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

(AB-2009-3)

Oral Statement of the United States of America

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1. Good afternoon, Madame Chair and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today.

2. In addition, as this is Mr. Ramírez's first oral hearing, we would also like to take this opportunity to welcome him. We look forward to his service on the Appellate Body.

I. The Panel Correctly Found that China's Measures Are Not Justified by Article XX(a) of the GATT 1994

3. The first and third parts of China's appeal relate to the Panel's analysis of China's trading rights commitment. As the Appellate Body considers the specific issues presented in those two parts of China's appeal, the United States would like to draw the Appellate Body's attention to the background of the U.S. claims, and to the Panel's comprehensive analysis of those claims.

4. In its Accession Protocol, China made a commitment to provide all foreign enterprises, all enterprises in China, and all foreign individuals with trading rights – that is, the right to import and export almost all goods (the only exceptions being a list of goods not relevant in this dispute). Despite that commitment, however, China allows only *state-owned* enterprises the right to import the products at issue: publications; audiovisual products, including sound recordings; and films for theatrical release.

5. The Panel undertook a thorough and thoughtful review of the numerous measures through which China restricts trading rights. The Panel also carefully considered the parties' legal arguments. On the basis of that work, the Panel concluded, correctly, that China is acting inconsistently with various paragraphs of the Accession Protocol. China has not appealed that conclusion.

6. Instead, China has raised two sets of defenses. One set concerns films for theatrical release and unfinished audiovisual home entertainment ("AVHE") products, and we will address that issue in a few minutes when we come to the third part of China's appeal. At this point, we would like to comment briefly on the second set, namely China's appeal concerning publications and other audiovisual products.

7. China argued that its measures were justified under Article XX(a) of the GATT 1994, but the Panel was correct to reject that position. In this connection, we would first like to reiterate our support for the Panel's decision to use an *arguendo* approach to the Article XX issue. We would urge the Appellate Body to follow an *arguendo* approach as well.

8. China's argumentation before the Panel and in this appeal focuses on several discrete legal issues, and we have addressed each of those issues in detail in our appellee submission. One common thread runs through the entire analysis: there is simply no reason that who owns the equity in an enterprise needs to affect China's ability to ensure that its content review goals are achieved. China's own experience and its submissions demonstrate that point in several ways; we would like to mention just a few examples.

9. To give one example, the Panel recognized that state-owned and non-state owned enterprises would be expected to have similar responses to an obligation to engage in content review. In particular, the Panel correctly noted that both kinds of enterprises would face essentially the same incentive structures related to content review.[1] Furthermore, the Panel pointed out that state-owned enterprises' conduct of content review was policed through

[1] Panel Report, para. 7.854.

dissuasive sanctions, and that there was no basis for believing that state-owned and non-state-owned enterprises would react differently to the prospect of such sanctions.[2] Consequently, there was no basis for concluding that non-state-owned enterprises would be unable to achieve China's content review policy goals.

10. While China asserts that only state-owned enterprises can bear the costs of content review, that assertion founders for several reasons. The most obvious reason is the fact that (as the Panel found) privately owned enterprises in China (as in other WTO Members) routinely bear the costs of compliance with regulatory measures generally.

11. A similar point applies to China's assertion that only state-owned enterprises can be expected to understand Chinese content review standards. As the Panel found, privately owned enterprises can be expected to be able to hire individual content reviewers with the necessary expertise, just as state-owned enterprises (such as China National Publications Import & Export Corporation ("CNPIEC")) do.[3]

12. To give another example, the state-owned importer does not perform content review at all for some products (such as audiovisual products, electronic publications, and films). A government agency does so. As the Panel found,[4] this demonstrates that China can achieve its public morals objectives without relying on importers at all. Moreover, evidence before the Panel amply supports the proposition that the Chinese Government has the capacity to conduct content review not only for those products, but also for all the products subject to China's appeal.

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[2] Panel Report, para. 7.854.
[3] Panel Report, para. 7.858.
[4] Panel Report, para. 7.901.

Therefore, because it is not necessary in the Chinese system for importers to perform content review in the first place, it is also not necessary to further limit eligible content reviewers to *state-owned* importers in order to achieve China's content review goals.

13. These points and similar ones informed the Panel's legal analysis. They support the Panel's finding that the state-owned enterprise requirement and the closely related exclusion of foreign-invested enterprises from import activities do not make a significant contribution to protecting public morals in China. They also support the Panel's finding that having Chinese government authorities conduct content review would be a reasonably available, WTO-consistent alternative to China's reservation of trading rights to state-owned enterprises. In short, China's restriction of trading rights is not "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"[5] the protection of public morals in China. Therefore, and for the reasons discussed in detail in our appellee submission, China's appeal of the Panel's findings on Article XX(a) does not withstand scrutiny.

II. The Panel's Analysis of the State Plan Condition Should Not Be Upheld

14. We now would like to comment on China's response to the U.S. other appeal. The Division will recall that, in one respect, the United States disagrees with the Panel's Article XX(a) analysis: The Panel should not have made an intermediate finding that the State plan condition – that is, the requirement that publication import entities can be approved only in conformity with an undisclosed State plan for their "quantity, geographical and product

[5] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

coverage"[6] – was "necessary" to achieve China's policy objectives. China's appellee submission fails to support the Panel's finding.

15. *First,* China attempts to argue that the Panel could draw conclusions about the State plan condition without examining the State plan. However, China has not rebutted the simple point that the Panel had no information at all about the contents of the plan. It is true that China told the Panel what the *subject matter* of the plan was, but – despite having the burden of proof on this issue – China declined to provide any documentation or other information about the numerical and geographic requirements and their operation. Without that basic information, the Panel could not meaningfully consider whether the actual plan made any contribution to China's objectives. China has also not responded to the U.S. point that China's failure to provide this evidence meant – under the reasoning in the *Gambling* report – that China failed to carry its burden of proof and that the Panel failed to base its findings on evidence.[7]

16. China's reliance on the Appellate Body's report in *Wheat Gluten* is misplaced. In *Wheat Gluten*, the appellant asked the Appellate Body to overturn a panel's failure to draw an inference that the appellant wanted. The Appellate Body considered that the appellant had failed to provide a sufficient explanation of what that inference should be and how the panel should have arrived at that inference in light of all the evidence before the Panel.[8] In this dispute, however, the United States does not contend that there is a particular *different* inference that the Panel should have drawn. Instead, we contend that – in light of the lack of any evidence of the actual

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[6] China Answer to Panel Question 44.
[7] U.S. Other Appellant Submission, paras. 32-33.
[8] *U.S. – Wheat Gluten*, paras. 174-75.

contents of the State plan – the Panel should not have drawn any inference at all about the State plan condition.

17. *Second,* China has never provided any support for its assertion that there is only a "small number" of individuals qualified to perform content review of imported publications. There is no reason to believe that China's assertion is correct, or even to know what number constitutes a "small number." There is also no reason to believe that additional content reviewers could not be trained to understand China's content review standards; we note for example that CNPIEC spends money to train reviewers every year. In any event, we note that China's appellee submission acknowledges that the number of domestic publishers is driven by the "market demand" for domestic publications.[9] That implies that the number of content reviewers must be able to grow to fill any increase in demand, which in turn implies that China's suggestion of a rigid limit on the number of qualified content reviewers is incorrect.

18. *Third*, China's appellee submission confirms that the Panel should not have accepted China's argument that the number of importing entities must be limited in order to limit the number of content review locations. Wholly apart from whether such a limit would make a contribution to protecting public morals in China, the Chinese rationale is undercut by the fact that under the Chinese system, the number of content review locations is actually not limited by the number of publication import entities, because each import entity can have (and indeed is expected to have) multiple branches. China's submission confirms that the branches "are involved in the day-to-day, individual reviews"[10] and that the General Administration of Press

[9] China Other Appellee Submission, paras. 20-21.
[10] China Other Appellee Submission, para. 25.

and Publication ("GAPP") offices at the localities of the branches conduct an annual examination of the branches.[11] While China notes that these local examination opinions are transmitted to the parent company, that changes nothing about the fact that local GAPP offices prepare individual opinions for each branch.

19. *Fourth*, China has not rebutted the U.S. points that China did not provide any information to the Panel about the actual burden that the annual inspections place on GAPP, and that it therefore was impossible for the Panel to assess whether any limitation on the number of importing entities is "necessary" to prevent that burden (if there even is any). Nor has China provided any response to the suggestions that the United States made about how that burden (again, if any) might be alleviated.[12]

20. *Finally*, China's comments about the supposed lack of restrictiveness of the State plan condition appear to contradict its statements to the Panel. In its appellee submission, China says that the State plan does not set any quantitative restriction on the number of enterprises that may be approved as publication import entities.[13] However, China told the Panel the exact opposite, and a major premise of the Panel's analysis of the State plan requirement was the fact that the plan is intended to limit that number.[14] In China's first written submission to the Panel, when describing Article 42 of the Publications Regulation, which is the subject of the U.S. other

[11] China Other Appellee Submission, para. 26.
[12] U.S. Other Appellant Submission, para. 36.
[13] China Other Appellee Submission, para. 34.
[14] Panel Report, para. 7.832.

appeal, China wrote: "The laws and regulations at issue provide for the limitation of the total number of entities approved for engaging in the importation of cultural goods."[15]

21. In summary, the Panel's intermediate finding that the State plan condition was "necessary" is a legal error, and it should not be upheld.

III. The Panel Correctly Found that the Electronic Distribution of Sound Recordings is Within the Scope of China's Commitments on Sound Recording Distribution Services

22. We would now like to address China's appeal of the Panel's finding regarding the electronic distribution of sound recordings (*i.e.*, the distribution of sound recordings over the Internet and other electromagnetic networks).[16] China maintains several measures that prohibit foreign investment in the electronic distribution of sound recordings, and the Panel found that those measures are inconsistent with Article XVII of the GATS.

23. China's appeal is limited to the scope of its market access commitment. According to China, its commitment on "sound recording distribution services" covers only the distribution of sound recordings on physical media (*e.g.*, on compact discs (CD)), and does not include within its scope the distribution of sound recordings through electronic means (*e.g.*, over the Internet). For the reasons discussed in the U.S. appellee submission, China's position should not be sustained. Today, we will review a few of the specific elements of the Panel's analysis.

24. *First*, the Panel correctly applied the rule reflected in Article 31 of the *Vienna Convention on the Law of Treaties* in order to interpret the meaning of "sound recording distribution

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[15] China First Submission, para. 215.

[16] *See* U.S. Appellee Submission, para. 70 citing Panel Report, paras. 7.1306-09.

services." Based on the definition of "recording" as "recorded material" – a dictionary definition cited by China as well as the United States – the Panel concluded that the ordinary meaning of the term "sound recording" is "not limited to sound embedded or transferred on physical media."[17] The Panel also found that the term "distribution" is not limited to the distribution of tangible items.[18] In reaching these conclusions, the Panel provided specific reasons for rejecting China's contentions that these terms should be understood as limiting China's services commitment to the distribution of sound recordings stored or transferred on physical media.[19] Thus, China's errs in asserting that the Panel failed to take sufficient account of its arguments.

25. The Panel also correctly analyzed the relevant context. China attempts to discredit the Panel's contextual analysis by suggesting that there was a "possibility" that China "could have" intended to schedule a commitment related only to physical products.[20] However, this statement does not provide a basis for rejecting the Panel's overall weighing of the arguments and its ultimate assessment that the context supports the Panel's reading of China's Schedule.

26. Additionally, the Panel's interpretation of China's services commitment accords with the object and purpose of the GATS. While China invokes the principle of progressive liberalization and the "positive list" basis for scheduling services, these elements of the GATS do not in fact support China's reading of its Schedule.

27. *Second*, turning to Article 32 of the Vienna Convention, the Panel considered supplementary means of interpretation for the purpose of confirming the Panel's conclusion

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[17] Panel Report, para. 7.1176.
[18] Panel Report, para. 7.1180.
[19] Panel Report, paras. 7.1173-7.1181.
[20] China Appellant Submission, para. 134.

based on an application of Article 31 of the Vienna Convention. China asserted before the Panel that the electronic distribution of sound recordings was not a "commercial reality" at the time of China's accession to the WTO, and that therefore Members could not have intended to include the electronic distribution of sound recordings within the scope of the relevant Chinese commitment.[21] However, the Panel correctly rejected these arguments.

28. Indeed, China conceded in its appellant submission that in China, "internal discussions concerning the possible implementation of a legal framework concerning the services at issue may have been ongoing since 1999."[22]

29. On appeal, China's argument focuses primarily on a single assertion that China did not actually adopt a legal framework addressing the electronic distribution of sound recordings until 2003. However, even if this were correct, the Panel correctly determined that such a fact did not support China's reading of its Schedule.

30. In *US – Gambling*, the panel made clear that "a market access commitment . . . implies the right of other Members' service suppliers to supply a service through *all* means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule."[23] In the absence of an explicit exclusion for sound recording distribution services in China's Schedule, the Panel in this dispute was correct in concluding that it could not read into the Schedule qualifications that are not there. In fact, such a reading would diminish the rights and obligations of Members under the WTO Agreement contrary to Article 3.2 of the DSU.

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[21] China's First Written Submission, paras. 476-82.
[22] China Appellant Submission, para. 191.
[23] Panel Report, *US – Gambling*, para. 6.285 (emphasis added).

31. In short, the Panel's comprehensive analysis of the term "sound recording distribution services" in China's Schedule led to the correct conclusion regarding the scope of that commitment. Accordingly, China's appeal should be rejected.

IV. The Panel Correctly Determined that China's Measures Restricting the Right to Import Films for Theatrical Release are Inconsistent with China's Trading Rights Commitments

32. We will now address China's appeal of the Panel's finding related to trading rights for films for theatrical release. The United States made a straightforward trading rights claim related to films for theatrical release, or hard-copy cinematographic films. As mentioned a few minutes ago, in its Accession Protocol, China committed to grant all enterprises in China and all foreign enterprises and individuals the right to import all goods with the exception of certain goods not at issue in this dispute. However, China maintains measures that impose restrictions on who may import films for theatrical release, and therefore, as the Panel found, these measures are inconsistent with China's trading rights commitments.

33. Before the Panel, China did not defend the consistency of these measures with China's trading rights commitments. Instead, China's arguments before the Panel and on appeal rest on the assertion that the measures at issue do not regulate films for theatrical release as goods, but rather regulate the importation of content, and therefore are not subject to the trading rights disciplines in China's Accession Protocol. This defense fails for the simple reason that, as the Panel found, and as China conceded, the relevant measures do restrict who may import the good at issue, namely films for theatrical release. China stated that pursuant to the Film Regulation:

> only entities designated by SARFT can import foreign films for public show . . . *If the importation of such foreign motion picture requires importation of exposed*

> *and developed cinematographic film containing such motion picture, the importation entity will import such cinematographic film.*[24]

34. This statement proves both that the relevant Chinese measures affect the importation of a good, and that the measures are inconsistent with China's trading rights restrictions because they restrict who may import that good.

35. As discussed in more detail in the U.S. appellee submission, all of China's arguments in support of its position are without merit. We would now like to highlight just a few problematic elements of China's position.

36. *First*, China attempts to create an artificial distinction between film as mere content and the physical carrier on which content may be embedded. Any such distinction is not at issue in this dispute. The U.S. claim challenges measures restricting the right to import a good, and that good – a film for theatrical release – is an integrated product that consists of a physical carrier medium containing content, in the same way that a book is an integrated product consisting of a physical carrier medium containing content.

37. *Second*, China's arguments regarding the meaning of its measures fail to support its position. China argues that the reference to specific types of films (*e.g.*, documentary films) in Article 2 of the Film Regulation illustrates that this measure "is focused on content, and not on the importation of hard-copy cinematographic film."[25] Leaving aside whether China is correct regarding the focus of the Film Regulation, a measure that restricts who may import goods is subject to China's trading rights commitments regardless of whether the focus of that measure is

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[24] China Answer to Panel Question 179 (emphasis added). Panel Report, para. 7.538 n. 415.

[25] China Appellant Submission, para. 223-24.

broader than that restriction. Consistent with the Appellate Body's guidance in *EC – Bananas*[26], a measure that affects trade in goods is subject to the goods disciplines – such as the trading rights disciplines – even though it may also be subject to other disciplines.

38. Furthermore, China's argument here appears to suggest that because one element of a good is content, the good is no longer a good. Such an approach is untenable. It would suggest that, for example, a book containing short stories, or clothing exhibiting a slogan, or an architectural drawing bearing a design, are not goods, simply because they carry content. In each of those cases, the expressive content and the physical material are part of a single good. The fact that such goods have content as one of their elements does not transform them into something other than goods. Indeed, as the Panel found, China itself includes exposed cinematographic film – whether or not containing content – in its tariff schedule for goods and charges customs duties on the importation of such goods.

39. In addition, China's reliance on one statement by the translator from the United Nations Office in Nairobi (UNON) regarding the meaning of the Chinese term "*dian ying*" is unavailing. The translator's statement on which China relies is premised on the dichotomy between a carrier medium in isolation and content in isolation, which, as just discussed, is irrelevant to this dispute.

40. *Third,* China's arguments that films for theatrical release are not goods because they are used to provide a service lacks merit, and the Panel correctly rejected these arguments. China's approach, if adopted, would deny to goods certain protections afforded by the WTO Agreement.

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[26] Appellate Body Report, *EC – Bananas*, para. 221.

Furthermore, China's line of reasoning has been rejected by the Appellate Body in *Canada – Periodicals*.[27]

41. *Finally*, the United States would like to take this opportunity to note that GATT Articles III:10 and IV make clear that cinematographic film has been considered a good since at least 1947. These provisions of the GATT 1994, which only applies to trade in goods, set forth an exception to the national treatment obligation for exposed cinematographic film.

42. In short, China has failed to demonstrate any error in the Panel's findings that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are subject to, and inconsistent with, China's trading rights commitments. Accordingly, China's appeal should be rejected.

V. The Panel Correctly Determined that China's Measures Restricting the Right to Import Unfinished AVHE Products and Sound Recordings are Inconsistent with China's Trading Rights Commitments

43. As with films for theatrical release, the U.S. trading rights claim related to unfinished audiovisual home entertainment (AVHE) products and sound recordings is straightforward. While China has committed in its Accession Protocol to grant all enterprises the right to import virtually all goods, including all AVHE products, China in fact restricts who may import unfinished AVHE products and sound recordings. China's only defense to this claim is that the measures providing for this restriction are not subject to China's trading rights commitments.

44. In making this argument, China makes many of the same erroneous assertions as in the context of films, including that the relevant measures regulate the importation of content rather

[27] Appellate Body Report, *Canada – Periodicals*, p. 17.

than the importation of goods, and that unfinished AVHE products and sound recordings are not goods, because they are accessories to services. However, for the reasons set forth in the U.S. appellee submission, the Panel correctly rejected those arguments. Accordingly, China's appeal should not be sustained.

VI. Conclusion

45. This concludes our statement. We welcome the opportunity to answer any questions you may have. Thank you for your attention.