

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

**Third Party Oral Statement
by the European Communities**

As Delivered

**Geneva
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Mr Chairman, distinguished Members of the Panel, the European Communities welcomes the opportunity to appear before you today. Our participation as a third party in this dispute is based on our systemic interest in the interpretation of the GATT 1994 and the GATS Agreements as well China's Accession Protocol to the WTO. In our written submission, the European Communities commented on a number of legal aspects pertaining to this dispute and we do not intend to repeat the comments in any detail today. Rather we would like to concentrate on a more limited number of items and comment on the written submissions of the other third parties.

I. TRADING RIGHTS AND CHINA'S WTO ACCESSION PROTOCOL

One of the main arguments raised by the United States in this dispute is that regarding the issue of "trading rights" that emanate from China's commitments, which are set out in Paragraphs 5.1. and 5.2 of its WTO Accession Protocol, as well as in paragraphs 83 and 84 of China's Working Party Report. The United States claims that China has committed to provide all enterprises in China, as well as all foreign enterprises and foreign individuals, the right to trade in all goods, (except for those listed in Annexes 2A and 2B of China's Accession Protocol). These commitments extend to what the United States terms in its First Written Submission as "the Products". These products, according to the United States, consist of reading materials (which includes books, periodicals, newspapers and electronic publications), audiovisual home entertainment products, (AVHE) (which includes videocassettes, VCDs and DVDs), as well as sound recordings and films for theatrical release.

The United States identifies various measures currently being enforced in China, through which China refuses to permit any foreign enterprises or foreign individuals to import the aforementioned "Products" into China. The United States also argues that China only allows an extremely limited number of enterprises to import these products into Chinese territory. China's main argument in this regard is that it has the right to impose restrictions and conditions on the grant of trading rights, provided that they are consistent with Article XX of the GATT 1994, and more specifically with Article XX(a), which relates to measures which are necessary to protect public morals.

In its written submission, the European Communities has already expressed its views that Article XX GATT 1994 is not directly applicable to China's Accession Protocol commitments, due to the fact that even if they are an integral part of the WTO Agreement, they are not a part of the GATT 1994. However, even in a scenario in which the GATT 1994 regime is deemed to be applicable to the measures at issue, China would still have to satisfy the requirements set out in Article XX of the GATT 1994. In the opinion of the European Communities, what is really at issue in this dispute is whether the "trading rights" of non-Chinese enterprises and individuals are being adversely affected, due to the fact that Chinese measures are restricting the importation of reading materials and other audiovisual products only to certain entities. This results in discriminatory treatment against non-Chinese enterprises, with the added effect of protecting Chinese enterprises from competition from foreign enterprises. Moreover, the stringent requirements that the Chinese measures impose on the importing entities, do not meet the "necessity" test criteria as required by Article XX GATT 1994, and as further developed by the Appellate Body. They are also having an extremely "restrictive impact on international commerce". In the opinion of the European Communities, it could still be possible for the Chinese authorities to implement a content review system, without restricting the right to trade in these to a very small number of Chinese entities.

II. CHINA'S COMMITMENTS IN THE DISTRIBUTION SECTOR UNDER THE GATS AND ITS SCHEDULE OF SPECIFIC COMMITMENTS

Another issue raised by the European Communities in its Third Party Written Submission relates to China's commitments in the Distribution Services Sector, and more specifically to China's explanations about the meaning of the term "*Fa Xing*". According to China, this is a generic term covering different features of distribution, which is then further sub-divided into two different types of distribution, to which China refers to as "*Zong Fa Xing*" and "*Fen Xiao*".

The European Communities is not convinced by China's attempt to define "*Zong Fa Xing*" as a distinctively Chinese concept, which apparently has no equivalent in the English language. In the understanding of the European Communities, the practice of publishers selling their products directly to their consumers, or through agency agreements with sub-distributors, takes place in Europe and elsewhere. Moreover, the use

of a "distinctively Chinese concept" or terminology in Chinese legislation does not imply that the services covered under this concept or term do not fall under the relevant GATS sector or sub-sector. It seems to the European Communities that entities in China offering "*Zong Fa Xing*" distribution services are conducting activities that would fall under China's distribution commitments, both under wholesaling and retailing services, depending on the factual situation and the users that are supplied. In the opinion of the European Communities, the exclusion of what China terms as "*Zong Fa Xing*" activities would have required an explicit exclusion in China's GATS Schedule of Specific Commitments.

III. "TECHNOLOGICAL NEUTRALITY" UNDER THE GATS AND THE READING OF CHINA'S SCHEDULE OF SPECIFIC COMMITMENTS ON AUDIOVISUAL SERVICES.

The European Communities supports the position that the GATS Agreement is generally neutral vis-à-vis technology (or as is sometimes termed: "technological neutrality"). The European Communities understands that this means that service suppliers are free to supply services unrestrictedly, through any means of delivery, both in a "traditional" format, but also through electronic means. Moreover, the quick developments in modern technological means, change the way in which services are delivered. This change is a continuous process. The European Communities thus does not agree with China's view that new developments in digital technologies and communication networks have resulted in the emergence of an entirely new type of services sector, which China refers to as "Network Music Services". It also does not agree with China's argument, that the "principal of technological neutrality is irrelevant in the present case".

IV. APPLICABILITY OF ARTICLE III.4 GATT TO SERVICES

The European Communities does not support the United States' line of argument that the Chinese measures regarding film distribution for theatrical release and the electronic distribution of sound recordings, should be assessed against the background of Article III:4 GATT 1994. The European Communities considers that these are two activities which are classified as services categories. Consequently, the measures affecting such activities can only be challenged under the GATS rules.

In the specific case of films distributed for theatrical release, it is an undeniable fact that there is a "tangible" good involved. A physical copy of the film, whether in celluloid or digital form, is a "good", which has to pass through customs clearance and falls under a specific tariff heading. However, the essential nature of a film which is being distributed for a theatrical release, means that the "tangible good" itself, becomes merely the "vehicle" to transport essentially a bundle of intellectual property rights, on which a distribution contract between the film producers, distributors and theatre owners is based. The distribution contract represents the essential commercial value, while the actual "tangible good", that is the celluloid or digital copy of the film, is a mere accessory. In the opinion of the European Communities, the public showing of films in theatres for the general public, cannot be treated as anything but a "service".

The European Communities does not agree with the argument made by Japan in paragraph 9 of its Third Party Written Submission where it stated that: *"the fact that tangible media (such as film reels) may be an "accessory" to the provision of a service does not mean that trade in such tangible media is trade in services."* It is certainly true, that the "good" in question, that is the "film reel", is not suddenly transformed from a tangible to an intangible object, and as such, as a "good", it retains all of its physical characteristics. However what is really relevant here is the distribution of that good, and the conditions under which that distribution is taking place, and the fact that the "distribution of a good" is a "service".

The European Communities would also like to refer to the points raised by the Republic of Korea in paragraphs 10 and 11 of its Third Party Written Submission. Whilst Korea first seems to agree that the *"characteristics of the motion pictures for theatrical release are somewhat closer to service"*, it then states that the *"regulation of services flowing from the projecting movies in theatres also affects the trade of the motion pictures and related accessories as goods"*. However, the concept of "trade of the motion pictures and related accessories as goods" is not related to distribution contracts for the release of films, that are shown in public theatres. Normally if a film is being traded as a "good" it would be copied to a DVD, or to a video-cassette, and would normally be sold to private individuals for their own personal use and viewing. Such copies of films are generally not intended for public viewing in theatres.

The European Communities would now like to refer to China's First Written Submission (paragraphs 58-70), where it referred to a judgement of the European Court of Justice (the *Fedecine* case - ECJ Case C-17/92 of the 4 May 1993). In fact the ECJ held in that case that: *"the exploitation of films in a cinema or on television implies that the author may make any public projection of the work subject to his authorisation and that the commercial exploitation of films by such means, which involves the grant of performing licences is an activity which comes under the freedom to provide services. That service is in particular one which producers of films provide to distributors by allowing them to make copies of their films and to organize public performances by means of such copies."* As a point of clarification, the European Communities would like to specify that even if it is evident that the ECJ held that the "exploitation of films in a cinema or television is a "service", one also needs to note, that the context of "service" to which the ECJ was referring to, was that of the "*freedom to provide services* " within the internal market of the European Communities, as set out in Title III of the EC Treaty (Articles 49-55). The question of the importation or discriminatory treatment of a "good", as set out in Title I of the EC Treaty, which deals with the "*free movement of goods*", was not addressed in the judgment of the ECJ in this case, but was elaborated upon by the Advocate-General in his Opinion.

Finally, the European Communities would like to say that it is not entirely clear if and what role the interpretation by the ECJ of the provisions of the EC Treaty can have on the interpretation of the WTO GATT 1994 and GATS Agreements, which provide the yardstick to address the issues raised in the present case. This is true *a fortiori* in a situation where the ECJ decision relates to a historic period in time preceding the entry into force of the WTO Agreement.

Mr Chairman, distinguished Members of the Panel, thank you for your kind attention. We remain of course at your disposal for trying to answer any questions you may have.

