

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

(WT/DS363)

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

August 1, 2008

I. INTRODUCTION

1. 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. Following this summary, we will offer responses to what we view as the main arguments raised by China in its first written submission. 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.

2. 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, audiovisual home entertainment products such as videocassettes, VCDs and DVDs, sound recordings and films for theatrical release into China. However, China's measures ensure that state-owned Chinese importation monopolies and oligopolies preserve their exclusive rights to import, since foreign companies are categorically prohibited from importing reading materials, AVHE products, sound recordings and films for theatrical release into China. The measures that impose these restrictions breach China's trading rights commitments.

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

4. *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.

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

5. First, 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*. First, the GATT has made clear for more than half a century that exposed cinematographic film crossing national borders is a good. This agreement, which applies to trade in goods, includes a specific provision on films for theatrical release in Article IV, which is entitled “*Special Provisions relating to Cinematograph Films.*”
6. China’s position also has a number of other major flaws. According to China, the alleged “intangible” nature of films disqualifies them as goods. However, even if China were correct that “tangibility” is the key element of a “good,” the United States is, in fact, challenging measures that prohibit foreign-invested enterprises from importing hard-copy cinematographic film, which are tangible items. China concedes this point in its first written submission.
7. International classifications of products also demonstrate the long-standing practice of Members treating films as goods. The Harmonized Commodity Description and Coding System (HS), which only covers goods, describes products under heading 3706, and the United Nations’ Central Product Classification (CPC) *does* classify cinematographic film as a good in Subclass 3895, in addition to classifying the associated services (in subclass 96113).
8. China’s next assertion, that films are not goods because they are sold through a series of associated services, would have serious systemic implications, if accepted. In essence, China would negate the existence of a good, whenever it is closely connected to a series of services. China uses a similar line of reasoning to contend that the challenged measures simply deal with a copyright licensing service for motion pictures rather than the importation of goods. Even if certain provisions of China’s measures regulate copyright licensing, this does not change the fact that other provisions in these measures directly prohibit foreign-invested entities from importing films.
9. China also asserts that its GATS commitments with respect to films demonstrate that films are subject exclusively to the disciplines of the GATS, and fall outside the scope of China’s Accession Protocol or the GATT 1994. Again, there is no foundation for this assertion in the text of the WTO Agreement, and the Appellate Body has rejected this line of reasoning. In *Canada – Periodicals*, the Appellate Body concluded that while a periodical may be comprised of elements that have services attributes *i.e.*, editorial content and advertising content, “they combine to form a physical product – the periodical itself.” Finally, China’s own customs regime recognizes that films are goods.
10. Second, China similarly argues that unfinished AVHE products and unfinished sound recordings, often called “masters,” are not goods. For the reasons we have articulated above, China’s arguments with respect to unfinished AVHE products and sound recordings are also unavailing. There is once again no textual basis for this assertion. Furthermore, the 2007 Harmonized System, (implemented under the Harmonized System Convention, to which China has been a party since 1993) describes products under HS heading 8523, which makes clear that these products are goods. The CPC also classifies “recorded media for sound or other similarly recorded phenomena” other than films under goods subclass 47520. In addition, as with films, China treats these products as goods. China’s

tariff schedule, which has not yet implemented the 2007 changes to the HS, incorporates the description of this product under HS heading 8524.

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

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

12. 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.

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

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

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

16. 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 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. 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.

17. The measures at issue are not “necessary” within the meaning of Article XX, and they do constitute “arbitrary or unjustifiable discrimination” and a “disguised restriction on international trade.” As the Appellate Body has stated, “a ‘necessary measure is...located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.” Given the utter absence of a nexus between the challenged measures and the protection of public morals, China’s measures denying trading rights lie far too distant from the pole of indispensability to qualify as “necessary” within the meaning of Article XX. The Appellate Body has not found a measure to be necessary where there is a “reasonably available WTO-consistent alternative”. Here, there are many such alternatives at hand. Indeed, China’s “in-house” content review regime for domestic producers offers a fully WTO-consistent alternative to China’s measures.

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

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

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

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

21. China also contends that the Electronic Publications Regulation was replaced in April 2008, rendering the concept of master wholesale “obsolete” and removing the prohibition on foreign investment in the wholesale of these products. However, the measure cited by China replacing the Electronic Publications Regulation does not in fact replace the key provisions of this measure involving the distribution of electronic publications. Of course, even if China’s new measure had

replaced the old regulation, the United States would continue to seek a finding with respect to the Electronic Publications Regulation that was included in our panel request.

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

22. 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. 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.

23. Consistent with Article 31 of the *Vienna Convention on the Law of Treaties*, 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.”

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

25. 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.” 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.

26. 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.”

27. 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.

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

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

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

31. In addition, if China's arguments were accepted, WTO Members could invoke this reasoning to evade services commitments any time a new means of delivering a service was developed. On the other hand, the principle of technological neutrality is consistent with the concept that the GATS is sufficiently dynamic so that Members need not renegotiate the Agreement or their commitments in the face of ever-changing technology.

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

32. China makes several unsuccessful arguments in attempting to rebut the U.S. claim under Article III:4 with respect to hard-copy sound recordings intended for electronic distribution. 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.

33. China also asserts that the challenged measures are "border measures" at the importation stage and therefore do not affect the distribution of products that have already been imported. China's argument is misplaced. The Ad Note to Article III of the GATT 1994 provides that internal measures applicable to both an imported product and the domestic like product that are enforced for imported products upon importation are internal measures, not border measures. In this case, the measures at

issue impose content review-related legal requirements on both imported and domestic hard copy CDs that they must fulfill before distribution inside China.

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

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

35. Finally, China raises numerous objections regarding the Panel’s terms of reference. First, in response to the U.S. trading rights claims regarding films for theatrical release, China contends that the Film Distribution and Projection Rule is a measure that is not within the Panel’s terms of reference, because it was not identified in the U.S. panel request. 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.

36. 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 and the Provisional Film Rule – involved with China’s trading rights regime, and included, as well in this connection, “any amendments, related measures or implementing measures”. The Film Distribution and 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.

37. Furthermore, as the panel stated in *Japan – Film*, measures that are not specified in a Member’s panel request can nonetheless be included in that request if they are “subsidiary or closely related to” measures that are specified in that request. Here again, the Film Distribution and 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.

38. China also asserts that the Several Opinions, the Importation Procedure and the Sub-Distribution Procedure should not be examined by the Panel. However, these measures are specifically identified in the 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.

39. Moreover, China erroneously asserts that three discriminatory requirements – pre-establishment legal compliance, approval process, and decision-making criteria applicable to the distribution of reading materials and AVHE products – are not within the Panel’s terms of reference because they were not spelled out in the U.S. panel request. Consistent with Article 6.2 of the DSU, 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.

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

41. 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 Article III:4 context is unavailing. Article 6.2 of the DSU requires the identification of each measure relevant to a particular claim, but does not require the complaining party to identify each individual provision of the relevant measure.

42. 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.

43. 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 because these measures were not included in the U.S. panel request. 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. Second, the section of the U.S. panel request dealing with the GATT 1994 includes the Internet Culture Rule, the Internet Culture Notice, the Network Music Opinions, the Catalogue, and the Several Opinions 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. Finally, these measures also properly fall within the Panel’s terms of reference under the panel’s reasoning in *Japan – Film*.