DS363 China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products

Third Party Written Submission
by the European Communities

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I. INTRODUCTION

1. The European Communities makes this third party written submission because of its systemic interest in the correct interpretation of the General Agreement on Tariffs and Trade (GATT 1994) and the General Agreement on Trade in Services (GATS). Given the limited time available for the preparation of this submission, the European Communities does not comment on all the legal issues raised in this dispute, but reserves the possibility to do so at a later stage in the proceedings.

II. TRADING RIGHTS AND CHINA'S WTO ACCESSION PROTOCOL

2. The European Communities would like to comment on the various issues relating to China's "trading rights" commitments set out in paragraphs 5.1, 5.2 and 1.2 of China's Accession Protocol as well as paragraphs 83 and 84 of China's Working Party Report.

3. The United States submits that China is committed to provide all enterprises in China and all foreign enterprises and foreign individuals the right to trade in all goods except those listed in Annexes 2A and 2B of China's Accession Protocol, and that these commitments extend to what the United States terms as "the Products, i.e. reading materials (including books, periodicals, newspapers and electronic publications), AVHE products (including videocassettes, VCDs and DVDs), sound recordings and films for theatrical release, as none of the Products is listed in either Annex."1 The United States claims that through a variety of measures, "China refuses to permit any foreign enterprises or foreign individuals to import the Products, and likewise only allows a subset of enterprises in China – i.e. wholly state owned Chinese enterprises approved or designated by the Chinese government – to import the Products."2 According to the United States this is inconsistent with China's obligations contained in Part I, paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol, as well as in paragraphs 83 and 84 of the Working Party Report.3

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1 United States' First Written Submission, paragraph 224.
2 Ibid, paragraph 227.
3 Ibid.
4. Paragraph 5.1 of China's Accession Protocol provides that:

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.4

5. Paragraph 5.2 of China's Accession Protocol states that:

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.

6. The United States interprets the terms "all enterprises in China" in paragraph 5.1 of the Protocol means that China is committed that "every enterprise throughout the customs territory of China, without exception shall have the right to trade",5 and that furthermore this "right to trade" applies to all goods except those listed in Annexes 2A and 2B of China's Accession Protocol.6 The United States argues that since none of the Products at issue in this dispute are listed in Annexes 2A and 2B, therefore "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 concerned. To limit

4 Emphasis added.
5 United States' First Written Submission, paragraph 237.
6 United States' First Written Submission, paragraphs 239-240.
7 However the United States contends that Annex 2B is not relevant to these proceedings is not relevant to these proceedings as none of the Products at issue in this dispute is covered by Annex 2B and that this limitation is no longer relevant to China's trading rights commitments, since it expired in 2004. – United States First Written Submission, paragraph 240.
the right to import any goods not listed in that Annex, including the Products concerned, would be inconsistent with China's trading rights commitments.”

7. The United States also refers to paragraphs 83 and 84 of the Working Party Report on China's Accession to the WTO and states that "read together, these provisions establish that all enterprises in China, all foreign enterprise 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. Moreover, none of the Products concerned is among those goods listed in Annex 2A of the Accession Protocol that are excluded from China's trading rights commitments."

8. Four Chinese measures were identified by the United States as being inconsistent with China's trading right commitments, namely the Catalogue, the Several Opinions, the Management Regulation, and the Importation Procedure. The United States argues that these measures are inconsistent with China's trading rights commitments by depriving foreign-invested, foreign enterprises and individuals of their right to import into China. These measures also restrict trading rights in a discriminatory manner, as they restrict the importation of reading materials, audiovisual products and sound recordings into China to wholly-stated owned Chinese enterprises.

9. China argues that it "has the right, under Paragraph 5.1 of the Accession Protocol, to impose restrictions and conditions to the grant of trading rights, such as the limitation of the right to import to a number of selected entities, provided that these measures are consistent with Article XX GATT".

10. China's main argument is that the Chinese regulations "establishing a system of selection of importation entities are fully justified under Article XX (a) GATT", which relates "to measures which are necessary to protect public morals".

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8 United States First Written Submission, paragraph 241.
9 United States First Written Submission, paragraphs 232-234.
10 United States First Written Submission, paragraphs 252-258.
11 The United States also identified a number of other measures, specifically to the different categories of goods at issue in this dispute in paragraphs 259-269 of its First Written Submission.
12 China's First Written Submission, paragraph 172.
13 China's First Written Submission, paragraph 175.
11. First of all the question arises if Article XX GATT 1994 applies to obligations arising from the Protocol of Accession. There is no WTO jurisprudence so far on whether the exceptions of Article XX GATT 1994, also apply to the provisions in China's Protocol of Accession, which may prescribe obligations that exceed the existing provisions found in the WTO Agreement, including the GATT 1994, which are also commonly described as "WTO-Plus Obligations".

12. In the view of the European Communities, Article XX GATT 1994 does not directly apply to Accession Protocol commitments. The reason for this is that Accession Protocol commitments are an integral part of the WTO Agreement, but not of the GATT 1994. The GATT 1994 is obviously also integral part of the WTO Agreement, but it is a different part amongst the various "parts" referred to in Article II:2 of the WTO Agreement. This makes sense, as it should only be logically possible to invoke exceptions within the specific agreement in which they are contained. It would appear obvious that exceptions contained in the TRIPS Agreement, could hardly become relevant in a GATT 1994 or GATS context. The EC does therefore hold the view that Article XX GATT 1994 is not directly applicable to Paragraphs 5.1 and 5.2 of the Chinese Accession Protocol as such. However, it is recalled that Paragraph 5.1 of the Chinese Accession Protocol is qualified by the opening clause: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". This may allow China to regulate trading rights, where these departures are in conformity with the WTO Agreement. Therefore the EC makes the following comments on China's suggested interpretation of Article XX GATT 1994.

13. In the opinion of the European Communities, even in a scenario in which the GATT 1994 regime is deemed to be applicable to the measures at issue, China would still have to satisfy the requirements set out in Article XX of the GATT 1994, and as specifically set out in the chapeau of this Article, in order for China to be able to say that it "regulate[s] trade in a manner consistent with the WTO Agreement".14

14. It is not the intention of the European Communities to comment on the Chinese system of content review which is deemed necessary by the Chinese authorities in order to protect public morals in China, however it is important to note that the requirements of all

14 Paragraph 5.1 of China's Accession Protocol.
relevant elements of Article XX of the GATT 1994 need to be met in order for this provision to be successfully invoked.

15. In fact the *chapeau* of Article XX GATT 1994 provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

16. This provision was repeatedly interpreted by the WTO Appellate Body\textsuperscript{15}, where it clearly stated that:

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

17. Moreover, in a later dispute\textsuperscript{16}, the Appellate Body amplified further on the standards established in the chapeau of Article XX GATT 1994 and stated that:

The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "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." (emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

18. In *Brazil – Retreaded Tyres*\textsuperscript{17} the Appellate Body commented on the application of the chapeau of Article XX GATT 1994 and stated that:


\textsuperscript{16} *US-Shrimp* (AB) WT/DS58/AB/R adopted on the 6 November, 1998, paragraph 120.
Accordingly, the task of interpreting and applying the chapeau is the "delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement." The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."

19. In the opinion of the European Communities what is really at issue in this dispute is not the system of content review in China, which as the Chinese submission describes in detail, is intended to protect the public morals of the Chinese people. What is at issue, rather, is whether the "trading rights" of non-Chinese enterprises and individuals are being adversely affected, through the application of Chinese measures which restrict the importation of reading materials and other audiovisual products, specifically, and only, to certain entities. Other entities that wish to engage in this type of trading in fact are prohibited or restricted from doing so.18

20. As the United States submits, the Catalogue bans foreign-invested enterprises from importing reading materials and other audiovisual products, and likewise, the Several Opinions forbid foreign-invested enterprises, whether or not they are located in China, from importing the products in question. The European Communities contends that this results in a discriminatory treatment against non-Chinese enterprises, which also has the effect of protecting Chinese enterprises from competition from foreign enterprises.

21. Likewise, the Management Regulation and the Importation Procedure also restrict the importation of reading materials, and other audiovisuals products into China to wholly-state owned enterprises specifically designated by the Chinese government.

22. However, according to China, the selection process which limits the number of importation entities, is "justified in order to implement an effective and efficient content review", which "although it may result in limitations of the right to trade, it is in full

17 Brazil – Rethreaded Tyres (AB) WT/DS332/AB/R adopted on the 3 December 2007, paragraph 224.
18 United States' First Written Submission, paragraphs 253, 256-7, 261.
19 United States' First Written Submission, paragraphs 253 and 254.
20 United States' First Written Submission, paragraphs 255-257.
compliance with China's WTO rights and obligations."\textsuperscript{21} However, in order to establish whether China can successfully invoke Article XX GATT 1994, one needs to analyse if the restrictions imposed on trading rights, actually meet the "necessity" requirements of Article XX GATT 1994.

23. China argues that the actual selection of importation entities is a necessity for the protection of public morals of its citizens and actually describes it as a "decisive element of the effective and efficient content review mechanism for imported cultural goods".\textsuperscript{22} It also identifies a number of criteria which "contribute to the efficient implementation of the content review mechanism and to the fulfilment of its objective".\textsuperscript{23}

24. In fact China actually states that as most of the preparatory work necessary for the content review is actually carried out by these importation entities themselves,\textsuperscript{24} "it is important that the importation entities correctly understand the meaning, purpose, scope and manner of implementing the content review in accordance with the requirements of the relevant laws and regulations…”\textsuperscript{25} It even identifies the "material capacity of the entities", that is whether or not they have "sufficient technical equipment and knowledge" as an "additional element to take into consideration".\textsuperscript{26}

25. China also considers that the importation entities would need to employ "reliable, capable and competent personnel" who are specifically qualified to carry out "content review".\textsuperscript{27} Another factor or criterion, which China considers is the "importing entities' geographical presence within China and whether this corresponds to the development prescribed by the State's plans". These entities actually need to be "located close to the entry points of the goods into the Chinese territory".\textsuperscript{28}

26. China actually argues that in order for "content review to be efficient and smooth and its impact on trade in cultural goods to be limited, it is necessary that only a limited number of entities be authorised to engage in the importation of such products".\textsuperscript{29} It also

\textsuperscript{21} China's First Written Submission, paragraph 128.
\textsuperscript{22} China's First Written Submission, paragraph 195.
\textsuperscript{23} Ibid.
\textsuperscript{24} China's First Written Submission, paragraph 198.
\textsuperscript{25} China's First Written Submission, paragraph 197.
\textsuperscript{26} China's First Written Submission, paragraph 199.
\textsuperscript{27} China's First Written Submission, paragraph 210.
\textsuperscript{28} China's First Written Submission, paragraph 214.
\textsuperscript{29} China's First Written Submission, paragraph 216.
states that the limitation of the number of entities is actually an "important factor contributing to the prevention of the breaking of the rules" and that it "enables the administrative authorities to have efficient control over whether these entities comply with the rules and procedures on inappropriate content."  

27. In the opinion of the European Communities, the stringent requirements that the Chinese measures impose on the importing entities, do not meet the "necessity" test as required by Article XX GATT 1994. According to the Panel in Brazil-Retreaded Tyres: the necessity of a measure should be determined through "a process of weighing and balancing a series of factors", which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.

28. Moreover, according to the Appellate Body in Korea – Various Measures on Beef: The panel in United States – Section 337 described the applicable standard for evaluating whether a measure is "necessary" under Article XX(d) in the following terms:

"It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."

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30 China's First Written Submission, paragraph 217.
31 China's First Written Submission, paragraph 218.
The standard described by the panel in United States – Section 337 encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available.

29. The European Communities is of the view that the Chinese measures in question are having an extremely "restrictive impact on international commerce". It does appear to be possible to identify, other measures that may be reasonably available to China, that would be less restrictive. Therefore, China would thus not meet one of the main requirements of Article XX GATT 1994. It would still be possible for the Chinese authorities to implement a content review system, without almost completely restricting the right to trade in these goods to a very small number of Chinese entities. This is due to the fact that it is the content of the material itself which is subject to a review, and not the entity or individual who is actually importing it into China. The content review system could in the view of the European Communities still be implemented through a set-up which is operated separately, and definitely not as required at present, i.e. that the content review operation needs to be carried out by the importing entities themselves. This view is further supported by the fact that content review for domestic products can be efficiently performed without identical or similar curtailments as imposed on imported products.

III. CHINA'S COMMITMENTS IN THE DISTRIBUTION SECTOR UNDER THE GATS AND ITS SCHEDULE OF SPECIFIC COMMITMENTS

30. The European Communities would now like to make some comments on the issue of China's commitments in the Distribution Sector, as set out in its Schedule of Specific Commitments, where more specifically under Sub-sector B, "Wholesale Trade Services", it is specifically stated that under mode 3, as a limitation on market access:
Within one year after China's accession to the WTO, foreign service suppliers may establish joint ventures to engage in the commission agents' business and wholesale business of all imported and domestically produced products, except those 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…

31. China has not specified any limitations on national treatment under mode 3 of the same sub-sector.

32. The United States is alleging that foreign-invested enterprises are "forbidden from engaging in the master distribution of books, newspapers and periodicals"\(^{34}\), as the Foreign Investment Regulation and the Catalogue list the master distribution of books, newspapers and periodicals as an activity on which foreign investment is prohibited.\(^{35}\)

33. Moreover, the Chinese 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.\(^{36}\)

34. In its First Written Submission, China is alleging that the United States has provided this Panel with an inaccurate picture of the different Chinese concepts related to distribution,\(^{37}\) and then proceeds to explain that in China, "Fa Xing" is a generic term which covers different features of distribution, which is then further sub-divided into "two distinct distribution channels", to which it refers as "Zong Fa Xing" and "Fen Xiao."\(^{38}\)

35. China then explains that "Fen Xiao" corresponds to the "traditional conception" of distribution and can take place through wholesaling and retailing.\(^{39}\) It then goes on to exclude "Zong Fa Xing" from what it calls the "traditional distribution channel" and states further that when a product is subject to "Zong Fa Xing" the entire distribution channel is handled by a single exclusive distributor, and that it is a comprehensive "top to bottom" distribution channel, which is distinct from the "traditional distribution channel".\(^{40}\) China

\(^{34}\) United States' First Written Submission, paragraph 76.

\(^{35}\) Ibid.

\(^{36}\) United States' First Written Submission, paragraph 77.

\(^{37}\) China's First Written Submission, paragraph 251.

\(^{38}\) China's First Written Submission, paragraph 252.

\(^{39}\) China's First Written Submission, paragraph 253.

\(^{40}\) China's First Written Submission, paragraphs 255-256.
also states that the United States translation as a "Zong Fa Xing" as "master distribution" is not accurate, as this is a "genuine concept with no equivalent in English".41

36. China contends further that when "committing distribution services in its Schedule to the GATS, China never intended to include "Zong Fa Xing" in the scope of distribution services", but what it actually committed to is "wholesale" which it describes as a "category of Fen Xiao."42 Furthermore China states that if it "would have committed the genuine and specific Zong Fa Xing, it would have specified it explicitly in Annex 2 of its Schedule to the GATS."43

37. China bases its main argument that "Zong Fa Xing" falls under the heading of "Retail Distribution Services" (where it has somewhat different commitments in its GATS Schedule, but still full commitments in respect of the products at issue) and not "Wholesale Distribution Services", on the premise that "Zong Fa Xing" is operated exclusively by a single distributor, (which could be either the publisher or a commissioned Publication "Zong Fa Xing" entity)44, and that no other intermediaries are involved in the distribution channel, and thus, according to China, as this is not a "re-selling operation", but a direct-sale to the end-consumer, this is actually a "retail service".

38. The European Communities would like to comment on China's statement that it never intended to include "Zong Fa Xing" in the scope of distribution services. As observed by the Appellate Body in US-Gambling45:

Schedules also represent a common agreement among all Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members…

39. In the US-Gambling case, the Appellate Body had concluded that the United States had undertaken GATS commitments in the relevant sector46. As the Panel had commented in this same case, even if this had happened perhaps inadvertently, "the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the

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41 China's First Written Submission, paragraph 257.
42 China's First Written Submission, paragraphs 269-270.
43 China's First Written Submission, paragraph 273.
44 China's First Written Submission, paragraph 279.
time of the negotiations\textsuperscript{47}; and "independent from any expectation or any unintentional mistake, the United States' obligations pursuant to Article XVI.4 (of the WTO Agreement) are to ensure that its relevant laws are in conformity with its WTO obligations, including any commitments undertaken in its GATS Schedule.\textsuperscript{48} Therefore, China's intention at the time of committing distribution services in respect of "\textit{Zong Fa Xing}" is not incompatible with China actually having undertaken commitments covering "\textit{Zong Fa Xing}" as well. This is, as developed below, the view of the European Communities.

40. The European Communities would like to comment on some terminology related arguments put forward in China's First Written Submission. It seems that the attempt to define "\textit{Zong Fa Xing}" as a distinctively Chinese concept with no equivalent in English does no more than to create confusion. It is not uncommon in Europe and elsewhere that publishers sell their products directly to their consumers, or through agency agreements with sub-distributors.

41. Moreover, the use of a "distinctively Chinese concept" or terminology in Chinese legislation does not imply that the services covered under this concept or term do not fall under the relevant GATS sector or sub-sector. The terms used to describe the specific activities in China are irrelevant; the decisive question is whether the specific activities under "\textit{Zong Fa Xing}" fall within the GATS sector of distribution services, a sector for which China has undertaken very significant commitments.

42. China further argues that distribution services do not cover the initial sale to the first intermediary of the distribution channel\textsuperscript{49}. However, the European Communities wishes to recall what the Appellate Body concluded in the \textit{EC – Bananas III case}\textsuperscript{50}:

\begin{quote}
The Headnote to Section 6 of the CPC defines "distributive trade services" in relevant part as follows:

...the \textit{principal services} rendered by wholesalers and retailers may be characterized as \textit{reselling merchandise}, accompanied by a \textit{variety of related, subordinated services}... (emphasis added)
\end{quote}

\textsuperscript{48} \textit{US – Gambling}, Panel Report paragraph 6.138
\textsuperscript{49} China's First Written Submission, paragraph 276.
\textsuperscript{50} \textit{EC-Regime for the Importation, Sale and Distribution of Bananas} - WT/DS27/AB/R, paragraphs 226-227.
We note that the CPC Headnote characterizes the "principal services" rendered by wholesalers as "reselling merchandise". This means that "reselling merchandise" is not necessarily the only service provided by wholesalers. The CPC Headnote also refers to "a variety of related, subordinated services" that may accompany the "principal service" of "reselling merchandise". It is difficult to conceive how a wholesaler could engage in the "principal service" of "reselling" a product if it could not also purchase or, in some cases, import the product. Obviously, a wholesaler must obtain the goods by some means in order to resell them. In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place.

The second issue relates to "integrated companies". In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of those "wholesale trade services", that company is a service supplier within the scope of the GATS.

43. This supports our statement that China's definition of "Zong Fa Xing" is not necessarily relevant for the question of whether the relevant activities fall within China's distribution commitments. However, in the opinion of the European Communities, it does confirm that entities offering "Zong Fa Xing" do conduct activities that would fall under its distribution commitments, both under wholesaling and retailing services depending on the factual situation and the users that are supplied. Contrary to what China argues in its First Written Submission, excluding "Zong Fa Xing" from its commitments would have required an explicit exclusion in its GATS Schedule which does not figure in its Schedule. The consequence is that "Zong Fa Xing" is, indeed, covered.

44. What appears actually to be happening is that today, in China, when a foreign-invested enterprises tries to distribute reading material at a wholesale level, it is stopped from engaging in the master distribution of all reading materials, the distribution of all imported books, newspapers and periodicals, as well as the master wholesale and wholesale of all electronic publications.

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51 China's First Written Submission, paragraph 273.
52 United States' First Written Submission, paragraph 292.
45. This prohibition has the effect of radically modifying the effects of competition in favour of Chinese-owned wholesalers. In the opinion of the European Communities these measures are thus inconsistent with – at least - Article XVII of the GATS and with China's commitments under its Services Schedule of Specific Commitments.

IV. "TECHNOLOGICAL NEUTRALITY" UNDER THE GATS AND THE READING OF CHINA'S SCHEDULE OF SPECIFIC COMMITMENTS ON AUDIOVISUAL SERVICES.

46. The European Communities would now like to make some comments about China's considerations over "technological neutrality" under the GATS framework in relation to the interpretation of some of its specific commitments in the audiovisual services sector, more specifically where it made commitments under "sound recording distribution services". The only limitation that figures in China's schedule of commitments for this sub-sector, under mode (3) on market access, reads:

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).

47. From China's schedule one can infer that China did not make any other limitation, or any kind of restriction regarding the means of delivery of the services concerned. This would mean that service suppliers are free to supply these services unrestrictedly, through any means of delivery, subject to the restriction on market access in mode (3) as specified in China's Services Schedule. Moreover, if a Member would have wanted to restrict the supply of a service through any particular means of delivery, it should state so specifically in its Schedule of Specific Commitments.

48. As was held by the Panel, in US-Gambling53,

If a Member desires to exclude market access with respect to the supply of a service through one, several or all means of delivery included in mode 1, it should do so explicitly in its schedule.

49. The European Communities supports the position that the GATS Agreement is generally neutral to technology ("technological neutrality"). In the view of the European

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Communities, GATS principles apply to the delivery of services by electronic means and that market access and national treatment commitments made by WTO Members in their GATS Schedules of commitments guarantee the market access and national treatment conditions which bind each WTO Member for those services can be provided in a "traditional" format, but also through electronic means.

50. The technological neutrality of commitments, unless otherwise specified in the Services Schedule, was recognised as an issue for which there was a general view in the GATS Council discussion on Electronic Commerce, also in light of the fact that there are no specific provisions in the GATS "that distinguish between the different technological means through which a service may be supplied." Moreover, the rapid changes evident in modern technology essentially mean that there are changes in the way that services are delivered, and that this change is continuous.

51. For these reasons, while the European Communities does not intend to engage in a discussion on the policy issue regarding the scheduling of commitments in audiovisual services, it cannot agree with the view expressed by China that the new changes in digital technologies and communication networks, have necessarily resulted in the emergence of an entirely new type of services sector, which China is referring to as "Network Music Services", and which China distinguishes from "Sound Recording Distribution Services". It also does not agree with China's argument, that the "principal of technological neutrality is irrelevant in the present case".

52. The rapid growth of the internet and consequently of websites which allow the downloading of music against payment, essentially means that there have been developments in the way these services are being delivered, however, the essential characteristics of what constitutes a "sound recording distribution service" would appear to still be present.

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55 China's First Written Submission, paragraphs 392-442.
56 China's First Written Submission, paragraphs 492-499.
V. THE CLASSIFICATION ON "VIDEOS, INCLUDING ENTERTAINMENT SOFTWARE AND DISTRIBUTION SERVICES"

53. The EC has noted with interest the United States' comments on the coverage of "videos, including entertainment software and distribution services". Indeed, while this question refers to multilateral discussions on the classification of certain services, the technical aspects highlighted in the United States' submission\(^{57}\), point to the classification of items like videogames under the sector of audiovisual services. Moreover, these types of services are regarded as audiovisual services for the purpose of regulatory and support policies of the European Communities.

VI. APPLICABILITY OF ARTICLE III.4 GATT TO SERVICES

54. In the opinion of the European Communities Article III:4 of the GATT 1994 is only applicable to domestic measures subsequent to importation of the goods, and has no relevance to the issue of "trading rights". Article III:4 of the GATT 1994 states:

> 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…

55. As the very terms of Article III:4 say, ("distribution or use"), this provision may create obligations affecting services related to imported goods, for example, if there is discriminatory treatment as regards the distribution or use of foreign goods as compared to similar domestic goods. The European Communities does not intend to exhaustively address this issue at this juncture; therefore the following comments are strictly limited to the facts of this present dispute.

56. The European Communities does not support the United States' line of argument based on the assessment of the discriminatory nature of national measures regarding film distribution for theatrical release and electronic distribution of sound recording against the background of Article III.4 GATT 1994. This argument is in fact based on the unwarranted assumption that both activities in question relate to trade in goods. The

\(^{57}\) United States First Written Submission, paragraphs 309-311.
European Communities considers that these two categories are to be considered as a "service", and thus it is in the framework of the GATS that any assessment of national measures challenged under WTO rules in this area should be carried out.

57. In particular, in the European Communities' view is that while the trade in copies on celluloid, cassette or video disk can be easily recognised as a trade in goods and would thus fall within the scope of GATT 1994, the exploitation of films for theatrical release, in the light of the nature and characteristics of the activities involved (film promotion, licensing for the distribution of copies and organising public projections of films in cinema theatres)\(^{58}\), is a service.

58. The European Communities is also of the view that electronic "deliveries" or transmissions are part of the supply of a service, and therefore issues arising in this area ought therefore to be assessed under the GATS. The GATS in fact provides a framework for rules and commitments for the supply of services, which as defined in Article XXVIII (b) GATS "includes the production, distribution, marketing sale and delivery of a service". This conclusion is first of all logical, in the sense that all electronic deliveries (containing information coded by electronic bits) transmit outcomes of services as defined in the GATS classification (e.g. sound recordings). In addition, claiming that some electronic deliveries may be goods, entails the definition of criteria to identify those deliveries that are goods. The fact that they have a tangible equivalent, does not prove by itself a sufficient element of identification. Many services (professional services, education, etc.) may have also have a tangible support, and this reasoning could lead to turn long recognised services into goods, thereby undermining the GATS architecture and leaving little or no legal certainty on existing commitments on most services.

59. The European Communities is grateful for having the opportunity to express its views as a third party in this important dispute and is looking forward to participating at the third party session of the hearing.

\(^{58}\) As described in China's First Written Submission, paragraphs 54 to 61.