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

(WT/DS363)

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

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1. Good morning, Mr. Chairman and members of the Panel. On behalf of the United States, we would like to begin by thanking the Panel and the Secretariat staff for taking on this task. Our delegation looks forward to working with you, and with the delegation of China, as you carry out your work.

I. INTRODUCTION

2. The dispute before you today involves several measures that implicate a number of China's WTO commitments. Our statement this morning will begin with just a brief summary of our WTO claims regarding those measures.[1] Following this summary, we will offer responses to what we view as the main arguments raised by China in its first written submission. We note at the outset that China has elected not to address several of our claims. Where China has raised defenses or objections, we will show that they are unavailing. We will not attempt to cover all of China's arguments this morning, but will address China's contentions in greater detail in our second written submission.

3. This dispute concerns commitments China made upon acceding to the WTO to liberalize trading rights, trade in services and trade in goods related to films, home videos, publications and music. Unfortunately, China maintains a series of measures that are inconsistent with China's obligations under its Accession Protocol, the GATS and the GATT 1994.

4. Briefly, our concerns focus on three issues. *First*, with respect to trading rights, China committed in its Accession Protocol to grant all foreign enterprises, all foreign individuals, and all enterprises in China the right to import reading materials (a term we use to refer to books, newspapers, periodicals and electronic publications), audiovisual home entertainment products such as videocassettes, VCDs and DVDs (which we have termed "AVHE products"), sound recordings and films for theatrical release into China. However, China's measures ensure that state-owned Chinese importation monopolies and oligopolies preserve their exclusive rights to import, since foreign companies are categorically prohibited from importing reading materials, AVHE products, sound recordings and films for theatrical release into China. For example, films

[1] *See* Summary of WTO Inconsistencies (Exhibit US-52).

may only be brought into China by the 57 year old state-owned monopoly importer. Likewise, a single wholly state-owned enterprise acts as the exclusive importer for finished DVDs and CDs. Similarly, only wholly state-owned enterprises approved or designated by the Chinese government can import reading materials and unfinished DVDs and CDs. The measures that impose these restrictions breach China's trading rights commitments.

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

6. *Third*, China committed to provide national treatment with respect to imported goods pursuant to both the GATT 1994 and China's Accession Protocol. However, China's measures concerning several of the products at issue – namely reading materials, films for theatrical release, and hard copies of sound recordings intended for electronic distribution – create discriminatory commercial hurdles for imported products. For example, many imported reading materials are subjected to a restrictive and discriminatory subscription regime. Furthermore, while both Chinese and foreign enterprises can distribute domestic Chinese products, only Chinese enterprises can distribute imported reading materials. Similarly, imported and domestic hard copies of sound recordings intended for electronic distribution face distinctly different content review regimes, with a significantly more onerous regime imposed on imports. Finally, only two state-controlled distributors are permitted to distribute imported films, and the distribution contract does not permit

the negotiation of key commercial terms. By contrast, domestic films have the full range of distributors at their disposal, and their distribution contracts are subject to full competitive negotiation. As China's measures accord imported products less favorable treatment than like domestic products, they are inconsistent with Article III:4 of the GATT 1994 and paragraphs 5.1 and 1.2 of China's Accession Protocol.

7. Having summarized the U.S. concerns that led to this dispute, we will now address assertions China has made on these matters in China's first submission.

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

8. First, we would like to address China's threshold argument that films for theatrical release, unfinished AVHE products, and unfinished sound recordings are not "goods," and therefore are not covered by China's trading rights commitments. The text of the GATT, the Appellate Body's clear guidance on this issue, and China's own treatment of these products, confirm that they are, in fact, goods. More significantly, if accepted, China's argument that goods made available through associated services are somehow no longer goods, would have serious systemic implications, because that reasoning would transform virtually every good that is sold through a series of associated services into a service and thereby exclude the good from trading rights and GATT disciplines. Indeed, as we will discuss, we find China's arguments in this regard quite surprising.

Films for Theatrical Release

9. Let us begin with an analysis of whether cinematographic film qualifies as a good for purposes of the Accession Protocol, since the parties agree that trading rights in the Protocol refer to the import (and export) of *goods*.

10. First, there is no textual basis for China's claims that films are not goods. To the contrary, the GATT has made clear for more than half a century that exposed cinematographic film crossing

national borders is a good. This agreement, which applies to trade in goods, includes a specific provision on films for theatrical release in Article IV, which is entitled *"Special Provisions relating to Cinematograph Films*." The treatment of films as goods since 1947 exposes the fallacy of China's argument that films for theatrical release can only be construed as services.

11. China's position also has a number of other major flaws. For example, China asserts that a film is "intangible," because it "consists of a sequence of pictures that is projected on to a screen in rapid succession and accompanied by a soundtrack."[2] According to China, the alleged "intangible" nature of films disqualifies them as goods. However, even if China were correct that "tangibility" is the key element of a "good," the United States is, in fact, challenging measures that prohibit foreign-invested enterprises from importing hard-copy cinematographic film, which are tangible items. China concedes this point in its first written submission, noting that the "delivery materials that 'carry' the motion picture are traditionally tangible items (*i.e.*, the film reel. . .)."[3] Furthermore, the fact that there is stored content on the film reel that is imported does not negate the existence of a good. For example, books are hard-copy media containing content, but there is no question that books are goods.

12. International classifications of products also demonstrate the long-standing practice of Members treating films as goods. The Harmonized Commodity Description and Coding System (HS), which only covers goods, describes products under heading 3706 as follows: "cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track."[4] Similarly, although China attempts to gloss over this point, the United Nations' Central Product Classification (CPC) *does* classify cinematographic film as a good in Subclass 3895, in addition to classifying the associated services (in subclass 96113).[5] These classifications further reinforce the point that films for theatrical release are goods.

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[2] China's First Written Submission, para. 55.

[3] China's First Written Submission, para.62.

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

[5] Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991) (Exhibit US-54).

13. China's next assertion, that films are not goods because they are sold through a series of associated services, would have serious systemic implications, if accepted. China asserts that the commercial value of the film lies in the associated services provided for the exploitation of films and that the physical delivery medium *i.e.*, the film reel, is a mere accessory of such service. In essence, China would negate the existence of a good, whenever it is closely connected to a series of services. However, the vast majority of goods are sold through a series of associated services. China's argument, if accepted, would transform them all into services, a nonsensical result. The fact that a good is used to provide a service does not mean that the good is not a good. For example, stethoscopes are goods that may be imported. The fact that the stethoscope is subsequently commercially exploited by health care service providers in order to examine patients does not mean that the stethoscope is not a good.

14. China uses a similar line of reasoning to contend that the challenged measures simply deal with a copyright licensing service for motion pictures rather than the importation of goods. In an effort to buttress this assertion, China cites to a single provision of its Films Regulation discussing the requirement of a copyright license for the distribution of films.[6] However, China does not address any of the other provisions in this and other measures that explicitly prohibit the importation of films by foreign-invested entities. Even if certain provisions of China's measures regulate copyright licensing, this does not change the fact that other provisions in these measures directly prohibit foreign-invested entities from importing films.

15. China also asserts that its GATS commitments with respect to films demonstrate that films are subject exclusively to the disciplines of the GATS, and fall outside the scope of China's Accession Protocol or the GATT 1994. Again, there is no foundation for this assertion in the text of the WTO Agreement, and the Appellate Body has rejected this line of reasoning.

[6] China's First Written Submission, para. 93.

16. In *Canada – Periodicals*, Canada argued that since the provision of advertising services falls under the GATS, a tax based on the value of advertising in periodicals did not regulate trade in goods. The Appellate Body disagreed, concluding that while a periodical may be comprised of elements that have services attributes *i.e.*, editorial content and advertising content, "they combine to form a physical product – the periodical itself."[7] The Appellate Body also noted that the specific periodicals at issue were subject to Canada's tariff code and Canada acknowledged that the tariff code was "a measure affecting trade in goods."[8]

17. In *EC – Bananas*, the Appellate Body adopted a similar line of reasoning, stating that with respect to "measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good, . . . the same measure could be scrutinized under both [the GATT and GATS] agreements. . . ."[9]

18. Finally, China's own customs regime recognizes that films for theatrical release are goods. China's accession schedule of tariff concessions, which only covers goods, incorporates the HS description of these products under heading 3706.[10] Thus, China's own HS schedule treats cinematographic film as a good. China's submission even concedes that a film must go through "customs clearance" for the "purpose of the distribution of motion pictures to Chinese distributors and theatres."[11] In short, China has provided the Panel with no basis to find that films are not goods. To the contrary, films for theatrical release are goods and China's trading rights commitments are applicable to such products.

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[7] *Canada – Periodicals (AB)*, p. 17.
[8] *Canada – Periodicals (AB)*, p. 17.
[9] *EC – Bananas (AB)*, para. 221.
[10] *See* Extracts from Schedule CLII (in HS96 nomenclature) (Exhibit JPN-2).
[11] China's First Written Submission, para. 95.

Unfinished AVHE Products and Unfinished Sound Recordings

19. China similarly argues that unfinished AVHE products and unfinished sound recordings, often called "masters," like films, are not goods. For the reasons we have articulated in the context of films, China's arguments with respect to unfinished AVHE products and sound recordings are also unavailing.

20. First, there is once again no textual basis for this assertion. Furthermore, the 2007 Harmonized System, (implemented under the Harmonized System Convention, to which China has been a party since 1993) describes products under HS heading 8523, in pertinent part, as follows: "[d]iscs, tapes, solid-state non-volatile storage devices, 'smart cards' and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs."[12] This description makes clear that these products are goods. The CPC also classifies "recorded media for sound or other similarly recorded phenomena" other than films under goods subclass 47520. In addition, as with films, China treats these products as goods. China's tariff schedule, which has not yet implemented the 2007 changes to the HS, incorporates the description of this product under HS heading 8524.[13]

21. Second, China asserts that its measures do not regulate the right to import master copies of AVHE products or sound recordings, but simply deal with rights to enter into copyright agreements.[14] As with films, China may have provisions regulating copyright licensing, but this does not change the fact that other Chinese provisions directly regulate who can import the good subject to that licensing. In this connection, it is telling that China does not contest the conclusion that finished AVHE products and finished sound recordings are goods, even though these products are also copyright protected.

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[12] World Customs Organization, Explanatory Notes, XVI-8523-1 (4th Ed. 2007) (Exhibit US-55).
[13] Extracts from Schedule CLII (in HS96 nomenclature) (Exhibit JPN-2).
[14] China's First Written Submission, paras. 119-20.

22. In short, for all of these reasons, these products are goods subject to China's trading rights commitments. As we will now discuss, China has not met these commitments.

III. TRADING RIGHTS: CHINA'S MEASURES ARE INCONSISTENT WITH ITS TRADING RIGHTS COMMITMENTS AND ARE NOT JUSTIFIED UNDER ANY EXCEPTIONS

23. China maintains numerous measures that prohibit all importers, other than a limited number of Chinese wholly state-owned enterprises, from importing reading materials, AVHE products, sound recordings and films for theatrical release (collectively the "Products") into China. The United States challenges these measures based on the broad trading rights commitments China made in its Accession Protocol.

24. China does not contest the U.S. arguments concerning the inconsistency of the challenged measures with its trading rights commitments related to reading materials, finished AVHE products, and finished sound recordings. Indeed, China asserts, but fails to demonstrate, that its measures governing these products are justified under several exceptions. As we have just discussed, China has erroneously claimed that the other products subject to restrictions under China's trading rights regime (films for theatrical release, unfinished AVHE products and unfinished sound recordings) do not qualify as goods, and China has raised no substantive goods-based defense with regard to these products.

UNESCO

25. China begins its efforts to try to justify its measures by invoking the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and a related UNESCO Declaration. It claims that these documents justify imposing special restrictions on so-called "cultural goods" under the entirely separate regime of rules created by the WTO. However, China fails to note that the UNESCO Convention expressly provides: "Nothing in this Convention shall

be interpreted as modifying the rights and obligations of the Parties under any other treaties to which they are parties."[15]

26. In any event, nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of "cultural goods," and China's Accession Protocol likewise contains no such exception. China's reference to the work of UNESCO is thus unavailing, even without considering the fact that the United States and a number of WTO Members are not parties to the UNESCO Convention.

Trading Rights and the Right to Regulate Trade

27. China then argues that China's "right to regulate trade in a manner consistent with the WTO Agreement," provided in the first clause of paragraph 5.1 of the Accession Protocol, justifies its wholesale carve out of the Products in dispute here from its trading rights commitments. This argument likewise has no merit.

28. First, if China's reading of its right to regulate trade allowed China to deny the right to import to all foreign and all private Chinese enterprises for entire categories of products at will, then China would have eliminated its trading rights commitment altogether, not simply "regulated trade."

29. Second, China's expansive reading of its right to "regulate" is inconsistent with the structure and operation of paragraph 5.1, read as a whole. Paragraph 5.1 provides a specific mechanism for excluding products from China's trading rights commitments – *i.e.*, Annexes 2A and 2B of the Accession Protocol. China's trading rights commitments cover "the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A" – and, until December 2004, Annex 2B. Annex 2A1 of China's Accession Protocol contains a list of

[15] Article 20.2, UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Exhibit CN-19).

eight categories of products subject to state trading for imports, while Annex 2A2 addresses exports. Annex 2B contains a further list of products subject to "designated trading," – that is, China had the right for an interim period after accession to continue to designate the entities allowed to import. China committed to phase out all trading rights limitations in Annex 2B by the end of 2004.

30. China's expansive interpretation of the right to regulate trade would make the specific mechanisms in Annexes 2A and 2B superfluous, since they serve precisely the same function China appears to claim flows from its right to regulate trade. To give effect to the entire first sentence of paragraph 5.1 of China's Accession Protocol, the scope of China's right to regulate trade cannot extend to the domain covered by these Annexes. Instead, if China wished to deny trading rights for the Products at issue here, it should have availed itself of the mechanism provided by Annexes 2A and 2B at the time of its accession. It did not.

31. China's effort to construct a secret entrance into paragraph 5.1's Annexes is contrary to the agreement negotiated by WTO Members. As discussed above, the language and structure of paragraph 5.1 make clear the intent of WTO Members to agree on a self-contained, complete, and agreed set of excepted products – to be found in Annexes 2A and 2B. China's arguments would render the exception provided under these Annexes superfluous. Further, as the Working Party Report notes, China's trading partners welcomed the fact that China's trading rights commitments would give "all enterprises . . . the right to import and export all goods (except for the share of products listed in Annex 2A)."[16]

Article XX of the GATT 1994

32. We now turn to China's assertion that its measures denying trading rights are justified under Article XX(a) of the GATT 1994. Without prejudice to the question of whether Article XX

[16] WP Report para 80; see also WP Report para 84(a).

applies to China's Accession Protocol, we submit that China has not met its burden to demonstrate that its measures satisfy the requirements of this article.[17] China's measures are neither "necessary to protect public morals," nor are they consistent with the *chapeau* of Article XX.

33. Fundamentally, denying trading rights to all foreign importers and to all privately owned Chinese importers cannot be justified under Article XX. Content review, China's concern here, is independent of importation and can be performed by individuals or entities unrelated to the importation process at any time before, during or after that process. China itself concedes this point, noting in its first written submission that CNPIEC – the monopoly importer of AVHE products and sound recordings – conducts content review before it even begins negotiating importation.[18] Moreover, Article 31 of the Films Regulation is equally instructive, providing that "[t]hose intending to import films for public screening shall, before importing, submit the film to the Film Censorship Board for review."[19] In other words, for imported films, the designated state-owned importer does not even perform the content review.

34. The measures at issue are not "necessary" within the meaning of Article XX, and they do constitute "arbitrary or unjustifiable discrimination" and a "disguised restriction on international trade." While China asserts that its selected importers play a critical role in content review, it never explains why the entities involved in content review need to monopolize the importation process. As the Appellate Body has stated, "a 'necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[20] Given the utter absence of a nexus between the challenged measures and the protection of public morals, China's measures denying trading rights lie far too distant from the pole of indispensability to qualify as "necessary" within the meaning of Article XX.

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[17] *US – Gasoline (AB)*, page 22-23.
[18] China's First Written Submission, para. 225.
[19] Exhibit US-20.
[20] *Korea – Beef (AB)*, para. 161.

35. Furthermore, the Appellate Body has not found a measure to be necessary where there is a "reasonably available WTO-consistent alternative".[21] Here, there are many such alternatives at hand. Content review can be conducted before, during or after importation by any number of entities, with no need to give China's state-owned enterprises a monopoly on importing. Indeed, China's "in-house" content review regime for domestic producers offers a fully WTO-consistent alternative to China's measures. The existence of this regime by itself demonstrates that China's measures are not necessary.

36. China's arguments regarding the *chapeau* of Article XX are equally unpersuasive. Under the *chapeau*, "measures are not [to be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

37. As applied, China's measures ban foreign and private Chinese importers from the business of importing the Products into China, thereby protecting the business interests of a limited group of Chinese state-owned enterprises. China has never explained why content review cannot be conducted by foreign enterprises, foreign individuals and privately held enterprises in China. Nor has it shown why entities engaging in content review must also be the exclusive importers of the Products into China.

38. Before we leave this topic, Mr. Chairman, one further aspect of China's *chapeau* analysis deserves mention. China's statement that domestic producers of reading materials, finished AVHE products, and finished sound recordings are confronted with limitations comparable to those on foreign producers is most remarkable, and in our view, does not reflect the facts.[22] First,

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[21] *US – Gambling (AB)*, para. 308. *See also Korea – Beef (AB)*, para. 166.

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

domestic enterprises producing these products are allowed to review these contents in-house,[23] while no foreign enterprises are permitted to conduct the review of these imported products.[24]

39. Second, these domestic products do not undergo the extra layer of government review that imported products must face. Regulations governing these domestic products provide only a list of prohibited content and establish that each publisher has "editorial responsibility" for its own products.[25] In contrast, imported products face mandatory government review procedures. Regarding reading materials, the General Administration of Press and Publications (GAPP) is required to review the catalogue of proposed imports and is authorized to intervene in the day-to-day content review of these imports. For AVHE products and sound recordings, importers must submit these products directly to the Ministry of Culture (MOC) for content review.[26]

IV. TRADE IN SERVICES: CHINA'S MEASURES PROHIBITING FOREIGN-INVESTED ENTERPRISES FROM ENGAGING IN MASTER DISTRIBUTION, MASTER WHOLESALE AND WHOLESALE OF READING MATERIALS ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS

40. As part of its claims under Article XVII of the GATS, the United States challenges four sets of discriminatory prohibitions on foreign-invested enterprises engaging in the wholesale of reading materials. China chose not to address U.S. claims with respect to three of these bans: (1) China's prohibition on the distribution of imported newspapers and periodicals; (2) China's prohibition on the distribution of imported books and imported electronic publications in the "limited distribution category"; and (3) China's prohibition on the distribution of imported books and electronic publications in the "non-limited distribution category."

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[23] Management Regulation, Articles 25-28 (Exhibit US-7); and Audiovisual Regulation, Articles 3 and 16 (Exhibit US-16).

[24] Management Regulation, Articles 44-45 (Exhibit US-7); Audiovisual Regulation, Article 28 (Exhibit US-16); and Audiovisual Import Rule, Articles 6 and 11-18 (Exhibit US-17).

[25] Management Regulation, Articles 25-28 (Exhibit US-7); Electronic Publications Regulation, Articles 6-7 (Exhibit US-15); Audiovisual Regulation, Articles 3 and 16 (Exhibit US-16).

[26] Management Regulation, Articles 44-45 (Exhibit US-7); Audiovisual Regulation, Article 28 (Exhibit US-16); and Audiovisual Import Rule, Articles 6 and 11-18 (Exhibit US-17).

41. China only attempts to address the fourth set of concerns raised by the United States – that is, concerns about China's discriminatory prohibition on foreign-invested enterprises engaging in the master distribution of books, newspapers and periodicals and the master wholesale and wholesale of electronic publications. However, China's efforts fail.

42. China contends that it made no commitment with respect to master distribution in Sector 4B of its Services Schedule. It asserts without citation that master distribution is a unique form of distribution distinct from traditional distribution in which "the entire distribution channel will be handled by a single exclusive distributor."[27] At the same time, China asserts in contradictory fashion that master distribution simply "corresponds to *retailing services*" rather than wholesaling.[28]

43. China's own statements and measures belie these claims. In fact, as China concedes, master distribution is a form of distribution[29] that is synonymous with master wholesale (*Zong Pi Fa*).[30] Several Chinese regulations and other sources confirm, in turn, that master distribution is also known as "first-level wholesale", and is the right to organize the distribution of a particular reading material, which includes the right to designate which "second-level wholesalers" may distribute the publication in a certain region of China.[31] Thus, master distribution or "first-level wholesale" is included in China's commitments under Sector 4B of its Services Schedule.

44. Turning to the prohibition on foreign-invested enterprises engaging in the master wholesale and wholesale of electronic publications, China contends that the Electronic Publications

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[27] China's First Written Submission, paras. 254-255.

[28] China's First Written Submission, para. 283.

[29] China's First Written Submission, para. 255.

[30] China's First Written Submission, para. 259.

[31] *See Interim Rules on the Management of the Master Distribution of Books*, Issued by the General Administration of Press and Publications and the State Administration of Industry and Commerce, May 11, 1991, Xin Chu Lian Zi [1991] No. 7, Article 2 (Exhibit US-56); *Several Opinions on Cultivating and Standardizing Books Market*, Issued by the General Administration on Press and Publications, June 1, 1996, Xin Chu Fa [1996] No. 367, Section III (excerpts) (Exhibit US-57); and Chen Min, "Book Selling Turns a Page for Eastern China's Wholesale Mart", Hong Kong Trade Development Council, March 24, 2005 (Exhibit US-58).

Regulation[32] was replaced in April 2008, rendering the concept of master wholesale "obsolete" and removing the prohibition on foreign investment in the wholesale of these products.[33]

45. However, the measure cited by China replacing the Electronic Publications Regulation does not in fact replace the key provisions of this measure – the Electronic Publications Regulation – for the purposes of this dispute. It may replace the provisions of the 1997 regulation related to production, publishing and importing, but it does not cover the distribution of electronic publications.[34] Furthermore, Article 63 of the new measure states explicitly that the old regulation's provisions continue to govern in areas where the new measure does not apply. Accordingly, the ban preventing foreign-invested enterprises from engaging in the master wholesale and wholesale of these products is unchanged.

46. Of course, even if China's new measure had replaced the old regulation, the United States would continue to seek a finding with respect to the Electronic Publications Regulation that was included in our panel request. This measure is properly before the Panel and is included in the Panel's terms of reference.

47. In this connection, the two GAPP approval decisions submitted by China as evidence that foreign-invested enterprises have been able to engage in electronic publications wholesale since 2006 do not resolve our concerns.[35] Perhaps most importantly, these approvals were contrary to the Electronic Publications Regulation, and as we have pointed out, the provisions on distribution in this Regulation continue to be in effect. These provisions prohibit foreign-invested enterprises from engaging in the wholesale of electronic publications.[36]

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[32] Exhibit US-15.
[33] China's First Written Submission, paras. 259-266.
[34] Article 2, *Provisions on the Administration of Publishing Electronic Publications* (Exhibit CN-20).
[35] China's First Written Submission, para. 266 and Exhibits CN-42 and CN-43.
[36] Article 62, Electronic Publications Regulation (Exhibit US-15).

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

48. We would now like to discuss China's argument with respect to the electronic distribution of sound recordings and China's obligations under Article XVII of the GATS. Article XVII:1 of the GATS provides that "subject to any conditions and qualifications set out" in a Member's schedule, "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." Moreover, under Article XVII:3, treatment "shall be considered less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

49. As set forth in the U.S. first written submission, China maintains numerous measures that accord less favorable treatment to foreign-invested distributors of sound recordings engaged in electronic distribution than to wholly Chinese-owned distributors.[37] As China inscribed no relevant market access limitations and no national treatment limitations with respect to the distribution of sound recordings in Sector 2D of its Services Schedule, these measures are inconsistent with Article XVII of the GATS.

50. China does not address the U.S. claims that the measures at issue treat foreign-invested enterprises less favorably than wholly Chinese-owned entities. Instead, China's defense to this claim rests on the argument that China did not undertake commitments in its Services Schedule with respect to the electronic distribution of sound recordings, but only with respect to distribution of hard-copy sound recordings. China's arguments are mistaken.

51. The proper application of the customary rules of treaty interpretation reflected in the *Vienna Convention on the Law of Treaties* leads to the conclusion that China's national treatment

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

commitments with respect to sound recordings distribution services include the electronic distribution of sound recording and this conclusion is consistent with the principle of technological neutrality. In addition, China's contention that the electronic distribution of sound recordings was not a commercial reality at the time of its accession and therefore could not have been contemplated by China as part of its services commitments is not supported by the facts.

Article 31 of the Vienna Convention

52. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Consistent with Article 31 of the Vienna Convention, let us begin with an analysis of the ordinary meaning of the relevant terms of China's commitments. In Sector 2D of its Services Schedule, China inscribed no limitations on market access or national treatment under mode 3 with respect to "sound recording distribution services."

53. The ordinary meaning of "recording" is "the action or process of recording audio or video signals for subsequent reproduction" or "recorded material."[38] Thus, the ordinary meaning of "recording" does not distinguish between recordings of sound stored on physical media or those stored electronically. Distribution of sound recordings thus includes distribution of any recorded sound, whether in hard-copy or electronic. Accordingly, the ordinary meaning of the term "sound recording distribution" includes electronic distribution of sound recordings. China's assertion to the contrary is incorrect.

54. The definitions of certain terms in the GATS provide relevant context for the interpretation of China's commitments. Article I:3(b) of the GATS defines services broadly to "includ[e] any service in any sector except services supplied in the exercise of government authority." In addition, Article XXVIII(e)(i) defines "sector" to mean "with respect to a specific commitment, one or more, or all, subsectors of that service as specified in a Member's Schedule." As the

[38] *The New Shorter Oxford English Dictionary*, p. 2506 (Exhibit US-59).

Appellate Body stated in *US – Gambling*, "because the GATS covers *all* services except those supplied in the exercise of government authority, it follows that a Member may schedule a specific commitment in respect of *any* service."[39] Similarly, the panel in *US – Gambling* reasoned that: "a market access commitment . . . implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member's schedule . . . . If a Member desires to exclude market access with respect to the supply of a service through one, several or all means of delivery . . . , it should do so explicitly in its schedule."[40] However, China scheduled no limitations on national treatment with respect to electronic or any other type of delivery of sound recording distribution services. In light of the ordinary meaning of "sound recording distribution" and the context, China's national treatment commitments in this sector include the electronic distribution of sound recordings.

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

56. In addition, China's position, if accepted, would suggest that the GATS and Members' commitments must be renegotiated each time a new technology results in a new means of supplying a service. This would be an unworkable outcome. The GATS is sufficiently dynamic to cover new technological innovations affecting the delivery of services. Indeed, a contrary result, would be inconsistent with the principle of technological neutrality, which we will discuss in more detail.

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[39] *US – Gambling (AB)*, para. 180 (emphasis in original).
[40] *US – Gambling (Panel)*, para. 6.286.

57. In short, an analysis of the ordinary meaning of the relevant terms under Article 31 of the Vienna Convention demonstrates that China's national treatment commitments cover the electronic distribution of sound recordings.

Article 32 of the Vienna Convention

58. China also erroneously raises supplementary means of interpretation under Article 32 of the Vienna Convention to arrive at the mistaken conclusion that China's commitments do not include the electronic distribution of sound recordings. As a threshold matter, it is important to recall that under Article 32 of the Vienna Convention, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

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

60. China contends that the electronic distribution of sound recordings was a new phenomenon that did not exist at the time of China's accession. Thus, China asserts that it could not have undertaken services commitments with respect to the electronic distribution of sound recordings. In fact, China's premise is false. An analysis of the "circumstances of [the] conclusion" of China's accession reveals that the electronic distribution of sound recordings was a reality long before China's accession and that China itself was aware of this development. Indeed, this is evident in many of the documents China itself has submitted.

61. For example, China cites to the testimony of David Hughes of Sony Music for the proposition that the electronic distribution of music has changed the business of selling music. In that same document Mr. Hughes states that he "first became involved in the digital distribution of music in September 1996,"[41] a time period well before China's WTO accession.

62. Additionally, China cites to an International Federation of the Phonographic Industry (IFPI) On-line Music Report from 2004 for the proposition that 2003 was the breakthrough year for on-line music services.[42] However, this report also states that the recent developments in online distribution of music "build on a process that goes back to 1998 when eMusic.com began selling MP3 singles and albums on the web in the U.S. Steamwaves, another American service, launched in 1999 and was one of the first to offer a streaming subscription service."[43]

63. Furthermore, China's own involvement in international fora dating back to the early 1990s demonstrates that China – like the WTO Members with which it was negotiating – was not only aware of the electronic distribution of music prior to its WTO accession, but was participating in discussions regarding electronic distributions and its implications for intellectual property rights. For example, in October 1995 at the WIPO World Forum on the Protection of Intellectual Creations in the Information Society, Mr. Shen Rengan, Deputy Director General of the National Copyright Administration of China in Beijing, participated in a working session that concerned among other issues, "digital transmission/delivery systems."[44] This was just one of multiple meetings during this time frame.

64. Within the WTO context, discussions regarding electronic delivery of services also took place prior to China's accession. For example, the Work Programme On Electronic Commerce - Progress Report to the General Council states that "[i]t was the general view that the electronic

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[41] Exhibit CN-56.

[42] Exhibit CN-57.

[43] Exhibit CN-57.

[44] WIPO World Forum on the Protection of Intellectual Creations in the Information Society agenda and excerpts (Exhibit US-60).

delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered, and that electronic delivery can take place under any of the four modes of supply. Measures affecting the electronic delivery of services are measures affecting trade in services in the sense of Article I of the GATS and are therefore covered by GATS obligations."[45]

65. Similarly, China itself submits a document from July 1998, which states that the GATS "makes no distinction between the different technological means by which a service may be delivered - whether in person, by mail, by telephone or across the Internet. The supply of services through electronic means is therefore covered by the Agreement in the same way as all other means of delivery."[46] This document from 1998 demonstrates that the electronic distribution of services was not only viewed as a reality well before China's accession, but also was viewed as covered by the GATS.

66. Another striking example of China's engagement with electronic distribution of music dates from early 2000 when a Houston-based company and the Government of China formed a joint venture to launch an MP3 website.[47] This was a website permitting the electronic delivery of sound recordings from the Internet to a user's MP3 music listening device. Published reports at the time made clear that "[t]he objective of the joint venture is to promote and develop Chinese music through the use of Houston InterWeb's advanced Internet technology both in China and overseas. By creating a gigantic MP3 portal for its 1.2 billion people, the Chinese government can not only promote and develop China['s] music industry, but it can also create a completely new, financially sustainable music distribution platform for its artists." Finally, numerous websites, such as chinamp3.com and suflash.com, were distributing music electronically in China prior to 2000.

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[45] *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).

[46] WTO Agreements and Electronic Commerce, WT/GC/W/90 (14 July 1998) (Exhibit CN-76).

[47] "MP3 Goes China - U.S. Company Inks Historical Internet Agreement with Chinese Government," *Business Wire* (February 29, 2000) (Exhibit US-61).

67. These circumstances surrounding the conclusion of China's WTO accession demonstrate that the electronic means of delivery for music were part of the landscape as China's commitments were being negotiated, and that China and its negotiating partners were aware that music was being distributed electronically at the time of China's accession.

68. Even if China were correct that it did not intend to make a commitment with respect to the electronic distribution of sound recordings, in *US – Gambling*, the panel made clear that a Member's intent is not relevant in discerning whether the Member has a commitment with respect to a particular means of delivery. Instead, the relevant question is whether the Member, in its schedule, explicitly excluded a particular means of delivery from its market access commitments.[48] Because China did not explicitly exclude electronic distribution of sound recordings from its national treatment obligations under mode 3, China's services commitments include this form of distribution.

Technological Neutrality

69. The U.S. interpretation of China's schedule is also consistent with the principle of technological neutrality, which China attempts to dismiss. In *US – Gambling*, the panel stated that "a market access commitment . . . implies the right of other Members' service suppliers to supply a service through *all* means of delivery."[49] As the panel in *US – Gambling* noted, this line of reasoning is consistent with the principle of technological neutrality recognized by the Work Programme On Electronic Commerce - Progress Report to the General Council. This report states that: "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."[50] This stated understanding of the GATS also means that a

[48] *US – Gambling (Panel)*, para. 6.286.

[49] *US – Gambling (Panel)*, para. 6.281.

[50] *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).

commitment with respect to sound recording distribution services in a Member's schedule includes electronic delivery as a means of distributing sound recordings.

70. China's effort to dismiss the principle of technological neutrality appears to rest on two flawed arguments: (1) technological neutrality is not relevant because electronic distribution of sound recordings is not merely a new type of delivery of an existing service; and (2) the principle of technological neutrality would require Members to make commitments with respect to services that are not yet known to exist.

71. As we have discussed, China has failed to demonstrate the electronic distribution of sound recordings was "new" at the time of its accession. Even if China were correct, China fails to establish that the electronic distribution of music is anything more than a new form of supply of an existing service. Accordingly, China's theoretical concerns about making commitments regarding totally novel services that have never been imagined in any shape or form are not relevant to this dispute.

72. China engages in a lengthy but fruitless discussion of the ways in which the mechanics of distributing hard-copy media containing music versus electronic distribution differ. At the end of the day, this discussion only confirms the point that electronic distribution of sound recordings merely constitutes a modern means to supply an existing service. Specifically, China states that from the consumer's perspective, electronic distribution of music is different from the sale of hard-copy media because "consumers can access or buy and receive music immediately from any computer with internet access, without having to visit a store, at any time and from anywhere."[51] China fails to explain why easier and more rapid distribution, or distribution that more efficiently matches supply and demand, is no longer distribution. Indeed, new means of delivery will often involve the use of new distribution models. China fails to explain how these distinctions amount to a "new service" rather than simply a new means of delivery for an existing service.

[51] China's First Written Submission, para. 496.

73. In addition, if China's arguments were accepted, WTO Members could invoke this reasoning to evade services commitments any time a new means of delivering a service was developed. For example, upon the advent of Internet sales of many commercial items, including hard-copy CDs, Members could have argued that such means of distribution were beyond the scope of their services commitments because the Internet distribution model differs from existing distribution models.

74. China points out that for the electronic distribution of sound recordings, the reliability of content and operating systems and the use of IT specialists become more relevant. These factors also became more relevant with the development of Internet sales of hard-copy CDs. Similarly, China notes that with electronic distribution of sound recordings, consumers need not visit retail outlets and can take advantage of "simplicity of use, personalization, efficient searches on albums and artists."[52] Websites that sell hard-copy CDs are likely to market the same features. For example, amazon.com offers recommendations to users based on the users' prior purchases and searches, and customers can search for specific items, including albums and artists, based on their interests. Despite these common features, China is not arguing that Internet sales of hard-copy CDs should be excluded from the scope of its or any other Members's services schedule.

75. On the other hand, the principle of technological neutrality is consistent with the concept that the GATS is sufficiently dynamic so that Members need not renegotiate the Agreement or their commitments in the face of ever-changing technology.

76. In sum, electronic distribution of sound recordings is within the scope of China's national treatment commitments for "sound recordings distribution services." Accordingly, China's measures according less favorable treatment to foreign-invested enterprises engaged in the electronic distribution of sound recordings are inconsistent with Article XVII of the GATS.

[52] China's First Written Submission, para. 426.

VI. TRADE IN GOODS: CHINA'S MEASURES REGARDING DISTRIBUTION OF HARD-COPY SOUND RECORDINGS INTENDED FOR ELECTRONIC DISTRIBUTION ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

77. Turning to the next topic of our oral statement, we would like to address China's defense to our claim under Article III:4 of the GATT 1994 as it relates to imports of hard-copy sound recordings intended for electronic distribution. The relevant measures subject these imports to a more onerous and lengthy content review regime than domestic like products. Accordingly, these measures accord less favorable treatment to imports in contravention of Article III:4 of the GATT 1994.

78. China makes several unsuccessful arguments in attempting to rebut this claim. First, China misunderstands the U.S. claim here by arguing that the electronic distribution of sound recordings is not covered by the GATT 1994, because the GATT 1994 only covers trade in goods. However, the U.S. claim applies only to measures affecting imports of hard-copy media containing sound recordings that are *intended for electronic distribution after importation*. The claim does not deal with the provision of electronic distribution services. Accordingly, China's ensuing discussion of the distinction between goods and services is not relevant to this dispute.

79. China also asserts that the challenged measures are "border measures" at the importation stage and therefore do not affect the distribution of products that have already been imported. China's argument is misplaced. The Ad Note to GATT Article III provides that internal measures applicable to both an imported product and the domestic like product that are enforced for imported products upon importation are internal measures, not border measures.

80. In this case, the measures at issue impose content review-related legal requirements on both imported and domestic hard copy CDs that they must fulfill before distribution inside China. The legal hurdles facing the imported hard-copy CDs are administered at the Chinese border, while domestic goods must meet their obligations prior to internal distribution. The fact that the

content review may take place upon importation for imports does not transform the measure into a border measure.

81. This conclusion is in fact confirmed by China's next argument, which turns its assertions regarding "border measures" on their head. China argues that the rationale behind the content review requirements for imports is to ensure that in the process of transferring content from the hard copy format to the digital format, China seeks to ensure that the content "has not been altered during its conversion into digital format."[53] China provides no support for this assertion, but this claim does reveal that China does not view this measure as a "border measure," since the conversion into digital form will only occur during the internal distribution process inside China.

82. Furthermore, even if China's concerns about alteration of content were valid, there is no reason that the same content review process should not apply to domestic sound recordings in hard-copy format that are to be transferred to digital format. China fails to justify the less favorable treatment accorded to imports of sound recordings intended for electronic distribution.

83. Once the inaccuracies in China's arguments are clarified, and the remaining defenses are scrutinized, nothing remains of China's defense with respect to the discriminatory treatment of imported hard copy sound recordings intended for electronic distribution. As set forth in our first written submission, contrary to its obligations under Article III:4 of the GATT 1994, China's measures accord less favorable treatment to imports of these products than to domestic like products.

VII. CHINA'S MEASURES ARE PROPERLY BEFORE THE PANEL AND WITHIN THE PANEL'S TERMS OF REFERENCE

84. Finally, China raises numerous objections regarding the Panel's terms of reference. These objections tie into aspects of our claims, some of which we have not discussed this morning, solely

[53] China's First Written Submission, para. 571.

in the interest of time. We will provide a thorough rebuttal of all of China's efforts to defend against our claims in our second written submission and are happy to answer any questions the Panel may have. We would like now to discuss the principal reasons why China's objections related to terms of reference have no merit and should be dismissed by the Panel.

Film Distribution and Projection Rule

85. First, in response to the U.S. trading rights claims regarding films for theatrical release, China contends that the Film Distribution and Projection Rule[54] is a measure that is not within the Panel's terms of reference, because it was not identified in the U.S. panel request.[55] China's objection is unavailing for two reasons.

86. The Film Distribution and Projection Rule is included in the U.S. panel request with respect to our trading rights claims. The U.S. panel request describes the measures at issue as the failure to "allow[] all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China the following products (collectively, the "Products"): films for theatrical release . . . ." The Film Distribution and Projection Rule is a legal instrument that falls within the scope of the measure described by this narrative.

87. Moreover, under Section I of the U.S. panel request, which addresses trading rights, the United States identified a series of measures – such as the Films Regulation[56] and the Provisional Film Rule[57] – involved with China's trading rights regime, and included, as well in this connection, "any amendments, related measures or implementing measures". The Film Distribution and Projection Rule is closely and directly related to both the Film Regulation and the Provisional Film Rule, which all explicitly address the importation of films for theatrical release. These measures constitute the legal foundation for China's film import regime.

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[54] Exhibit US-21. *See* China's First Written Submission, paras. 24-28.
[55] China's First Written Submission, paras. 24-28.
[56] Exhibit US-20.
[57] Exhibit US-21.

88. In this regard, we recall the panel's finding in *EC – Bananas III* that the inclusion of the following language – "subsequent EC legislation, regulations, and administrative measures . . . which implement, supplement and amend [the bananas] regime" – satisfied the specificity requirement of Article 6.2 of the DSU as it "adequately identified" the measures at issue, although those measures were not explicitly listed in the panel request.[58]

89. Furthermore, as the panel stated in *Japan – Film*, measures that are not specified in a Member's panel request can nonetheless be included in that request if they are "subsidiary or closely related to" measures that are specified in that request.[59] Here again, the Film Distribution and Projection Rule is closely related to both the Film Regulation and the Provisional Film Rule in that it focuses specifically on, and elaborates upon, the film import regime addressed in these two measures.

90. For these reasons, the Film Distribution and Projection Rule is included in the U.S. panel request and is part of the Panel's terms of reference.

Several Opinions, Importation Procedure and Sub-Distribution Procedure

91. China also asserts that the Several Opinions,[60] the Importation Procedure[61] and the Sub-Distribution Procedure[62] should not be examined by the Panel. However, these measures are specifically identified in the U.S. panel request and are part of the Panel's terms of reference. They are each legally binding on the agencies that issued them, represent the type of legal document widely used in routine administration, and are fully recognized in the Chinese administrative law regime.

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[58] *EC – Bananas III (Panel)*, paras.7.22-7.27.
[59] *Japan – Film (Panel)*, paras. 10.8-10.9.
[60] Exhibit US-6. *See* China's First Written Submission, fn. 49 and 147.
[61] Exhibit US-8. *See* China's First Written Submission, fn. 49.
[62] Exhibit US-29. *See* China's First Written Submission, fn. 125.

92. The Several Opinions were issued by five key agencies responsible for the various Products at issue here – MOC; the State Administration of Radio, Film and Television ("SARFT"); GAPP; the National Development and Reform Commission ("NRDC") and the Ministry of Commerce ("MOFCOM") – and they were approved by the State Council – the executive body of the highest organ of state power.[63] This measure is one of the measures regulating the importation of the Products and was issued to all provincial, autonomous regional, and municipal governments, all ministries, commissions and agencies under the State Government, and all provincial, autonomous regional and municipal organs of GAPP, MOC, MOFCOM, NRDC, and SARFT in order to be "implemented earnestly." The legal weight of this document is further demonstrated by the State Council's approval.

93. The Importation Procedure and Sub-Distribution Procedures were issued by, and are legally-binding on, GAPP. The Importation Procedure states explicitly that it implements Article 43 of the Management Regulation, which addresses the application and approval process for "publication import entities." It sets out the requirements and examination and approval procedures for applicants seeking to import reading materials into China. While it may be found on GAPP's website, as China notes, so are many of the other challenged measures. That in no way detracts from its status as a measure subject to challenge before the Panel.

94. Likewise, the Sub-Distribution Procedure implements State Council Order No. 412 (State Council Decision on Setting Up Administrative Licensing for Administratively Examined and Approved Projects That Truly Need to be Preserved). The Sub-Distribution Procedure sets out the requirements and examination and approval procedures for foreign-invested enterprises seeking to engage in the sub-distribution of books, newspapers and periodicals published in China. While it may also be found on GAPP's website, so are many of the other challenged measures. As with the Importation Procedure, this measure is more than mere "guidance for applicants;" it fulfills

[63] China's Working Party Report, para. 66 (Exhibit US-3).

GAPP's administrative law obligations by implementing and elaborating upon China's legal regime governing the importation and sub-distribution of reading materials.

Pre-Establishment Legal Compliance, Approval Process and Decision-Making Criteria

95. The United States has made several claims regarding the inconsistency of Chinese measures with Article XVII of the GATS. China erroneously asserts that three discriminatory requirements – pre-establishment legal compliance, approval process, and decision-making criteria applicable to the distribution of reading materials and AVHE products – are not within the Panel's terms of reference because they were not spelled out in the U.S. panel request.[64]

96. Article 6.2 of the DSU provides that a party requesting establishment of a panel "shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consistent with this requirement, Section II of the U.S. panel request identified all of the measures that provide for these three problematic requirements – *i.e.*, the Foreign-Invested Sub-Distribution Rule, the Publication Sub-Distribution Procedure, the Audiovisual Sub-Distribution Rule, and the Several Opinions. The United States also identified the WTO obligation that these measures breached. Accordingly, the United States has satisfied Article 6.2 of the DSU by identifying each of the measures relevant to its claim. Contrary to China's contentions, Article 6.2 does not require the party requesting a panel to identify each individual provision of the relevant measures that may be inconsistent with the other party's obligations.

97. China's reliance on *Japan – Film* and *US – Carbon Steel* in this connection is misplaced. In both of those disputes, the complaining party sought to incorporate measures not identified in the panel request into the terms of reference.[65] This situation is not an issue in this dispute, since the U.S. panel request identified each of the measures relevant to the three discriminatory

[64] China's First Written Submission, paras. 237-250.
[65] *Japan – Film (Panel)*, paras. 10.7-10.20; and *US – Carbon Steel (AB)*, para. 171.

requirements at issue here. This, together with identification of the relevant WTO obligation being breached, provided China with sufficient notice regarding the measures and claims at issue. Accordingly, China's measures setting forth these discriminatory requirements are within the Panel's terms of reference.

Distribution Opportunities, Subscription Regime, Conditions on Subscribers and Electronic Publications

98. China also raises two sets of procedural objections with respect to certain elements of the U.S. Article III:4 claim regarding reading materials.[66]

99. First, China argues that the U.S. claim under Article III:4 of the GATT 1994 regarding different distribution opportunities for imported reading materials was not addressed during consultations and, therefore, is not part of the Panel's terms of reference. This objection is without merit, as the legal bases contained in a party's consultation request and panel request need not be identical. As the Appellate Body concluded in *Mexico – Rice*, a "precise and exact identity" between the legal bases included in a consultation request and those included in a panel request is not required.[67]

100. Moreover, the United States and China consulted extensively on the Chinese distribution regime for reading materials. As a result of those consultations, it became clear to the United States that China's regime raised additional concerns with respect to the discriminatory distribution restrictions placed on imported reading materials. We note in this context that the Appellate Body has recognized that an important rationale of consultations is to afford the parties the opportunity to engage in an "exchange of information necessary to refine the contours of the dispute, which are subsequently set out in a panel request".[68] The U.S. claim under Article III:4 regarding different

[66] China's First Written Submission, paras. 523-536.
[67] *Mexico – Rice (AB)*, para. 137-138.
[68] *Mexico – Rice (AB)*, para. 138.

distribution opportunities for imported reading materials is therefore included in the Panel's terms of reference.

101. Second, China contends that certain aspects of the discriminatory treatment accorded to reading materials – that is, aspects related to China's subscription regime for imported reading materials, to the conditions imposed on subscribers, and to electronic publications – were not mentioned in the U.S. panel request and are not measures included in the Panel's terms of reference. However, China's objection in this GATT III:4 context is unavailing for the same reasons that we identified a few moments ago in the context of China's objection to the inclusion of three discriminatory requirements in our claims under Article XVII of the GATS. That is, Article 6.2 of the DSU requires the identification of each measure relevant to a particular claim, but does not require the complaining party to identify each individual provision of the relevant measure.

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

103. Accordingly, China's objections regarding the inclusion of the subscription regime for imported reading materials, the conditions imposed on subscribers, and the discriminatory treatment of imported electronic publications as measures in the Panel's terms of reference should be dismissed.

Audiovisual Regulation and Audiovisual Import Rule

104. Finally, China argues that the Audiovisual Regulation and the Audiovisual Import Rule are not in the Panel's terms of reference for purposes of our claims under Article III:4 of the GATT 1994 because these measures were not included in the U.S. panel request.[69]

105. The Audiovisual Regulation and the Audiovisual Import Rule are within the Panel's terms of reference. First, these two instruments fall within the scope of the narrative in the U.S. panel request describing the measure at issue, which states that China "provid[es] distribution opportunities for sound recordings imported into China in physical form that are less favorable than the distribution opportunities for sound recordings produced in China."

106. Second, the section of the U.S. panel request dealing with the GATT 1994 includes the Internet Culture Rule,[70] the Internet Culture Notice[71], the Network Music Opinions,[72] the Catalogue,[73] and the Several Opinions[74] as well as "any amendments, related measures, or implementing measures." The Audiovisual Regulation and Audiovisual Import Rule are closely related to the other measures specifically listed in that request and therefore are within the Panel's terms of reference.

107. Finally, these measures also properly fall within the Panel's terms of reference under the panel's reasoning in *Japan – Film*. In that case, the panel stated that "the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claim asserted by the complaining party."[75]

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[69] China's First Written Submission, paras. 555-557.
[70] Exhibit US-32.
[71] Exhibit US-33.
[72] Exhibit US-34.
[73] Exhibit US-5.
[74] Exhibit US-6.
[75] *Japan – Film (Panel)*, para. 10.8.

108. The U.S. claim regarding the national treatment of hard copies of sound recordings intended for electronic distribution addresses the discriminatory nature of China's content review regime. The provisions of the Audiovisual Regulation and the Audiovisual Import Rule that have been cited by the United States specifically govern that content review regime as it applies to imported and domestic hard copies of sound recordings. These provisions are in turn fundamentally related to the measures specifically identified in the U.S. panel request, which address China's content review regime for hard-copy sound recordings intended for electronic distribution. The Panel should find, therefore, that the Audiovisual Regulation and the Audiovisual Import Rule are within its terms of reference.

VIII. CONCLUSION

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

TABLE OF EXHIBITS

U.S. Exhibit No.	Description
US-52	Summary of WTO-Inconsistencies
US-53	World Customs Organization, Explanatory Notes, VI-3706-1, (4th Ed. 2007)
US-54	Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991)
US-55	World Customs Organization, Explanatory Notes, VI-8523-1, (4th Ed. 2007)
US-56	Interim Rules on the Management of the Master Distribution of Books (1991)
US-57	Several Opinions on Cultivating and Standardizing Books Market (1996)
US-58	"Book Selling Turns a Page for Eastern China's Wholesale Mart," *Hong Kong Trade Development Council* (March 24, 2005)
US-59	*The New Shorter Oxford English Dictionary* (5th ed. 2002), p. 2506
US-60	WIPO World Forum on the Protection of Intellectual Creations in the Information Society agenda and excerpts (October 1995)
US-61	"MP3 Goes China – U.S. Company Inks Historical Internet Agreement with Chinese Government," *Business Wire* (February 29, 2000)