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

(WT/DS363)

Oral Statement of Australia

Geneva, 23 July 2008



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Introduction

1. Thank you for the opportunity to comment on some of the issues concerning the interpretation of China's Accession Protocol and of its GATS Schedule. In this statement, Australia will address:
 - whether "films for theatrical release" and "unfinished audiovisual products" are "goods" within the meaning of the Protocol;
 - how "China's right to regulate trade in a manner consistent with the WTO Agreement" relates to "the right to trade" in the context of Article 5.1 of the Protocol;
 - the applicability and scope of the "public morals" exception of GATT Article XX;
 - some matters relating to China's GATS obligations; and
 - a matter relating to the US claims under GATT Article III:4.
2. Australia reserves its position in relation to any matter not addressed in this statement.

"Films for theatrical release" and "unfinished audiovisual products"

3. China has questioned whether "films for theatrical release" and "unfinished audiovisual products" are "goods" covered by the relevant commitments of its Protocol. Notwithstanding its arguments, the information provided by China indicates that the specific items at issue in the dispute are goods within the meaning of the Protocol.
4. China states that "motion pictures for theatrical release" are subject to "customs clearance of the delivery materials for the purpose of the distribution of motion pictures to Chinese distributors and theatres."¹ In Australia's view, that statement presumes that the items are goods.
5. China also states that, in respect of "audiovisual products for publication", "the master copy would then be returned or destroyed", and refers to a model *Production and Sales*

¹ China's First Written Submission, paragraph 95.

China requires that the master copy be crushed under the right owner of the master copy. Australia understands that such conditions could only be fulfilled if the master copy exists in physical form, in which case it would be a good.

6. However, the Panel may consider that the items at issue in the dispute are not necessarily physical goods. In that event, Australia does not consider content separate from carrier media to be a good to which the right to trade would apply.

“China’s right to regulate trade in a manner consistent with the WTO Agreement” vis-à-vis “the right to trade”

7. Paragraph 5.1 of the Protocol provides in relevant part: “[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China. Such right to trade shall be the right to import and export goods.”

8. “The right to trade” within the meaning of the Protocol is a necessary prerequisite for the application of the WTO Agreement. There must be a right to import and export goods to and from China before China can have a right to regulate trade in a manner consistent with the WTO Agreement. Moreover, Australia believes that its view is supported by the opening phrase of paragraph 5.1: “without prejudice to”. A right to trade must exist for there to be the possibility of detriment to China’s rights under the WTO Agreement.³

9. Accordingly, in Australia’s view, it is not open to China to restrict or limit “the right to trade” within the meaning of the Protocol, that is, the right to import and export goods, on the basis of its “right to regulate trade in a manner consistent with the WTO Agreement”.

The applicability and scope of the “public morals” exception of GATT Article XX

10. It follows that Australia does not consider China is able to invoke GATT Article XX to justify a restriction or limitation on “the right to trade” within the meaning of the Protocol. Article XX is only potentially available in respect of measures adopted subsequent to the right to trade having been granted.

² China’s First Written Submission, paragraph 117, and Exhibit CN-16.

³ *The New Shorter Oxford English Dictionary*, Ed. Lesley Brown, Clarendon Press, Oxford, 1993, Vol. 2, page 2333, defines the phrase “without prejudice” as “without detriment to any existing right or claim”.

that the Accession Protocol is an integral part of the WTO Agreement. The language of Article XX makes clear that it may only be invoked in respect of measures that violate another GATT provision.

12. The Panel may nevertheless wish to explore the potential applicability of Article XX in more depth. In that event, Australia notes that the meaning of the term “public morals” was considered by the Panel in *US – Gambling*. That Panel considered that the term denoted “standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁴ Further, that Panel considered that the concept of “public morals”, as well as the concept of “public order” as used in Article XIV of GATS, “can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”⁵ The *US – Gambling* Panel’s findings provide useful guidance for consideration of the “public morals” exception in the context of GATT Article XX.

13. Australia agrees that cultural values can contribute to the public morals prevailing in a WTO Member. However, not all items having genuine cultural value to a Member will automatically be encompassed by the term “public morals” within the meaning of Article XX. Consider the example of books, which have cultural value in Australia. The fact that books have cultural value in Australia would not automatically give Australia the right to control the import of all books to protect public morals in Australia. Rather, Australia would have to show a relationship between the cultural value of books to Australia and the standards of right and wrong conduct maintained in Australia.

14. It is incumbent upon China to show that there exists a relationship between the cultural value of the items at issue, that is, between reading materials and audiovisual products, including sound recordings, and the standards of right and wrong conduct maintained in China. In Australia’s view, China is not able to rely on the cited UNESCO instruments to demonstrate such a relationship. China has not taken account of the aspirational status of the *UNESCO Universal Declaration on Cultural Diversity*. At the same time, it has ignored Article 20(2) of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Article 20(2) states: “[n]othing in this Convention shall be

⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (“*US – Gambling*”), Report of the Panel, WT/DS285/R, paragraph 6.465.

⁵ *US – Gambling*, Report of the Panel, paragraph 6.461.

15. Further, the Appellate Body has several times considered the standard established by the word “necessary” in Article XX. Most recently, in *Brazil – Tyres*, the Appellate Body reaffirmed its earlier findings on the “necessity” test in *US – Gambling* when it said:

“the weighing and balancing process inherent in the necessity analysis begins with an assessment of the relative importance of the interests or values furthered by the challenged measure⁶, and also involves an assessment of other factors, which will usually include the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce⁶”

16. Australia does not comment on the level of content review of the items at issue considered necessary by China. However, Australia agrees with the view expressed by the EC that it is the content of the material itself which is subject to review, not the entity or individual conducting the review.⁷ China has not shown that its desired level of content review cannot be achieved through alternative means that would have a less-restrictive impact on the right to trade.

China’s GATS obligations

17. I turn now to China’s obligations in relation to the GATS. There are three matters about which Australia would like to comment.

18. Firstly, China has not scheduled any national treatment limitations on its scheduled commitments in relation to Distribution Services and Audiovisual Services. In relation to its scheduled commitments, China is therefore obliged to extend national treatment as required by GATS Article XVII to the services and service suppliers of other Members. Australia notes that China’s national treatment obligation applies to a “foreign-invested enterprise” insofar as such an enterprise remains a “juridical person of another Member” as defined in GATS Article XXVIII(m).

⁶ *Brazil – Measures Affecting Imports of Retreaded Tyres* (“*Brazil – Tyres*”), Report of the Appellate Body, WT/DS332/AB/R, paragraph 143.

⁷ Third Party Written Submission by the European Communities, paragraph 29.

has not scheduled, and never intended to include,⁸ a type of wholesale distribution channel.⁹ Australia recalls that the *US – Gambling* dispute involved an analogous situation concerning whether the United States had scheduled commitments in respect of gambling and betting services. In that dispute, the Appellate Body made a number of relevant findings:

- the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention of Members*;¹⁰
- [GATS Article I:3(b)] defines “services” very broadly, as including “any service in any sector except services supplied in the exercise of governmental authority”;¹¹
- the GATS definition of “sector” provides that any reference to a “sector” means “unless otherwise specified in a Member’s Schedule a reference to all of the subsectors contained within that sector”;¹² and
- [t]he Scheduling Guidelines “make clear that parties wanting to use their own subsectoral classification or definitions “were to do so in a “sufficiently detailed” way “to avoid any ambiguity as to the scope of the commitment”.¹³

20. In Australia’s view, if the contested wholesale distribution channel is “generally covered by CPC 61, 62, 63 and 8929” as referred to in Annex 2 to China’s Schedule, it is a distribution service in respect of which China has made market access commitments. Having regard to the Appellate Body’s findings in *US – Gambling*, China would need to have explicitly excluded the contested wholesale distribution channel from the scope of its commitments for its claim to succeed.

21. The third matter on which I would like to comment concerns China’s claims that “network music services” are not covered by its Schedule commitments for sound recording

⁸ First Written Submission of China, paragraph 269.

⁹ First Written Submission of China, paragraphs 267-287, in reference to “*Zong Fa Xing*”.

¹⁰ *US – Gambling*, Report of the Appellate Body, WT/DS285/AB/R, paragraph 160.

¹¹ *US – Gambling*, Report of the Appellate Body, paragraph 180.

¹² *US – Gambling*, Report of the Appellate Body, paragraph 180.

¹³ *US – Gambling*, Report of the Appellate Body, paragraph 203.

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Entertainment Products

network music services¹⁴ as the dissemination of music
to users.¹⁵

22. Australia does not agree that network music services are a new service totally different in kind from the sound recording distribution services¹⁵ committed by China. The subsector sound recording distribution services is not definitionally limited in regard to the methods of distribution covered. Accordingly, having regard to the Appellate Body's findings in *US – Gambling* as previously outlined, China would need to have expressly limited its commitments to particular methods of distribution for its argument to succeed.

23. In any case, distribution of sound recordings over the Internet was occurring for some years before China acceded to the WTO, as China itself acknowledges in its reference to the file-sharing platform Napster.¹⁶ Not all such distribution infringed copyright or related rights, for example, copyright on some material may have expired. Even when such distribution did infringe copyright and related rights, that infringing activity did not invalidate the Internet's status as a means of distribution.

GATT Article III:4

24. Finally, I refer to the claim by the United States under GATT Article III:4.

25. Australia has earlier expressed its view that content separate from carrier media is not a good. Accordingly, to the extent that the US claim is based on content being a product distinct from a carrier medium, Australia does not consider that the US claim can succeed.

Conclusion

26. That concludes Australia's remarks. Australia would of course be pleased to provide responses to any questions that the Panel may have.

Thank you, Mr Chairman, Members of the Panel

¹⁴ First Written Submission of China, paragraph 393.

¹⁵ First Written Submission of China, paragraph 390.

¹⁶ First Written Submission of China, paragraph 396.