

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

Reply of the European Communities to
Third Party Questions

I. FOR ALL THIRD PARTIES:

Question 1:

With reference to paras. 1.2, 5.1 and 5.2 of the Accession Protocol, please answer the following questions:

a) Is Article XX(a) of the GATT 1994 available as an affirmative defence to the obligations in paras. 1.2, 5.1 and 5.2 of the Accession Protocol? Please explain your answer for each of the relevant paragraphs.

(b) What is the meaning and effect of the opening clause ("Without prejudice . . . in a manner consistent with the WTO Agreement) in para. 5.1? Could China restrict the right to trade pursuant to provisions of the WTO Agreement without committing a breach of para. 5.1? If yes, why?

(c) Why does para. 5.1 of the Accession Protocol refer to the "right to regulate trade" in a manner consistent with the WTO Agreement and not to the "right to regulate the right to trade" in such a manner?

Response:

The position already taken by the European Communities in its First Written Submission is that Article XX of the GATT 1994 does not directly apply to the commitments undertaken by China in its WTO Accession Protocol. (please refer to para. 12 of the EC's Written Submission).

The European Communities refers the Panel to the response given below to the Panel's question 5, which addresses important questions about the status of accession commitments within the WTO Agreement. The result of the incorporation of China's Accession Protocol, which includes the commitments stipulated in the Working Party Report, into the WTO Agreement, but not into one or the other Multilateral Trade Agreements, is that Article XX of the GATT 1994 does not apply to China's accession commitments, unless the accession commitment itself provides for such application by way of reference or incorporation.

The first sentence of para. 5.1 of China's Accession Protocol opens with the phrase "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". The WTO Agreement referred to here, is that existing before China's

accession to the WTO (as specified in para. 1.2 of China's Accession Protocol) as the reference would otherwise be circular and without legal effect. Therefore to the extent that China is entitled to regulate trade in conformity with the WTO Agreement, it remains able to do so notwithstanding the stipulation in the first sentence of para. 5.1 of the Protocol. In this way, Article XX is indirectly relevant, but this does not necessarily mean that China can on this basis restrict the right to trade.

Rather, since the opening clause in para. 5.1 is that China has the right to "regulate trade" (in a way which is in conformity with the provisions of the WTO Agreement¹) and since "regulating trade" is much broader than "regulating the right to trade", the opening clause in para. 5.1, first sentence, could refer to general regulations of trade such as TBT and other measures that restrict trade, and thus affect trading opportunities, but not *specifically* the right to trade.

Even if not directly invoked in this dispute nor mentioned in the present question of the Panel, it is useful to also take into consideration para. 6.1 of China's Accession Protocol as context. This paragraph contains a commitment that is specifically qualified by the language: "*except in accordance with the WTO Agreement*".² . This language in para. 6.1, which is quite different from the opening clause in para. 5.1, shows how the drafters of China's Accession Protocol formulated a clause when they intended to qualify an accession commitment by the possibility to apply a measure that is in conformity with the WTO Agreement, including measures justified under Article XX of the GATT 1994.

Para. 5.2 of China's Accession Protocol is not qualified by any language that implies the application of Article XX of the GATT 1994. The paragraph starts with the phrase "*Except as otherwise provided for in this Protocol*". This would include any other paragraphs in the Protocol dealing with trade in goods, including para. 5.1, but the question of course will be whether these other paragraphs provide otherwise than para. 5.2. It would seem to the European Communities that none of these stipulations qualify

¹ Since the rest of the text of para. 5.1 specifies that this relates to trade in goods only, and not to trade in services or intellectual property, then the indicated text also has to be understood within that context.

² This phrase permits China to invoke, by way of defence, for instance that its measure is permitted despite its inconsistency with the commitment in para. 6.1, on the grounds that it is compatible with the GATT 1994, and not outlawed by any other provision of the WTO Agreement (except China's accession commitment in para. 6.1).

China's accession commitment in para. 5.2 by the applicability of Article XX of the GATT 1994.

In the opinion of the European Communities, para. 1.2 of China's Accession Protocol is not generally subject to the affirmative defence of Article XX(a) of the GATT 1994. However, it is not excluded that a specific commitment referred to in paragraph 342 of the Working Party Report expressly stipulates the qualification of that commitment by Article XX of the GATT 1994.

(d) Does the phrase "all enterprises in China" in para. 5.1 include:

- (i) partly or wholly foreign-owned Chinese enterprises registered in China;**
- (ii) such enterprises as mentioned in (i) which are not registered in China (if so, please explain how an enterprise could operate in China without being registered as such); and/or**
- (iii) additional/other "foreign" enterprises ?**

Response:

The phrase "*all enterprises in China*" does include partly or wholly foreign-owned enterprises in China. The term does not make any distinctions, nor does it exclude any particular kind of enterprise.

(e) Does the phrase "all foreign enterprises" in para. 5.2 cover foreign-owned enterprises in China and/or foreign incorporated enterprises operating in China?

Response:

Yes, it covers all of these.

(f) Does the phrase "all foreign individuals" in para. 5.2 cover:

- (i) non-Chinese individuals in China, non-Chinese individuals outside China or both?**
- (ii) individuals importing for their own use (as opposed to commercial traders)?**

Response:

The phrase would cover both non-Chinese individuals in China and outside China. In fact paragraph 5.2 continues to define it further as it states it applies to "*all foreign individuals*

and enterprises, including those not invested or registered in China". As there is no clear exclusion of individuals importing for their own personal use, then it would also be applicable to them.

(g) Regarding the opening clause of para. 5.2 ("Except as ..."), where does the Protocol provide otherwise?

Response:

Presumably this would refer to other paragraphs in the Protocol which deal with the regulation of trade in goods (e.g. this could include para. 6 which deals with State Trading, para.7 on Non-Tariff Measures and para.8 which deals with Import and Export Licensing), to the extent that these provide otherwise.

(h) To what category of goods does the phrase "All such goods" in the third sentence of para. 5.1 refer – all goods or Annex 2A goods?

Response:

In the opinion of the European Communities the phrase all "*All such goods*" refers to all goods.

(i) Linked to the previous sub-question, would "such goods" be subject to Article III:4 of the GATT 1994 in the absence of the third sentence of para. 5.1?

Response:

The European Communities can see no reason why Article III:4 of the GATT 1994 should not be applicable even in the absence of a reference to Article III:4 GATT 1994 in para 5.1 of China's Accession Protocol.

Question 2:

Does the GATT 1994 or any other covered agreement, permit a Member to regulate trade by regulating trade in a manner that restricts the right of enterprises or individuals to trade?

Response:

In the opinion of the European Communities, the GATT 1994 and other covered agreements permit a Member to regulate trade in certain manners that restrict the right of enterprises or individuals to trade. For example, a WTO Member is entitled to ban the

importation and sale of heroin, which inevitably restricts the right of enterprises and individuals to trade in that product.

Question 3:

With reference to para. 16 of Japan's written submission, please comment on what role a measure's efficiency and effectiveness in achieving the pursued aims of the regulating Member plays in determining whether that measure was "necessary" within the meaning of Article XX(a) of the GATT 1994.

Response:

The meaning of the word "efficiency"³ is the "quality of being efficient, the ability to accomplish or fulfil what is intended". Something is described to be "effective", when it is "concerned with of having the function of accomplishing or executing"⁴ The European Communities agrees with Japan's view expressed in para. 16 of its Written Submission that "*a measure's efficiency and effectiveness in achieving the pursued aims is not enough to demonstrate necessity*". In fact as was held by the Panel in *US-Gambling*⁵ :

The Appellate Body has pointed to two factors that in most cases, will be relevant to a Panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce."

In the view of the European Communities the quality of "effectiveness" is only one of the factors referred to in *US-Gambling*. It appears that the Panel was referring to the "effectiveness" of a measure when it referred to the "*contribution of the measure to the realization of the ends pursued by it*". When a Panel assesses the "necessity" or otherwise of a measure, in order to judge whether it meets the requirement of Article XX *chapeau*, the effectiveness of a measure, and its efficiency, or indeed any other factors, cannot be considered in isolation. Another important factor, the one relating to the restrictive impact

³ Shorter Oxford English Dictionary, 5th Edition.

⁴ Ibid.

⁵ *US-Gambling*, para. 306. Emphasis added.

that the measure may have on international commerce, needs also to be assessed by the Panel.

Question 4:

With reference to para. 84(b) of the Working Party Report, please indicate:

(a) whether the term "non-discriminatory" concerns discrimination as between (i) different "foreign enterprises and individuals" (for instance, US enterprises and EC enterprises), (ii) foreign enterprises and individuals, on the one hand, and enterprises in China, on the other, or (iii) both.

Response:

In the opinion of the European Communities, the term "non-discriminatory" in this context applies to both cases described in (i) and (ii) above.

(b) the type of requirements China is permitted to impose as a precondition for granting trading rights. Please indicate, inter alia, whether requirements relating to capitalisation, prior registration, business scope, business site, compliance with Chinese laws, etc. would be permissible.

Response:

In the opinion of the European Communities, China is not permitted to impose any requirements that constitute a barrier to trade. The only requirements that may imposed as a precondition for obtaining trading rights would be for customs and fiscal purposes only, and as long as they do not constitute a barrier to trade. No requirements relating to capitalisation, prior registration, business scope, or business site would be allowed. Whether compliance with Chinese laws could be required depends on the content of these laws and whether they comply with the preceeding and other requirements set out in the Accession Protocol.

Question 5:

Article II:2 of the Marrakesh Agreement states that the Multilateral Trade Agreements are "integral parts" of the WTO Agreement. China's Accession Protocol (Para. 1.2) states that it is an "integral part" of the WTO Agreement. What does the phrase "integral part" mean? Does it mean the same thing in both cases?

Response:

The phrase “integral part” means the same thing to the extent that it incorporates legal texts into the WTO Agreement, which is one global international agreement. The Multilateral Trade Agreements form part of the WTO Agreement, as does every Accession Protocol. Accession Protocols modify, and become part of, the WTO Agreement because they integrate a new Member into the WTO Agreement and because they set the terms on which the new Member accedes (Article XII:1 of the WTO Agreement).

The phrase “integral part” means something different in relation to Multilateral Trade Agreements, on the one hand, and Accession Protocols, on the other, when it comes to the location and status of the legal incorporation. Multilateral Trade Agreements are inscribed in Annexes 1 to 3 of the WTO Agreement. They are thereby subject to the rule of legal precedence of Article XVI:3 of the WTO Agreement, which gives priority to the WTO Agreement over contrary stipulations in the Multilateral Trade Agreements. (Additionally, within Annex 1A, the General interpretative note gives priority to Annex 1 A Multilateral Agreements on Trade in Goods over the GATT 1994). An Accession Protocol, in contrast, is incorporated into the WTO Agreement without becoming part of its Annexes 1 to 3, nor becoming a separate Annex to the WTO Agreement (an exception to this is the incorporation of China’s schedules of concessions and commitments into the GATT 1994 and the GATS, see Part II – Schedules, of the Protocol, and Articles II:7 of the GATT 1994 and XX:3 of the GATS).⁶

⁶ This structure of the incorporation of Accession Protocols also has an implication for dispute settlement, as the DSU applies to disputes on accession commitments on the basis of Article 1.2 of the DSU, given that neither the 16 Articles of the WTO Agreement, nor Accession Protocols contain “consultation and dispute settlement provisions” in the sense of Article 1.1 of the DSU (e.g. Article XXII, XXIII of the GATT 1994).

Question 6:

What is the relevance, if any, of the provisions of Articles III:10 and IV of the GATT 1994 to the issue of whether or not films for theatrical release are to be considered goods or services? In replying to this question, please address the fact that the article appears to be concerned with regulations pertaining to the exhibition of cinematographic films and screen time reservations, but at the same time is contained in the GATT 1994 which is a Multilateral Agreement on Trade in Goods.

Response:

The European Communities' answer is that there is no relevance. The GATT 1994 is a Multilateral Agreement on Trade in Goods, but, unlike the GATS, does not contain a general provision by which the entire GATT 1994 applies to trade in goods only. As a result, each GATT provision applies wherever all of the elements or conditions of that provision are satisfied. While many GATT provisions refer to "(imported) goods" or "products", this is not the case of Article III:10 and IV of the GATT 1994, which can therefore apply even in the absence of internationally traded "goods/products". Thus, the fact that the GATT 1994 is a Multilateral Agreement on Trade in Goods and that it contains provisions regarding films for theatrical release is not decisive for the question of whether these films are to be considered goods or services.

Question 7:

Do the Third Parties consider that the statement by the Panel in *US – Gambling* regarding means of delivery (reproduced, e.g., in the EC written submission at para. 47) would apply equally in the case of commitments under mode 3? (The Panel is aware that the European Communities and Japan have already addressed this question. They may elaborate, if they wish.)

Response:

In the view of the European Communities, the statement of the Panel in *US – Gambling* reproduced at para. 47 in the EC written submission would apply equally in the case of commitments under mode 3. Moreover, as maintained by the Panel in the same case⁷, when a Member inscribes the word "None" in the market access column of its schedule for

⁷ *US-Gambling* (Panel) WT/DS285R, paragraph 6287.

mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector.

Question 8:

Article XXVIII(b) of the GATS distinguishes between the "distribution" of a service and its "delivery". In this regard, please answer the following questions:

(a) What is the meaning of the concept of "delivery" and how, if at all, does it differ from "distribution"?

Response:

According to dictionary definitions, "delivery" means "the action of handing over something to another especially a scheduled performance of the action of delivering letters, goods etc". It can also mean a "discharge, provision or supply".⁸ The word "distribution" is defined as "the action of spreading or dispersing throughout a region; the state or manner of being located in different places all over a region."⁹ This implies that, although "distribution" and "delivery" may function as synonyms and thus there is a significant degree of overlap between the two concepts, "delivery" generally conveys a meaning of a service consumer actually receiving the service, whereas "distribution" is a wider concept that may or may not include the actual delivery.

(b) Is it possible for a service to be distributed and delivered electronically? If so, please provide examples.

Response:

Yes, a service can be distributed and delivered electronically. An example would be home banking provided by electronic means.

⁸ Shorter Oxford English Dictionary, 5th Edition.

⁹ Ibid.

Question 9:

In the case of "sound recording distribution services" (Sector 2D of China's GATS Schedule), what is/are the relevant service(s)? If this is about distribution of a service, what is the relevant service that is being distributed?

Question 10:

With reference to Sector 2D of China's GATS Schedule, in the market access column, do the terms "audiovisual products" and "audio and video products" cover (i) goods, (ii) services or (iii) both? In answering this question, please address, inter alia, sub-heading "D. Audiovisual Services".

Question 11:

Sector 2.D.a in W/120, as well as CPC 96113, use the terms 'distribution services'. What does the service described in CPC 96113 consist of? Does it consist in the distribution of goods, or something else? How different is its scope from that of China's commitment on "Videos, including entertainment software and (CPC 83202), distribution services"?

Question 12:

Could the Third Parties provide their views on whether according to W/120 the distribution of sound recordings and AVHE products in physical form would be covered under Sector 4, Sector 2D, or both? With reference to para. 19 of Japan's written submission, could the third parties please also provide their views on whether the distribution of sound recordings in physical form is covered by China's commitment in relation to Sector 2D?

Response:

These questions (9 to 12) relate to the specificity of China's scheduling. For instance, usually the distribution of sound recordings in a physical form is scheduled under Sector 4 (Distribution Services), which according to W/120 includes CPC 632 which in turn covers "retailing services of radio and television equipment, musical instruments, music scores, and audio and video records and tapes" in CPC 63235. CPC 83202 is usually scheduled under "Business Services". Although W/120 Sector "Audiovisual services" usually only covers the distribution of services, Members are free to use their own sub-sectoral

classification or definitions.¹⁰ China's GATS scheduling may have consequences in terms of scope of the commitments at hand.

Question 13:

With reference to China's assertion that "network music services constitute a new type of service" that is not included in its GATS commitments, could the third parties please answer the following questions:

- (a) **What is a new service?**
- (b) **How do you distinguish between a new mode of delivery of an existing service a "new service"?**
- (c) **How different must a new technology be in order to qualitatively change the nature or character of an existing service into a "new one"?**
- (d) **Could the Third Parties comment on how China's assertion relates to the existing classification system used for GATS Schedules (i.e., W/120 and the Provisional CPC)? In this regard, please comment on the Appellate Body statement in US – Gambling (para. 172) that the Provisional CPC is "exhaustive"?**

Response:

As indicated in its written submission, the European Communities does not agree with China's assertion that "network music services constitute a new type of service". There is no new category of service, but rather an innovative form of delivery of sound recordings.

Question 14:

With reference to para. 374 of the U.S. first written submission and paras. 609-610 of China's first written submission, on the assumption that in relation to the U.S. claim concerning "distribution of films for theatrical release" the good being distributed is exposed and developed cinematographic film, please elaborate on whether providing the exposed and developed cinematographic film to the film distributor amounts to "distribution" within the meaning of Article III:4. Please take into account China's argument that the film producers typically do not sell the master negatives to their contractual distributors and that the distributors would not resell, or supply, the master negatives to movie theatres, but copies.

¹⁰ Guidelines for the Scheduling of Specific Commitments under the GATS (S/L/92), para. 24

Response:

As indicated in the European Communities' Written Submission, Article III:4 GATT applies in respect of measures affecting the internal distribution or use of foreign products, and may be relevant, if there is discriminatory treatment as regards the distribution or use of foreign goods as compared to like domestic goods. As regards film distribution for theatrical release, the European Communities is of the view that it is to be considered as a service, and that any assessment of national measures in this area should be carried out in the framework of the GATS.

Question 15:

With reference to paras. 65, 82, 117, 570 and 608 of China's first written submission, can the Third Parties comment on whether tangible, physical objects which are "accessories to services" are outside the scope of WTO disciplines on goods? If yes, please explain why and provide the Panel with any criteria for determining when a tangible physical product is such an "accessory to a service" that it is not subject to WTO disciplines on goods.

Response:

In the opinion of the European Communities, tangible, physical objects are not outside the scope of WTO disciplines on goods, even where they are utilized as an "*accessory to a service*".

II. FOR THE EUROPEAN COMMUNITIES:

Question 16:

With reference to paras. 40, 42 and 43 of the EC written submission, please address whether direct sale by publishers to their consumers, or through agency agreements, would constitute wholesale distribution within the meaning of Annex 2 of the China's GATS Schedule. Does this involve "reselling"?

Response:

As indicated in the written submission of the European Communities, the factual situation concerning the scope and characteristics of "*Zong Fa Xing*" is unclear and would require further clarification before a final view on this matter can be taken. This lack of clarity extends to the characteristics and precise role of the "entrusted Publication *Zong Fa Xing*

entity". In any event, China itself has characterized "Zong Fa Xing" as a "comprehensive "top to bottom" distribution channel¹¹". We note that in accordance with the definition of wholesale distribution in Annex 2 of China's GATS Schedule, wholesaling services consist of the sale of goods/merchandise to various types of users.

Question 17:

With reference to para. 58 of the EC written submission, please answer the following questions:

(a) What is the point the European Communities is intending to make when it says that "all electronic deliveries (containing information coded by electronic bits) transmit outcomes of services as defined in the GATS classification (e.g. sound recordings)"?

Response:

In the opinion of the European Communities, electronic deliveries are services. As a result, the electronic delivery of a sound recordings is a service, without any good being involved in the process.

Any electronic delivery corresponds to the supply of a service as defined in Article XXVIII of the GATS. In the case of sound recordings, for instance, there can be a transmission of content through traditional physical carriers (e.g. disks, tape) or in the form of digitised content (e.g. download). This does not change the fact that in either case there is a service consisting of the transmission of content by a service provider. In fact, in the opinion of the European Communities, all electronic deliveries of music, films, games, and other multimedia contents are *per se* services.

These are not tangible goods in themselves, but can be incorporated into physical carriers which are goods. However, this does not change their nature as services. In the absence of the goods (tapes, cd, DVD etc.), the services nature of the product is the only relevant one. Nowadays, the same TV programme can be accessed through broadcasting, web-casting on the internet, downloading, or copied onto a DVD. In this context, the distinction between traditional broadcasting and the internet for the determination of the

¹¹ China's First Written Submission, para. 256.

nature of a programme as a good or a service is irrelevant, given that internet is now available through cable TV network.

The outcome of services supplied in the form of electronic deliveries also corresponds to the category of the services activity identified in the Services Sectoral Classification List used by WTO Members for scheduling their GATS commitments (sound recordings in the case at issue). Before the advent of telecommunications networks with enough transmission capacity, there was a need to have a manufacturing process in order to put the information on a tangible carrier and transmit it: thus, the carrier (e.g. tape, CD) was recognised as a "good". Today, the service can also be supplied (in the sense of the GATS definition referred to above) directly to the consumer, in an electronic format.

Many other services produce physical outcomes, notably professional services (e.g. drawings in the case of architecture, engineering or industrial research, etc.), and these outcomes have been treated at the border as "goods" because they are the result of a manufacturing process of the information produced by the service. When those services (e.g. an architectural service) are provided physically in a cross-border manner, it cannot be ruled out that some countries collect duties on the physical outcome produced (e.g. drawings), but that does not change the fact that all recognise the "seller of the product" (the architect) as a service provider, and that the electronic provision of such service is itself a service.

(b) Could the European Communities explain further what it means by services which have a "tangible support"? Also, please provide examples of services which "have tangible support" and would be turned into goods? Why and under what circumstances would they be turned into goods?

Response:

Many services require some form of tangible support. An example would be payment services through the use of credit cards. The card itself is not the service, but provides a necessary "tangible support".

The point made by the European Communities with regard to "tangible support" was not that services would be turned into goods, but rather the opposite: that the fact that there was a tangible element, was not enough to turn the service into a good. Some services, such as professional services or education services, may have a tangible support element

(e.g. maps, designs, drawings, books, manuals etc.). If one follows this logic it would be difficult to draw the line and this would be detrimental to the whole GATS architecture, in the sense that there would not be any legal certainty left on existing commitments on most services.

Question 18:

With reference to page 4 of the European Communities' oral statement, if a film producer imports its own cinematographic films (master negatives) into another WTO Member's territory without having concluded any distribution contracts with local distributors (e.g., because it is considering to distribute the films itself), and the importer is being prevented by the authorities of that Member from importing or distributing the films, would this governmental action be subject to WTO rules on goods (GATT 1994, etc.) or services (GATS), or both?

Response:

In the opinion of the European Communities, the distribution of films (and their subsequent exploitation in cinema theatres) is a "service": Promoting a film, making available its prints, making trailers, booking theatres, which will subsequently project or screen those prints and trailers, all fall under the definition of a "service". In this context, it is only the basic physical support ("inter-negative" or "master video") that crosses the borders in physical terms. This means that the supposed trade in goods would be reduced to only one unit or possibly a reduced number of units, whereas the "reproduction" and the dubbing/subtitling/localisation (for DVDs) usually takes place within the territory of the commercial exploitation.

Moreover, the basic support for copies can be transmitted via modes of dissemination which do not require tangible (i.e. physical) means, such as the internet, cable, satellite, etc. Actually the current trend towards the digitisation of the audiovisual sector points to an increasing dematerialisation, and further reinforces a configuration which fits the concept of a "service". In the opinion of the European Communities, the "distribution of films for theatrical release" should be dealt with under the GATS.

Question 19:

In para. 422 of its first written submission, China stated that the difference between network music services and traditional music or sound recording distribution business models has "been confirmed by the competition authorities of the European Union in several merger control cases, where the European Commission has repeatedly held that "[. . .] the structure of on-line distribution of downloadable music is completely different from the physical distribution of music in bricks and mortar shops and e-commerce." (emphasis supplied by China). Can the European Communities please comment on the relevance of these European Commission determinations?

Response:

In the view of the European Communities, a difference in the structure of the services provided does not imply the existence of a new service. The same service may be provided through more than one mode of supply, with various means of delivery available under the same mode of supply.

With reference to footnote 206 of paragraph 422 of China's First Written submission, where China makes a specific reference to a European Commission Decision in a merger procedure case. In fact this related to a Commission Decision¹² which declared a concentration to be compatible with the common market and the functioning of the EEA Agreement. This Commission Decision was later annulled by a judgement of the European Court of First Instance of the 13 July 2006 (Case T-464/04).

¹² C(2004) 2815 of the 19 July 2004.