

*Before the Appellate Body of the  
World Trade Organization*

***China – Measures Affecting Trading Rights and  
Distribution Services for Certain Publications  
and Audiovisual Entertainment Products  
(DS363)  
AB-2009-3***

**Third Participant Submission of Australia**

Geneva, 19 October 2009

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## **I. INTRODUCTION**

1. The appeal concerns a number of the Panel’s findings that China maintains measures affecting certain publications and audiovisual entertainment products that are inconsistent with China’s WTO obligations.
2. Australia submits that the Appellate Body should reverse or modify the Panel’s findings that China’s WTO Accession Protocol commitments relating to trade in goods are applicable to the measures at issue in the dispute concerning films for theatrical release and unfinished audiovisual products. In Australia’s view, the content of audiovisual products is a service, and the Panel failed to consider whether the measures at issue regulate films for theatrical release and unfinished audiovisual products on the basis of their characteristics as goods or on the basis of their content.
3. Australia would welcome clarification by the Appellate Body of the relationship between the assessment of whether a measure is “necessary” and whether there are reasonably available alternatives within the meaning of GATT Article XX(a).
4. Australia submits that the Appellate Body should uphold the Panel’s findings that:
  - (i) China has not demonstrated that any of the inconsistencies in respect of the *Catalogue of Prohibited Foreign Investment Industries*, the *Foreign Investment Regulation*, the *Several Opinions*, the *Publications Regulation*, the *2001 Audiovisual Products Regulation* and the *Audiovisual Products Importation Rule*, insofar as the latter two measures concern finished audiovisual products, and the *Audiovisual (Sub-)Distribution Rule* are necessary to protect public morals within the meaning of GATT Article XX(a); and
  - (ii) in relation to the electronic distribution of sound recordings, the *Circular on Internet Culture* (Article II), the *Network Music Opinions* (Article 8), and the *Several Opinions* (Article 4) are each inconsistent with China’s national treatment commitments under GATS Article XVII, and Article X:7 of the *Catalogue of Prohibited Foreign Investment Industries* of the *Catalogue*, in conjunction with

Articles 3 and 4 of the *Foreign Investment Regulation*, is also inconsistent with GATS Article XVII.

5. This submission addresses some issues of law and legal interpretation raised by the Panel’s findings concerning the WTO consistency of:

- measures regulating the import of films for theatrical release;
- measures regulating the import of unfinished audiovisual products; and
- the State plan requirement in Article 42 of the *Publications Regulation*.

6. Australia reserves the right to further address these and other issues in its oral statement.

## **II. MEASURES REGULATING THE IMPORT OF FILMS FOR THEATRICAL RELEASE**

7. The Panel found that Articles 5<sup>1</sup> and 30<sup>2</sup> of the *Film Regulation* and Articles 3 and 16 of the *Film Enterprise Rule*<sup>3</sup> (the measures at issue) regulate films for theatrical release as goods and that, as a consequence, such films are subject to the trading rights commitments of China’s Accession Protocol.<sup>4</sup>

8. The Panel correctly noted that previous Appellate Body findings concerning the scope of application of the GATT and GATS provide guidance as to the applicability of different,

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<sup>1</sup> Article 5 of the *Film Regulation* provides in relevant part that “[t]he State shall implement a licensing system with respect to film production, import, export, distribution, and screening, and the public screening of films. No entity of individual shall, without permission, be engaged in the activities of production, import, distribution or screening of films, or import, export, distribute or screen a film for which a permit has not been obtained”. (*China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel, WT/DS363/R, “Panel Report”, para.7.528)

<sup>2</sup> Article 30 of the *Film Regulation* provides that “[t]he business of importing films shall be conducted by film import entities designated by the [SARFT]; without being designated, no entity or individual shall engage in the business of importing films”. (Panel Report, para.7.528)

<sup>3</sup> “... Article 3 (licensing requirement) and Article 16 (approval requirement) of the *Film Enterprise Rule* are similar to Article 5 (licensing requirement) and Article 30 (designation requirement) of the *Film Regulation*.” (Panel Report, para.7.584).

<sup>4</sup> Panel Report, paras 7.527/7.560 and 7.582/7.584.

potentially overlapping agreements. Specifically, drawing on the Appellate Body’s findings in *EC – Bananas*,<sup>5</sup> the Panel found “... that Articles 5 and 30 [of the *Film Regulation*] could possibly be scrutinized under the GATS to the extent they affect the supply of a service. We consider that they could also be scrutinized under China’s trading rights commitments to the extent they affect who may import a good.”<sup>6</sup>

9. Australia submits that the appropriate test is whether the measures at issue affect trading rights in goods in a manner that is inconsistent with the WTO Agreement.

10. In that context, a critical threshold question is: what is being regulated by the measures at issue? Do those measures regulate the import of films for theatrical release on the basis of characteristics of those films as goods? Do they regulate the import of such films on the basis of their content? Do they regulate the import of such films on some other basis? If the measures apply to such films irrespective of their means of import, for example, including via electronic transmission, it seems unlikely that the measures regulate the import of such films on the basis of their characteristics as goods. In Australia’s view, the Panel erred in failing to examine the structure and design of the measures to determine their object before finding that China’s trading rights commitments in relation to goods were applicable.

11. The Appellate Body has previously said:

“... [A] responding Member’s law will be treated as *WTO-consistent* until proven otherwise. The party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. [...] Such evidence will typically be produced in the form of the text of the relevant legislation

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<sup>5</sup> In *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas”)*, Report of the Appellate Body, WT/DS27/AB/R, the Appellate Body said in relevant part (at para.221):

“... There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. ...”

<sup>6</sup> Panel Report, para.7.542.

or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.”<sup>7</sup> (*emphasis in original*)

12. Australia considers that China adduced evidence to the Panel sufficient to raise doubt that the measures at issue regulate the import of films for theatrical release on the basis of their characteristics as a good. In particular, China’s arguments, on the meaning of the Chinese terms “Dian Ying”, “Dian Ying Jiao Pian” and “Jinkou”, supported by the comments of the independent translator, do not seem to have been countered by the United States through, for example, the provision of domestic court judgments or other appropriate opinions.

13. As a consequence, it was incumbent upon the Panel to consider in detail the threshold question of what is being regulated by the measures at issue and, subsequently, whether the measures affect China’s trading rights commitments in a manner that is inconsistent with the WTO Agreement.

14. Accordingly, in the absence of such consideration, the Panel erred in finding that the measures at issue regulate films for theatrical release as goods and that, as a consequence, such films are subject to China’s trading rights commitments. Australia submits that the Appellate Body should reverse or modify those findings.

### **III. MEASURES REGULATING THE IMPORT OF UNFINISHED AUDIOVISUAL PRODUCTS**

15. The Panel found that Article 5 of the *2001 Audiovisual Products Regulation*<sup>8</sup> and Article 7 of the *Audiovisual Products Importation Rule*<sup>9</sup> (the measures at issue) regulate

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<sup>7</sup> *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, Report of the Appellate Body, WT/DS213/AB/R, para.157.

<sup>8</sup> “According to Article 5, the State is to institute a licensing system for, *inter alia*, the import of audiovisual products. It further provides that no entity or individual may engage in the import of audiovisual products without the necessary licence.” (Panel Report, para.7.636)

unfinished audiovisual products as goods and that, as a consequence, such products are subject to the trading rights commitments of China’s Accession Protocol.<sup>10</sup>

16. In particular, the Panel relied on its finding that films for theatrical release are goods subject to China’s trading rights commitments to conclude that unfinished audiovisual products are also goods subject to those commitments. Referring to China’s argument that “hard-copy master copies are accessories to the licensing service to be provided by foreign rights holders under a licensing agreement”,<sup>11</sup> the Panel said:

“... We note in this regard that we have examined the same issue for hard-copy cinematographic films in the context of our analysis above of the *Film Regulation*. The reasons we have given there in our view are also applicable, *mutatis mutandis*, to the master copies at issue in the present context.”<sup>12</sup>

17. For the reasons set out above in relation to films for theatrical release, Australia considers it was incumbent upon the Panel to consider in detail the threshold question of whether the measures at issue apply to unfinished audiovisual products on the basis of their characteristics as goods or on the basis of their content and, subsequently, to consider whether the measures affect China’s trading rights commitments in a manner that is inconsistent with the WTO Agreement.

18. Accordingly, in the absence of such consideration, the Panel erred in finding that the measures at issue regulate unfinished audiovisual products as goods and that, as a consequence, such products are subject to China’s trading rights commitments. Australia submits that the Appellate Body should reverse or modify those findings.

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<sup>9</sup> “... Article 7 provides that the State is to implement a licensing system for the importation of audiovisual products. ...” (Panel Report, para.7.671).

<sup>10</sup> Panel Report, paras 7.652 and 7.672.

<sup>11</sup> Panel Report, para.7.650.

<sup>12</sup> Panel Report, para.7.651.

#### **IV. THE STATE PLAN REQUIREMENT IN ARTICLE 42 OF THE *PUBLICATIONS REGULATION***

19. The Panel found that “... in the absence of reasonably available alternatives, the State plan requirement in Article 42 of the *Publications Regulation* can be characterized as ‘necessary’ to protect public morals in China”<sup>13</sup> within the meaning of GATT Article XX(a).

20. Australia recalls the findings by the Appellate Body in *Brazil – Tyres*, when it said:

“... Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. ...”<sup>14</sup>

21. In Australia’s view, in seeking to rely on the public morals exception of Article XX(a), China needs to have demonstrated the contribution the measure at issue brings to the achievement of its objective, having regard in particular to the trade-restrictiveness of that measure.

22. Australia notes that Members rely heavily on previous dispute findings in relation to Article XX as they seek to respond to a variety of public policy challenges in a manner that respects their WTO rights and obligations. It is therefore important that there be clarity concerning the meaning of “necessary” in relevant context. Australia would welcome clarification by the Appellate Body of the relationship between the assessment of whether a measure is “necessary” and whether there are reasonably available alternatives.

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<sup>13</sup> Panel Report, para.7.836.

<sup>14</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Report of the Appellate Body, para.210.