equipment, predominantly for home entertainment.” Therefore, “[v]ideos, including entertainment software and (CPC 83202), distribution services” covers the distribution of, *inter alia*, videocassettes, VCDs, DVDs, video games, computer games as well as the leasing or renting services concerning videocassettes.

312. 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).” Contractual joint ventures are addressed in China’s horizontal market access commitments under mode 3, which also contain the footnote referred to at the end of the inscription in the second column of Sector 2D.

313. China’s horizontal commitments are relevant to the analysis of this market access inscription in Sector 2D. As discussed above, China’s horizontal market access commitment

²⁰¹ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 678 (Exhibit US-43). Note that in China, the video compact disc (VCD) (and later the Super VCD, also know as the SVCD or Chaoji VCD) served as the bridge technology for video content storage media between the videotape/videocassette and the DVD. See Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, January 2007, pages 59-60 (Exhibit US-24).

²⁰² *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 3534 (Exhibit US-42).

²⁰³ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 2910 (Exhibit US-44).

²⁰⁴ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 836 (Exhibit US-45).

²⁰⁵ “Video game”, as defined above, means “a game played by electronically manipulating computer-generated images displayed on a television screen”. Likewise, a “computer game” is “(a software package for) a game played on a computer” (*The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 472 (Exhibit US-46)). The term “game”, as with “entertainment”, entails “amusement”, and “game console” is “a small machine for playing computerized video games, normally requiring connection to a television set” (*The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 1065 (Exhibit US-47)).

²⁰⁶ Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations (1991) (Exhibit US-48).

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 percent of total registered capital; no maximums for foreign investment participation in equity joint ventures are established.

314. 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. As footnote 2 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.*²⁰⁷

Thus, 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.

315. The remaining aspects of China’s horizontal market access and national treatment commitments under mode 3 – *i.e.*, regarding branches, representative offices, existing agreements and licences, land usage, and existing subsidies – are not relevant to the market access restrictions and discriminatory limitations contained in the measures at issue.

316. 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”²⁰⁸ and means in this context a film for theatrical release as opposed to an AVHE product, such as a videocassette, VCD or DVD.

317. In sum, 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 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;

²⁰⁷ China’s Services Schedule, Part I:Horizontal Commitments, WT/MIN(01)/3/Add.2 , p. 2 (emphasis added) (Exhibit US-2).

²⁰⁸ *The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 1840 (Exhibit US-49).

rather, it expressly acknowledged that this level is to be negotiated and agreed by the parties to the contractual joint venture.

318. Turning to national treatment, China inscribed “None” – *i.e.*, no limitations – in the national treatment column of Sector 2D.

2. Article XVI of the GATS

319. As outlined below, the foreign equity participation restrictions imposed by China on foreign-invested AVHE product distributors are inconsistent with Article XVI of the GATS. Article XVI 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 the 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 shareholding or the total value of individual or aggregate foreign investment.

320. As the Appellate Body has explained, the chapeau of Article XVI:2:

define[s] the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member’s Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member’s Schedule.²⁰⁹

Article XVI:2, sub-paragraph (f), therefore, 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

²⁰⁹ *US – Gambling (AB)*, para. 233.

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 Service Schedule.

321. 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.

**a. China’s Limitation on the Participation of Foreign Capital in
AVHE Product Distribution Enterprises is Inconsistent with
Article XVI of the GATS**

322. 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’s horizontal market access commitments contain no maximum foreign equity participation limitations on contractual joint ventures under mode 3. Instead, China left it to the parties of such contractual joint ventures to determine the level of equity participation. Accordingly, majority foreign-owned contractual joint ventures should be fully permissible. Likewise, China’s specific market access commitment under mode 3 in Sector 2D contains no limitations with respect to foreign equity participation.

323. 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.

324. Article 8 of the Audiovisual Sub-Distribution Rule requires the Chinese party to a Chinese-foreign contractual joint venture engaging in the sub-distribution of “audiovisual products” – including video tapes, discs, compact discs, and laser discs that have recorded content – to have no less than 51 percent of the shares of the enterprise.

325. These limitations are reinforced in the Foreign Investment Regulation, the Catalogue, and the Several Opinions. The Catalogue, which is incorporated by reference into the Foreign Investment Regulation, states that foreign-invested enterprises may engage in the sub-distribution of audiovisual products (excluding motion pictures) only in the form of contractual joint ventures in which the Chinese party holds the majority of shares.²¹⁰ Similarly, Article 1 of the Several

²¹⁰ Foreign Investment Regulation, Articles 3-4 (Exhibit GY-5); and Catalogue, “Catalogue of Restricted Foreign Invested Industries”, Article VI.3 (Exhibit US-5). As noted above, Article 8 of the Foreign Investment

Opinions 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.²¹¹ Each of these measures is inconsistent with China’s obligations under GATS Article XVI.²¹²

3. Article XVII of the GATS

326. In addition to their Article XVI inconsistencies, China’s measures at issue are also inconsistent with Article XVII of the GATS. As discussed above, a breach of Article XVII is established when: (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 limitations 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 favorable than that accorded to its own like service suppliers.²¹³

a. China’s Video Distribution Services Commitments Under Mode 3

327. 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.

b. China’s Measures Affecting the Supply of Video Distribution Services under Mode 3

328. 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. The Audiovisual Regulation establishes general rules governing AVHE products.²¹⁴ This measure also provides that Chinese-foreign contractual joint ventures may engage in audiovisual sub-distribution services, including

²¹⁰(...continued)

Regulation states that phrase “the Chinese party holds the majority share” as used in the Catalogue means “the total proportion of investment of the Chinese investor in the foreign-invested project is 51% and above.”

²¹¹ Several Opinions, Article 1. As discussed above Article 4 of the Several Opinions also prohibits foreign investment in businesses engaged in the *master distribution* of AVHE products (Exhibit US-6).

²¹² Foreign Investment Regulation, Articles 3-4 (Exhibit US-9); and Catalogue, “Catalogue of Restricted Foreign Invested Industries”, Article VI.3 (Exhibit US-5).

²¹³ See, e.g., *EC – Bananas III (Panel)*, para. 7.314.

²¹⁴ Audiovisual Regulation, Article 2 and Chapter V (Articles 31-36) (Exhibit US-16).

the sub-distribution of AVHE products, but notes that the requirements applicable to such sub-distribution joint ventures are set forth in other measures.²¹⁵

329. The Audiovisual Sub-Distribution Rule specifically regulates Chinese foreign contractual joint ventures engaging in the sub-distribution of AVHE products.²¹⁶ As discussed in section III.C.3 above, this measure establishes numerous requirements that dictate whether and to what extent foreign-invested enterprises may engage in the sub-distribution of these products in China.

330. Finally, the Catalogue, the Foreign Investment Regulation, and the Several Opinions all underscore the restrictive regime governing audiovisual services under mode 3 in China by reiterating that foreigners may only hold a minority share in a contractual joint venture engaging in audiovisual services, including the distribution of AVHE products.²¹⁷

c. China’s Measures Treat AVHE Product Distribution Service Suppliers of Other Members Less Favorably Than China’s Own Like Suppliers

331. China’s measures fail to meet the obligations of Article XVII: they treat AVHE product distribution services and service suppliers of other Members less favorably 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 on foreign-invested enterprises engaged in these services compared to their wholly Chinese-owned competitors. This formally different treatment significantly modifies the conditions of competition in favor of wholly Chinese-owned enterprises engaging in AVHE products distribution in China.

332. China modifies the conditions of competition through a variety of discriminatory requirements with respect to equity participation, operating terms, the existence of pre-establishment legal violations, examination and approval processes, and decision-making criteria.

333. First, with respect to equity participation, foreign investors may never possess more than 49 percent of the shares of an enterprise engaging in AVHE product sub-distribution, while Chinese investors may possess 100 percent of the shares of such an enterprise, and no less than 51 percent of the shares of a Chinese-foreign contractual joint venture engaging in such distribution.²¹⁸ As noted above, the Audiovisual Sub-Distribution Rule, the Catalogue, the

²¹⁵ Audiovisual Regulation, Article 35 (Exhibit US-16).

²¹⁶ Audiovisual Sub-Distribution Rule, Article 2 (Exhibit US-18).

²¹⁷ Several Opinions, Articles 1 (Exhibit US-6); Foreign Investment Regulation, Articles 3 and 4 (Exhibit US-9); and Catalogue, “Catalogue of Industries with Restricted Foreign Investment”, Article VI.3 (Exhibit US-5).

²¹⁸ Audiovisual Sub-Distribution Rule, Article 8.4 (Exhibit US-18); Several Opinions, Article 1 (Exhibit US-6); Foreign Investment Regulation, Articles 3 and 4 (Exhibit US-9); and Catalogue, “Catalogue of Industries

Foreign Investment Regulation, and the Several Opinions all directly prohibit foreigners from holding the majority share in a joint venture engaged in AVHE product distribution in China, so that a joint venture in which non-Chinese nationals hold such a majority share is prohibited from engaging in such distribution. The inability to take a majority position creates a significant competitive disadvantage for foreign suppliers, since it deprives them of important control over the operation of the AVHE product distribution venture. Chinese suppliers do not face this problem.

334. Second, the Audiovisual Sub-Distribution Rule mandates that foreign-invested AVHE product sub-distribution enterprises may have an operating term of no more than 15 years.²¹⁹ No equivalent restriction is imposed on wholly Chinese-owned enterprises.

335. Moreover, Article 7 of the Audiovisual Sub-Distribution Rule and Article 6 of the Several Opinions both require foreign-invested AVHE product sub-distribution suppliers to have no record of illegal activities in the three years prior to their application for establishment. Wholly Chinese-owned AVHE product sub-distributors face no similar requirement.

336. China also places fewer administrative burdens on wholly Chinese-owned service suppliers than on their foreign-invested competitors in the context of the examination and approval process.

337. First, foreign-invested AVHE product distributors must successfully complete a six-step examination and approval process involving three separate government agencies – MOC, MOFCOM and SAIC.²²⁰ While the national-level MOC (step two) and the national-level MOFCOM (step four) each have 30 working days to provide their decision regarding approval to the applicant, there is no time limit imposed on the regional-level MOC (step one), the regional-level MOFCOM (step three), the national-level MOC (step five), and the SAIC (step six). Foreign invested enterprises also face requirements to produce unspecified “other documents requested by” the MOC and MOFCOM as part of the examination and approval process.²²¹ Chinese enterprises do not face this open ended requirement.

338. Notably, foreign participants in the contractual joint venture may not contact Chinese government agencies during the examination and approval process. The Chinese party to the Chinese-foreign contractual joint venture is designated in the Audiovisual Sub-Distribution Rule as the only party authorized to engage with the relevant government agencies during this

²¹⁸(...continued)

with Restricted Foreign Investment”, Article VI.3 (Exhibit US-5).

²¹⁹ Audiovisual Sub-Distribution Rule, Article 8.5 (Exhibit US-18).

²²⁰ Audiovisual Sub-Distribution Rule, Article 11 (Exhibit US-18).

²²¹ Audiovisual Sub-Distribution Rule, Articles 12.5 and 13.9 (Exhibit US-18).

process.²²² This requirement deprives the foreign participant of the ability to choose which personnel are best suited to interact with government decision-makers responsible for approving the joint venture's application.

339. In contrast, wholly Chinese-owned AVHE product distributors are afforded a significantly more streamlined two-step approval process. These distributors submit an application for approval to engage in AVHE product distribution to the regional-level MOC, which will provide a decision within 30 days of the receipt of the application. Chinese distributors must also obtain a business license from SAIC.²²³

340. Second, the approval process for foreign-invested service suppliers includes discriminatory elements even beyond the fact that the process itself can take at least twice as long as the approval process for domestic suppliers.²²⁴ Article 6 of the Several Opinions directs the relevant authorities engaged in approving applications from foreign invested joint ventures to give priority to foreign-invested enterprises displaying the friendliness, capital strength, management standardization, and technological advancement of foreign-invested applicants in making their determinations.²²⁵ These criteria impose additional approval conditions on foreign-invested enterprises that wholly Chinese-owned sub-distributors simply do not face.²²⁶

4. Conclusion

341. The measures at issue impose market access restrictions on foreign-invested enterprises engaging in AVHE product distribution. These measures also treat foreign-invested AVHE product distributors less favorably than their wholly Chinese-owned competitors. Moreover, the measures at issue do not fall within the terms, limitations, conditions, or qualifications on market access or national treatment that China has specified under mode 3 in Sector 2D of its Services Schedule. Thus, the measures at issue are inconsistent with China's obligations under Articles XVI and XVII of the GATS.

²²² Audiovisual Sub-Distribution Rule, Articles 11-13 (Exhibit US-18).

²²³ Audiovisual Regulation, Article 32 (Exhibit US-16).

²²⁴ Audiovisual Sub-Distribution Rule, Article 11 (providing for a minimum of 60 days for examination and approval) (Exhibit US-18); and Audiovisual Regulation, Article 32 (providing for a minimum of 30 days for examination and approval) (Exhibit US-16).

²²⁵ Several Opinions, Article 6 (Exhibit US-6).

²²⁶ Several Opinions, Article 5 (providing for pre-application procedures for foreign-invested AVHE product distributors, which impose no time limit on relevant authorities and are silent with respect to what such pre-application procedures entail.) and Article 6 (establishing subjective approval criteria for foreign-invested AVHE product distributors) (Exhibit US-6); Audiovisual Sub-Distribution Rule, Article 11 (setting forth an examination and approval process for foreign-invested AVHE product distributors that do not subject the relevant authorities to time limitations at several key stages of the process) and Articles 12.5 and 13.9 (requiring foreign-invested applicants to provide unspecified "other documents" upon the request of MOC and MOFCOM, respectively) (Exhibit US-18).

D. China’s Measures Regarding Sound Recording Distribution Services are Inconsistent with China’s Obligations Under Article XVII of the GATS

1. China’s Sound Recording Distribution Services Commitments

342. 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’s commitment states, in relevant part:

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
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 regulations on the administration of films, upon accession, 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.

fn.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.

343. As indicated in section V.C.1 above, China has also inscribed “sound recording distribution services” under the audiovisual services sector of its Services Schedule.²²⁷ 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.

344. The second column of Sector 2D applies to China’s market access commitments under mode 3. China’s market access commitment under mode 3 provides that, as of December 11, 2001, foreign service suppliers are allowed to establish contractual joint ventures with Chinese partners to engage in sound recording distribution, without prejudice to China’s right to examine

²²⁷ Section 2.D of the World Trade Organization, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (“W/120”) (circulated 10 July 1991) refers to “sound recordings” (Exhibit US-50). China scheduled its commitments with respect to sound recordings distribution services in this section of its Schedule, which thus is the focus of the GATS analysis here.

the content of audio products. Pursuant to footnote 2 in China’s horizontal commitments, the parties to contractual joint ventures engaged in sound recording distribution are responsible for determining the levels of equity participation for each party. Neither China’s horizontal market access commitments under mode 3, nor its market access commitment under mode 3 in Sector 2D of its specific commitments, contains limitations on foreign equity participation in contractual joint ventures engaged in sound recording distribution.

345. 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.

346. As the panel noted in *US – Gambling*, “the GATS does not limit the various technologically possible means of delivery under mode 1”.²²⁸ The panel also pointed out that “[i]f 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.”²²⁹ This reasoning applies equally to China’s market access commitments under mode 3. That is, since China did not schedule any limitations regarding delivery mechanisms, all forms of delivery under mode 3 are covered by this commitment.

347. This conclusion 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*. This document, adopted by the Council for Trade in Services, provides:

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.²³⁰

348. The third column of Sector 2D contains the inscription “None” under mode 3. China, therefore, inscribed no limitations on national treatment in respect of sound recordings distribution through commercial presence. Here again, as with China’s market access commitment, China’s national treatment commitment includes no restrictions on the means of delivery that may be used to distribute sound recordings in China.

²²⁸ *US – Gambling (Panel)*, para. 6.281.

²²⁹ *US – Gambling (Panel)*, para. 6.286.

²³⁰ *Work Programme on Electronic Commerce, Progress Report to the General Council*, adopted by the Council for the Trade in Services on 19 July 1999, S/L/74, circulated 27 July 1999, para. 4 (Exhibit US-51).

2. Article XVII of the GATS

349. 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.

350. As discussed above, a breach of Article XVII is established when: (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 limitations 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 favorable than that accorded to its own like service suppliers.²³¹

a. China's Sound Recording Distribution Commitments under Mode 3

351. China made both market access and national treatment commitments regarding sound recording distribution services under mode 3. These commitments contain no terms, limitations, conditions or qualifications justifying the measures at issue.

352. Under market access for mode 3 in Sector 2D, China committed to permit foreign service suppliers to establish contractual joint ventures with Chinese partners to engage in sound recordings distribution. In addition, China scheduled no national treatment limitations under mode 3 for these Chinese-foreign contractual joint ventures. Given these commitments, Chinese-foreign contractual joint ventures, including majority foreign owned joint ventures, likewise should enjoy national treatment regarding all forms of sound recording distribution, including electronic distribution.

b. China's Measures Affect the Supply of Services with Respect to Sound Recording Distribution under Mode 3

353. As discussed in section V.C.3.b above, the Audiovisual Regulation, the Audiovisual Sub-Distribution Rule, the Catalogue, the Foreign Investment Regulation and the Several Opinions all affect the supply of audiovisual distribution services. Since audiovisual services include sound recording distribution, each of these measures regulates the distribution of sound recordings in China.

354. China's measures further affect the supply of sound recording distribution services via mode 3. The Internet Culture Rule, the Internet Culture Notice, and the Network Music Opinions dictate how certain types of electronic distribution are to be conducted through

²³¹ See, e.g., *EC – Bananas III (Panel)*, para. 7.314.

commercial presence within China, and they likewise dictate who may engage in these activities. The Internet Culture Rule, for instance, governs, *inter alia*, the importation and electronic distribution of sound recordings.²³² The Internet Culture Notice, which applies equally to these activities, confirms and elaborates upon certain elements in the Internet Culture Rule.²³³ Finally, the Network Music Opinions provides specific rules related to the importation and electronic distribution of sound recordings, setting forth various prohibitions, limitations and other requirements that regulate the supply of that service in China.²³⁴

c. China’s Measures Treat Sound Recording Distributors of Other Members Less Favorably than China’s Own Sound Recording Distributors

355. The measures at issue affect the supply of sound recording distribution services by treating foreign-invested service suppliers far more restrictively than like wholly Chinese-owned services suppliers. Chinese measures prohibit foreign-invested enterprise from engaging in any electronic distribution of sound recordings through commercial presence.²³⁵ Through these measures, then, China accords formally different treatment to foreign-invested sound recording distributors and dramatically modifies the conditions of competition in favor of wholly Chinese-owned sound recording distributors.

356. As a practical matter, the regime governing the electronic distribution of sound recordings in China gives wholly Chinese-owned service suppliers an overwhelming competitive advantage over their foreign-invested competitors, given how rapidly this arena for music distribution is growing. In this high-technology, fast-moving distribution realm, the Chinese measures totally shield Chinese owned service suppliers from any competition with enterprises that are cutting-edge, global competitors in the rest of the world. Chinese measures creating this regime are the Internet Culture Rule, the Internet Culture Notice, the Network Music Opinions, and the Several Opinions.

357. The Internet Culture Rule establishes the overarching regulatory structure for enterprises engaging in electronic distribution of sound recordings, requiring specific government approvals,

²³² Internet Culture Rule, Article 2-4 (Exhibit US-32).

²³³ Internet Culture Notice, Article I (Exhibit US-33).

²³⁴ Network Music Opinions, *e.g.*, Articles I, VIII, IX, XII, and Appendix 2 (Exhibit US-34).

²³⁵ Internet Culture Rule, Articles 2-4 (Exhibit US-32); Internet Culture Notice, Article II (Exhibit US-33); and Network Music Opinions, Article VIII (Exhibit US-34); Several Opinions, Article 4 (Exhibit US-6); Foreign Investment Regulation and Catalogue, “Catalogue of Prohibited Foreign Investment Industries”, Article X.7 (providing 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*”) (emphasis added) (Exhibits US-9 and US-5).

including MOC approvals, to conduct these activities.²³⁶ The Internet Culture Notice then prohibits MOC authorities from even accepting applications from foreign enterprises, while the Network Music Opinions and the Several Opinions directly prohibit foreign-invested enterprises from engaging in the electronic distribution of sound recordings.²³⁷ These measures give wholly Chinese-owned enterprises a complete “corner on the market” for sound recording electronic distribution, free of any foreign competition within China.

3. Conclusion

358. A host of Chinese measures creates a regime for sound recording distribution that treats foreign-invested sound recordings distributors much less favorably than wholly Chinese-owned sound recording distributors. Moreover, the 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 with respect to the supply of sound recording distribution services. The measures at issue, therefore, are inconsistent with China’s obligations under Article XVII of the GATS.

E. Conclusion

359. China made important market access and national treatment commitments with respect to wholesale distribution services for reading materials, as well as audiovisual services, including distribution services, for AVHE products and sound recordings. Specifically, under mode 3 of Sector 4B of China’s Schedule, China made broad market access and national treatment commitments for wholesale distribution services including, *inter alia*, the distribution of books, newspapers, periodicals and electronic publications. Under mode 3 of Sector 2D of its Schedule, China also made substantial market access and national treatment commitments pertaining to sound recording distribution services, and China made similarly substantial market access and national treatment commitments regarding AVHE products distribution services under mode 3.

360. The measures at issue, however, impose market access restrictions on AVHE products distribution services that deny these service suppliers market access within the meaning of Article XVI of the GATS, as provided in China’s Services Schedule.

361. The measures at issue also impose discriminatory limitations on foreign-invested enterprises engaged in reading materials wholesale distribution services, AVHE products distribution services, and sound recording distribution services that deny these service suppliers national treatment within the meaning of Article XVII of the GATS, as provided in China’s Services Schedule.

²³⁶ Internet Culture Rule, Articles 2-4, 6, and 7-9 (Exhibit US-32).

²³⁷ Internet Culture Notice, Article II (Exhibit US-33); Network Music Opinions, Article VIII (Exhibit US-34); and Several Opinions, Article 4, first sentence (Exhibit US-6).

362. The United States requests the Panel to find that the maximum percentage limit on foreign shareholding imposed on AVHE product distribution service suppliers as set forth in the measures at issue is inconsistent with China's obligations under Article XVI of the GATS. The United States further requests the Panel to find that the prohibitions and discriminatory limitations on foreign service suppliers seeking to engage in the wholesale distribution of reading materials, and in the distribution of AVHE products and sound recordings, as maintained by the measures at issue, are inconsistent with China's obligations under Article XVII of the GATS.

VI. CHINA'S MEASURES REGARDING PRODUCT DISTRIBUTION ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE III:4 OF THE GATT 1994

A. Introduction

363. 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 measures confine 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 favorable than that accorded to like domestic products.

B. Article III:4 of the GATT 1994

364. China's measures governing the distribution of imported reading materials, hard copies of imported sound recordings intended for electronic distribution, and imported films for theatrical release are also inconsistent with Article III:4 of the GATT 1994. This provision states, in relevant part:

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.

365. 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 favorable treatment than the domestic like product.²³⁸

1. “Like Products”

366. For each product, imports are “like” those made in China within the meaning of Article III:4. Whether they are reading materials, sound recordings intended for electronic distribution, or films for theatrical release, the imported and domestic products shares 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 favor the purchase and use of their domestic counterparts.

367. 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.²³⁹ 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.”²⁴⁰

a. Reading Materials

368. China’s Imported Publication Subscription Rule applies on its face only to imported reading materials.²⁴¹ Specifically, it subjects all imported newspapers and periodicals as well as imported books and electronic publications falling within the limited distribution category, to a mandatory subscription regime as the sole mechanism for their distribution within China.²⁴² China imposes no such regime on domestic publications. In other words, 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. Likewise, only imported reading materials find themselves blocked from distribution channels in China available through foreign invested enterprises. Chinese reading materials can use both Chinese and foreign-invested enterprises for distribution within China. As such, imported and domestic publications satisfy the “like products” requirement of Article III:4.

b. Sound Recordings Intended for Electronic Distribution

369. 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

²³⁸ *Korea – Beef (AB)*, para. 133.

²³⁹ See *Canada – Autos (Panel)*, para. 10.74; and *India – Autos (Panel)*, paras. 7.173-7.176.

²⁴⁰ *India – Autos (Panel)*, para. 7.174.

²⁴¹ Imported Publication Subscription Rule, Article 1 (Exhibit US-30).

²⁴² Imported Publication Subscription Rule, Article 3 (Exhibit US-30).

rules will apply. If a sound recording intended for electronic distribution is imported, that fact alone dictates that the more onerous and lengthy government content review regime will apply, whereas all domestic Chinese products with Chinese copyright owners are automatically subject to the substantially less restrictive and less time consuming registration obligation.

370. Under the Network Music Opinions, where a domestic Chinese sound recording intended for electronic distribution also has a copyright owned by a wholly Chinese-owned enterprise, that sound recording is considered “domestic”.²⁴³ The Network Music Opinions simply require a “domestic” sound recording to be registered with MOC; it does not have to be submitted for official content review and approval by MOC prior to any distribution.²⁴⁴

371. On the other hand, sound recordings intended for electronic distribution that do not meet this definition of “domestic” – including imported sound recordings, as well as sound recordings made in China but whose copyright is owned by “Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, and Wholly Foreign-owned Enterprises”²⁴⁵ must meet the more burdensome requirements created by the MOC content review and approval process.²⁴⁶ According to Appendix 2, Paragraph I and II, imported sound recordings intended for electronic distribution must follow the formal MOC content review process and gain prior MOC approval in order to be distributed. This is true whether the products are being imported for the first time, or whether the products were imported earlier for distribution in hard copy and only later are being shifted to electronic distribution.

372. Similarly, Article 16 of the Audiovisual Regulation provides that a domestic sound recording is subject to its publisher’s own internal editorial responsibility system, but Article 28 of the Audiovisual Regulation requires that both finished and unfinished imported sound recording must be submitted to MOC for content review and approval. Likewise, Article 16 of the Audiovisual Import Rules, which confirms that imported sound recordings intended for distribution over networks are subject to the same content review requirements as hard copy sound recordings, relies on no other basis than origin to impose discriminatory treatment on imported sound recordings.

373. 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 measures at issue, however, make a distinction based solely on product origin and copyright owner nationality. Therefore, imported and domestic sound recordings intended for electronic distribution are “like products” under the Internet Culture Rule within the meaning of Article III:4.

²⁴³ Network Music Opinions, Appendix 2, para. V (Exhibit US-34).

²⁴⁴ Network Music Opinions, Article IX (Exhibit US-34).

²⁴⁵ Network Music Opinions, Appendix 2, Paragraph V (Exhibit US-34).

²⁴⁶ Network Music Opinions, Article 9 (Exhibit US-34).

c. Films for Theatrical Release

374. Films for theatrical release are distributed in China in one of two ways. The measures at issue require imported films to be distributed by one of two state-controlled enterprises – China Film Group or Huaxia Film Distribution. Moreover, these two entities must undertake their imported film distribution work mindful of their legal obligation to “actively support the . . . distribution and exhibition of *domestic* films”.²⁴⁷ In contrast, any of the more than 50 licensed distributors in China, including these two state-controlled entities, can distribute domestic films.²⁴⁸

375. The Film Regulation and the Provisional Film Rule establish the baseline rule that only licensed enterprises may distribute films. The Provisional Film Rule then establishes a licensing system for domestic film distribution and includes one brief reference to imported film distribution, providing only that SAFRT-designated enterprises may be licensed to distribute imported films.²⁴⁹

376. The Film Distribution and Projection Rule fills in the details with regard to the regime governing imported film distribution, providing that only two specific state-controlled enterprises may distribute imported films. This Rule also conditions the distribution of imported films on at least two factors: (1) the distribution of domestic films by the two state-controlled distributors; and (2) maintaining the restrictive government-mandated ratio between domestic and imported films.²⁵⁰ As China’s dual distribution system is, therefore, applied strictly on the basis of the origin of the film, imported and domestic films for theatrical release satisfy the “like products” requirement of Article III:4.

2. Laws, Regulations and Requirements Affecting the Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use

377. 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.²⁵¹ The term “affecting” in Article III:4 has been understood to have a “broad scope of application”,²⁵² and to cover measures even beyond those which

²⁴⁷ Film Distribution and Projection Rule, Article 3 (emphasis added) (Exhibit US-21).

²⁴⁸ See Screen Digest and Nielsen NRG, “Cinema and Home Entertainment in China”, (January 2007), pages 41-43 (Exhibit US-24); and China eCapital Corporation, “Chinese Media & Entertainment Research: The Chinese Film Market”, March 18, 2005, pages 76-81 (Exhibit US-26).

²⁴⁹ Film Regulation, Article 5 (Exhibit US-20); and Provisional Film Rule, Article 16 (Exhibit US-22).

²⁵⁰ Film Distribution and Projection Rule, Article 3 (Exhibit US-21).

²⁵¹ Emphasis added.

²⁵² See, e.g., *US – FSC (Article 21.5) (AB)*, para. 210. See also *Canada – Autos (Panel)*, para. 10.80; and *India – Autos (Panel)*, para. 7.196.

directly regulate or govern the sale of imported and domestic like products.²⁵³ As the discussion below demonstrates, 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.

a. Reading Materials

378. The Imported Publication Subscription Rule regulates and governs the internal sale, offering for sale, purchase, distribution or use of imported reading materials in China. Article 3 of this measure 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. Further, domestic publications are not subject to this restrictive subscription regime. All of these provisions have a direct impact on how these like products are distributed. In a similar fashion, the Foreign-Invested Sub-Distribution Rule clarifies that only books, newspapers and periodicals published in China may be sub-distributed by foreign-invested enterprises. In short, the Imported Publication Subscription Rule is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use of publications within the meaning of Article III:4.

b. Sound Recordings Intended for Electronic Distribution

379. The Network Music Opinions govern the conditions that must be met in order to distribute sound recordings intended for electronic distribution. This measure makes content review and approval by MOC a prerequisite for the electronic distribution of imported sound recordings. This mandatory pre-condition for distribution does not apply to domestic sound recordings, which only must be registered with MOC. The provisions in this measure determine whether and when these products can be distributed. Accordingly, the Network Music Opinions are a law, regulation or requirement 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.

380. The Internet Culture Rule likewise regulates and governs the distribution of sound recordings intended for electronic distribution in China. Article 2(2) provides that Internet cultural products include audiovisual products in hard copy that have been transformed in order to be disseminated over the Internet. Furthermore, Article 3(1) of the Internet Culture Rule expressly states that Internet cultural activities include the wholesaling, retailing and renting of Internet cultural products. Therefore, the Internet Culture Rule is a law, regulation or

²⁵³ See, e.g., *EC – Bananas III (Panel)*, para. 7.175; and *India – Autos (Panel)*, para. 7.196.

requirement 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.

381. Moreover, the Audiovisual Regulation and the Audiovisual Import Rules regulate and govern sound recording distribution in China. Article 2 of the Audiovisual Regulation states that this measure applies to the wholesale, retail, and rental of audiovisual products, including sound recordings. Similarly, the coverage of Article 3 of the Audiovisual Import Rules includes finished sound recordings as well as unfinished sound recordings that will be used for publishing, for transmission over networks or for other purposes. As a result, the Audiovisual Regulation and the Audiovisual Import Rules are 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.

c. Films for Theatrical Release

382. The Film Regulation, the Provisional Film Rule, and the Film Distribution and Projection Rule govern the distribution of films for theatrical release in China. Each of these measures explicitly states that it deals with the distribution of films for theatrical release,²⁵⁴ and each measure contains rules concerning how that distribution is to be conducted.²⁵⁵ In addition, the Provisional Film Rule and the Film Distribution and Projection Rule make clear that imported films for theatrical release can only be distributed by two state-controlled enterprises, while domestic films for theatrical release can be distributed by these two distributors as well as any other distributor in China.²⁵⁶ In short, the Film Regulation, the Provisional Film Rule, and the Film Distribution and Projection Rule are laws, regulations or requirements affecting the distribution of films for theatrical release within the meaning of Article III:4.

3. “Treatment No Less Favourable”

383. The last element in an Article III:4 analysis is whether the measures at issue accord less favorable 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.²⁵⁷ Finally, the panel in *Canada – Wheat* found that “the imposition of additional, or extra, requirements on imported

²⁵⁴ Film Regulation, Article 2 (Exhibit US-20); Provisional Film Rule, Article 2 (Exhibit US-22); and Film Distribution and Projection Rule, Article 1 (Exhibit US-21).

²⁵⁵ Film Regulation, Chapter V: Distribution and Projection of Films (Articles 36-45) (Exhibit US-20); Provisional Film Rule, Chapters III: Film Distribution and Screening (Articles 10-15) and IV: Film Import and Export (Articles 16-17) (Exhibit US-22); and Film Distribution and Projection Rule, Article 3 (Exhibit US-21).

²⁵⁶ Film Distribution and Projection Rule, Article 3 (Exhibit US-21).

²⁵⁷ *EC – Bananas III (AB)*, paras. 213-214; *Korea – Beef (AB)*, paras. 135, 137, and 144; and *Dominican Republic – Cigarettes (AB)*, para.96. See also *Japan – Alcohol (AB)*, pp. 16-17.

products as compared to like domestic products constitutes less favorable treatment”.²⁵⁸ The discussion below demonstrates that 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.

a. Reading Materials

384. China’s Imported Publication Subscription Rule accords less favorable treatment to imported publications than that accorded to domestic publications by modifying the conditions of competition in the Chinese marketplace to the detriment of imported publications. 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.

385. These imported reading materials cannot compete on an equal footing with domestic reading materials, because potential consumers of imported reading materials may or may not even be able to gain access to these materials. Subscriptions to all imported publications, other than books and electronic publications in the non-limited distribution category, are compulsory. Without a subscription, consumers in China have no right to obtain these reading materials.²⁵⁹

386. Obtaining a subscription requires being in an eligible category to apply for a subscription to the particular imported reading materials, and then requires successfully completing mandated application and approval procedures. In certain circumstances, the would-be subscribers must file a subscription application letter and obtain Chinese government approval from GAPP to obtain their reading materials. Other subscribers must be reviewed and approved by various government agencies at various levels before even applying for a subscription, depending on the type of reading material involved.²⁶⁰ Still other subscribers may not subscribe to certain reading materials at all – for example, non-Chinese subscribers have no right [under this measure] to subscribe to imported books and publications in the limited distribution category,²⁶¹ and the Imported Publication Subscription Rule does not provide that Chinese individuals (as opposed to Chinese enterprises) may independently subscribe to imported newspapers, periodicals, books or electronic publications in the limited distribution category.²⁶²

387. The opaque nature of the process GAPP employs to determine issues such as when GAPP will grant a request for a subscription to imported reading materials, and which reading materials

²⁵⁸ *Canada – Wheat (Panel)*, paras. 6.184-6.185.

²⁵⁹ Imported Publication Subscription Rule, Article 3 (Exhibit US-30).

²⁶⁰ Imported Publication Subscription Rule, Articles 5-8 (Exhibit US-30).

²⁶¹ Imported Publication Subscription Rule, Article 8 (Exhibit US-30).

²⁶² Imported Publication Subscription Rule, Article 7 (Exhibit US-30).

will fall into the limited distribution category creates additional barriers to the distribution and sale of imported reading materials, which are not present for domestic reading materials.²⁶³

388. 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.²⁶⁴ Domestic publications are subject to neither the subscription requirement nor the limitation on who can distribute them. As a result, China accords less favorable treatment to imported publications than it accords to domestic publications in contravention of Article III:4.

b. Sound Recordings

389. China's measures modify the conditions of competition in its sound recordings market be modified 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 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. The Network Music Opinions also authorize the company with domestic sound recordings to transform the recordings into multiple products, such as ringtones, as demand arises, and simply register those products with MOC.

390. The more onerous content review requirement for imported sound recordings intended for electronic distribution contain multiple significant burdens. First, compliance with the requirement itself implies costs and delays on imported sound recordings intended for electronic distribution that are not entailed in the requirements applicable to domestic sound recordings.²⁶⁵ When the domestic product is ready for distribution, the measure provides that it can move onto the market quickly to take advantage of market interest. However, this measure does not provide that imported sound recording can be distributed immediately. According to the terms of the Network Music Opinions, the imported product must first successfully pass through the MOC content review process. Given the requirement that MOC has a minimum of 20 days to complete this process, and may not, even then, provide its approval, significant delay and market uncertainty for imported products are inevitable.

391. In practical terms, this measure sets forth requirements that conflict with efforts to distribute imported sound recordings simultaneously across the global market place to maximize

²⁶³ Imported Publication Subscription Rule, Article 3 (Exhibit US-30).

²⁶⁴ Imported Publication Subscription Rule, Article 4 (Exhibit US-30).

²⁶⁵ Network Music Opinions, Article IX (Exhibit US-34).

interest in the recording and to reduce the opportunity for pirates to illegally copy the products to send into other markets. Domestic Chinese sound recordings, however, are allowed under the Network Music Opinions to take full advantage of all available market opportunities, given how their content review regime is structured.

392. This measure provides for a second discriminatory burden on imported sound recordings. That is, if they already received MOC content approval when imported for distribution in hard copy, then they must go through content review and approval by MOC twice – *i.e.*, once when a distributor is intending distribution in hard copy, and a second time when the distributor plans to engage in electronic distribution.²⁶⁶ The Network Music Opinions contain no provisions that impose this redundant burden on domestic sound recordings.

393. The third burden contained in the measure applies to imported sound recordings intended for electronic distribution that are still available via the Internet or other networks and that were being digitally distributed when the Network Music Opinions were issued. According to this requirement, these imported sound recordings also must undergo content review and approval by MOC.²⁶⁷ By contrast, domestic sound recordings in similar circumstances only need to be recorded with MOC.²⁶⁸

394. The Internet Culture Rule further perpetuates this disparate treatment by providing for asymmetrical content review requirements that decidedly favor domestic over imported sound recordings intended for electronic distribution. Article 16 of the Internet Culture Rule requires that imported Internet cultural products must be reviewed and approved by MOC. While MOC has 20 days from the date of receipt of the request for review to decide whether to grant approval, MOC content review specialists are given unlimited time to conduct their review, which does not count against the 20-day period. 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.

395. The Audiovisual Regulation and the Audiovisual Import Rules echo this discriminatory content review requirement. As with the Network Music Opinions and the Internet Culture Rule, these two measures impose additional 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. Thus, the Audiovisual Regulation subjects imported sound recordings to MOC content review and approval that can take up four weeks,²⁶⁹ whereas domestic sound recordings are relieved of this administrative and time burden, having only to

²⁶⁶ Network Music Opinions, Appendix 2, para. I (Exhibit US-34).

²⁶⁷ Network Music Opinions, Appendix 2, para. VI (Exhibit US-34).

²⁶⁸ Network Music Opinions, Appendix 2, para. VII (Exhibit US-34).

²⁶⁹ Audiovisual Regulation, Article 28 (Exhibit US-16)

undergo their publisher's internal editorial system. The Audiovisual Import Rules further provides that imported sound recordings intended for distribution over networks are also subject to MOC content review and approval. Domestic sound recording intended for network distribution, however, are subject to no such requirement.

396. For all of these reasons, the Network Music Opinions, the Internet Culture Rule, the Audiovisual Regulation, and the Audiovisual Import Rules accord less favorable treatment to imported sound recordings intended for electronic distribution than that accorded to domestic sound recordings intended for electronic distribution, and therefore are inconsistent with Article III:4.

c. Films for Theatrical Release

397. China's regime for the distribution of films for theatrical release also creates discriminatory competitive conditions that harm imported products. In the case of films for theatrical release, China's unfavorable regulatory structure for imported films is established through the Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule. Together, these measures subject the distribution of imported films for theatrical release to a variety of conditions that treat imports far less favorably than domestic films.²⁷⁰

398. First, the Provisional Film Rule and the Film Distribution and Projection Rule only permit imported films for theatrical release to be distributed by two state-controlled enterprises, China Film Group and Huaxia Film Distribution.²⁷¹ In contrast, domestic films can be distributed by these two enterprises as well as by any of the other film distributors established in China.

399. 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.

400. Moreover, these requirements operate in China's unique commercial environment, in which only 20 imported films a year can be distributed on a revenue-sharing basis, while – unlike imported films – domestic films enjoy negotiated revenue-sharing terms.

401. These requirements treat imported films less favorably than domestic films. In this regard, it is useful to note a number of adverse competitive effects that result from these limitation. Foremost among these is the very exclusion of imported films from the full range of more than 50 distributors operating commercially in China, and thus the denial of the opportunity

²⁷⁰ Film Regulation, Article 44 (Exhibit US-20); and Film Distribution and Projection Rule, Article 3 (Exhibit US-21).

²⁷¹ Film Regulation, Article 5 (Exhibit US-20); Provisional Film Rule, Article 16 (Exhibit US-22); and Film Distribution and Projection Rule, Article 3 (Exhibit US-21).

for a commercial decision of which distributor is best suited to market that film at a particular time and a particular place.

402. Moreover, by being the sole authorized state-controlled distributors, China Film Distribution Company and Huaxia are able to set the revenue-sharing arrangements for the few qualifying imported films through a non-negotiable Master Contract containing set terms. The Master Contract, *inter alia*, limits a film's producer to only 13-15 percent of the film's total box office receipts. Domestic films, however, are distributed predominantly on a revenue-sharing basis that is freely negotiated between the producer and the distributor, with domestic producers typically receiving two times the percentage of receipts that foreign producers can receive.

403. Producers know their films well, which makes their expertise a key factor in strong market distribution plans. However, the domestic film producer stands to gain twice the financial resources of the foreign producer to try to ensure a domestic film is marketed and distributed effectively.

404. Because imported films outside of the revenue-sharing category likewise can only be distributed by the two state-controlled distributors, these two distributors are unable to offer only a low flat-fee for these imported products. Low fees make it much harder for these products than for domestic films, with negotiated producer fees, to benefit from the resources of their expert producers to ensure effective distribution.

405. In addition, producers of imported films have no control over critical aspects of the distribution process. For example, China Film Group and Huaxia Film Distribution, along with SARFT, dictate the release dates for imported films as well as their screening times. Choosing release dates is a strategic decision that maximizes the market penetration of the products. Releases on certain days of the week and at certain times of the year are known to improve or reduce market returns for a film. Decisions on where, when and how long a film will be shown likewise make a significant difference in how competitive a film will be, yet imported films are not permitted to reap the benefit of their film producers' expertise in these areas. To the contrary, China's measures require their two distributors to encourage the distribution and exhibition of domestic films.

406. The two state-controlled distributors also exclusively control the marketing and promotion for imported films, as well as the dubbing and subtitling process, all of which are critical elements to creating fully competitive products in the marketplace. With respect to a domestic film, the producer's commercial judgment on how to market and how much to spend can enhance the film's success. Likewise, the producer can use its choice of dubbing and subtitling to ensure that the film's message comes through effectively.

407. The fact that the two state-controlled distributors handling imported films are explicitly required by law to support the distribution and exhibition of *domestic* films at the same time that they are the only entities who can distribute imported films also provides for more favorable

conditions of competition for domestic films.²⁷² In other words, in a market where there is competition among films for a limited number of screening opportunities, the distributors of imported films are required to support domestic films.

408. The distribution opportunities afforded to domestic films are radically different, involving access to the complete range of distribution channels. Films can choose a particular channel on the basis of the most favorable commercial terms, as well as any specific qualitative advantages offered by particular distributors. These advantages could include regional experience, marketing expertise, and genre specialty. Further exemplifying the disparity of treatment between domestic and imported films, domestic producers can distribute their own films and thereby use their intimate knowledge of the film's strengths and marketing successes in other markets to create the best competitive conditions for the film. Imported films cannot take advantage of this distribution channel.

409. In sum, China's dual distribution system for films for theatrical release significantly modifies the conditions of competition in the Chinese market to the disadvantage of imported films, and, therefore, accords less favorable treatment to imported films for theatrical release than it accords to domestic films for theatrical release in contravention of Article III:4.

C. Conclusion

410. The measures at issue accord imported reading materials, imported sound recordings intended for electronic distribution, and imported films for theatrical release less favorable treatment than that accorded to domestic reading materials, domestic sound recordings, and domestic films for theatrical release with respect to distribution in China. These measures modify the conditions of competition to the detriment of these imported products by imposing additional and discriminatory requirements on the distribution of imported products that are not imposed on like domestic products. These requirements impose an onerous subscription regime on the distribution of many imported reading materials, and restricted distribution channels for all imported reading materials; a burdensome content review requirement prior to the distribution of imported sound recordings intended for electronic distribution; and a highly restrictive two-distributor based system for distributing imported films for theatrical release.

411. As a result of these measures, China denies imports of these products national treatment. The United States, therefore, respectfully requests that the Panel find that the Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Audiovisual Regulation, the Audiovisual Import Rules, the Internet Culture Rule, the Network Music Opinions, the Film Regulation, the Provisional Film Rule, and the Film Distribution and Projection Rule are inconsistent with China's obligations under Article III:4 of the GATT 1994.

²⁷² Film Distribution and Exhibition Rule, Article 3 (Exhibit US-21).

**VII. CHINA’S MEASURES REGARDING PRODUCT DISTRIBUTION ARE INCONSISTENT WITH
CHINA’S OBLIGATIONS UNDER THE ACCESSION PROTOCOL**

**A. China’s Measures are Inconsistent with Paragraph 5.1 of Part I of the
Accession Protocol**

412. The Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Network Music Opinions, the Internet Culture Rule, the Audiovisual Regulation, the Audiovisual Import Rules, the Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule are also inconsistent with paragraph 5.1 of Part I 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 indicated in section IV.B.1 above, paragraph 5.1 states, in relevant part:

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 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)

413. This three-year transition period has expired and, as noted above, the goods at issue in this dispute are not listed in Annexes 2A or 2B. Furthermore, as the discussion above demonstrates, the Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Network Music Opinions, the Internet Culture Rule, the Audiovisual Regulation, the Audiovisual Importation Measure, the Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule are all inconsistent with Article III:4 of the GATT 1994. Consequently, these measures likewise are in breach of Section 5.1 of Part I of the Accession Protocol. The United States, therefore, respectfully requests that the Panel find that these measures are inconsistent with Section 5.1 of Part I of the Accession Protocol.

**B. China’s Measures are Inconsistent with Paragraph 1.2 of Part I of the
Accession Protocol**

414. Furthermore, the Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Network Music Opinions, the Internet Culture Rule, the Audiovisual Regulation, the Audiovisual Importation Measure, the Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule are 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. Paragraph 1.2 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.

415. 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.

416. In light of the earlier discussion demonstrating that the Imported Publication Subscription Rule, the Foreign-Invested Sub-Distribution Rule, the Network Music Opinions, the Internet Culture Rule, the Audiovisual Regulation, the Audiovisual Importation Measure, the Film Regulation, the Provisional Film Rule and the Film Distribution and Projection Rule are inconsistent with China's obligations under Article III:4 of the GATT 1994 regarding national treatment with respect to imported and domestic products, these measures are consequently inconsistent with Section 1.2 of Part I of the Accession Protocol and paragraph 22 of the Working Party Report. The United States, therefore, respectfully requests that the Panel find that these measures are inconsistent with Section 1.2 of Part I of the Accession Protocol and paragraph 22 of the Working Party Report.

VIII. CONCLUSION

417. For the foregoing reasons, the United States respectfully requests that the Panel find that:

- With respect to China's trading rights obligations, the following measures are inconsistent with paragraphs 5.1, 5.2, and 1.2 of the Accession Protocol: the Management Regulation; the Importation Procedure; the Catalogue; the Foreign Investment Regulation; the Several Opinions; the Electronic Publications Regulation; the Audiovisual Regulation; the Audiovisual Import Rule; the Audiovisual Sub-Distribution

Rule; the Film Regulation; the Provisional Film Rule; and the Film Distribution and Projection Rule;

- 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;

- The following measures are inconsistent with Article XVII of the GATS: the Management Regulation; the Publication Market Rule, the Foreign-Invested Sub-Distribution Rule, the Sub-Distribution Procedure; the Imported Publication Subscription Rule; the Electronic Publications Regulation; the Internet Culture Rule; the Internet Culture Notice; the Audiovisual Regulation; the Audiovisual Sub-Distribution Rule; the Network Music Opinions; the Catalogue; the Foreign Investment Regulation; and the Several Opinions;

- The following measures are inconsistent with Article III:4 of the GATT 1994: the Imported Publication Subscription Rule; Foreign-Invested Sub-Distribution Rule; the Network Music Opinions; the Internet Culture Rule; the Audiovisual Regulation; the Audiovisual Import Rules; the Film Regulation; the Provisional Film Rule; and the Film Distribution and Projection Rule.

- With respect to China's national treatment obligations for products, the following measures are inconsistent with paragraphs 5.1 and 1.2 of the Accession Protocol: the Imported Publication Subscription Rule; the Foreign-Invested Sub-Distribution Rule; the Network Music Opinions, Internet Culture Rule, the Audiovisual Regulation, the Audiovisual Import Rules, the Film Regulation, the Provisional Film Rule; and the Film Distribution and Projection Rule.

418. 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.