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 SECOND SUBSTANTIVE MEETING OF THE PANEL

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I. INTRODUCTION

1. We appreciate this opportunity to appear before you today to present further views on the reasons why the Chinese measures at issue are inconsistent with China's obligations under the Accession Protocol, the GATS and the GATT 1994. Where China has endeavored to rebut the U.S. claims, it has fallen short, while other U.S. claims have received no response. Likewise, China has failed to sustain its burden with respect to the defenses it has raised.

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

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

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

4. In addition, China points to the language in the Harmonized Commodity Description and Coding System (HS) description of the product as referring to cinematographic film "for the projection of motion pictures." However, this language demonstrates that the Harmonized System contemplates a physical product with integrated content that may be commercially exploited in a particular way. This HS description does not take films out of the category of goods, but instead confirms that films containing content to be exploited are goods. China's accession schedule of tariff concessions, incorporates the HS description of these products under heading 3706.

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

6. China also repeats its argument that because films are a mere accessory to a service, measures relating to importation should be analyzed exclusively under the GATS, rather than the trading rights disciplines. China's reasoning is flawed and has been rejected by the Appellate Body. In a related argument, China asserts that a good that is an accessory to a service cannot be scrutinized under the

WTO disciplines on goods. First, there is no textual basis in the WTO Agreement for China's assertion that a good used to provide a service is no longer a good. Similarly, China's proposed criteria for determining when a good is a mere accessory of a service have no textual basis in the GATT 1994 or the GATS and do not create a principled rationale for distinguishing among different kinds of goods.

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

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

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

III. TRADING RIGHTS: CHINA'S MEASURES REGARDING READING MATERIALS, FINISHED AVHE PRODUCTS AND FINISHED SOUND RECORDINGS ARE NOT JUSTIFIED UNDER ITS RIGHT TO REGULATE TRADE IN A MANNER CONSISTENT WITH THE WTO AGREEMENT OR ARTICLE XX OF THE GATT 1994

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

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

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

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

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

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

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

17. Likewise, China's concerns regarding cost are addressed under the U.S. proposals. Two of the U.S. proposals – either having the foreign importers and privately held importers in China conduct content review after obtaining the necessary expertise, or having these importers hire domestic entities with the appropriate expertise to conduct content review – would require minimal additional costs. These proposals essentially involve substituting foreign importers and privately held importers in China into the roles currently played by the state-owned importers. The third U.S. proposal – having

the Chinese Government conduct all content review – would also require minimal additional costs, as much of the content review of imported products is already performed by the Chinese Government, and the Chinese Government is already bearing the costs of these activities.

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

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

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

IV. TRADE IN SERVICES: CHINA'S SERVICES COMMITMENTS COVER THE MASTER DISTRIBUTION OF READING MATERIALS

21. We included Exhibit US-99 that illustrates our rebuttal arguments regarding master distribution and its inclusion of "wholesaling" within the meaning of Annex 2 of China's Services Schedule.

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

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

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

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

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

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

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

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

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

Opinions, "music was defined for the first time, referring to music products as transmitted through the Internet, mobile communication network as well as other wired and wireless media . . . ."

VI. TRADE IN GOODS: CHINA'S MEASURES REGARDING THE INTERNAL SALE, OFFERING FOR SALE, PURCHASE, DISTRIBUTION AND USE OF THE PRODUCTS ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

A. Sound Recordings Intended for Electronic Distribution

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

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

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

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

imported products before the ICP or MCP can move the product further downstream, the relevant Chinese measures adversely affect the conditions of competition for the imported product.

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

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

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

B. Films for Theatrical Release

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

VII. CHINA HAS NOT SUSTAINED ITS CLAIM UNDER ARTICLE 6.2 OF THE DSU WITH RESPECT TO THE PANEL'S TERMS OF REFERENCE

A. China's Film Distribution and Projection Rule, Audiovisual Regulation and the Audiovisual Import Rule are Within the Panel's Terms of Reference

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

39. China goes on to contend unsuccessfully that these three measures are not included in the Panel's terms of reference, despite the fact that they are closely and directly related to measures identified in the U.S. panel request. First, the United States has shown that these three measures are included in the U.S. panel request because they fall within the clause incorporating amendments, related measures and implementing measures contained in the U.S. panel request. China ignores the panel report in *EC – Bananas III*. Second, the United States has shown that the three measures are "subsidiary or closely related to" measures cited in the U.S. panel request, and are thereby included in the Panel's terms of reference pursuant to the reasoning of the panel in *Japan – Film*.

B. China's Discriminatory Requirements and Different Distribution Opportunities are Within the Panel's Terms of Reference

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

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

VIII. TRANSLATION

42. China provided a discussion of the translation of certain measures in an exhibit submitted with its second written submission. The United States would like to take this opportunity to respond to China's discussion of these translation issues in Exhibit US-102.