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National Interest Analysis [2008] ATNIA 9

with attachment on consultation

**Film Co-production Agreement between the Government of Australia and the
Government of the People's Republic of China
(Beijing, 27 August 2007)
[2007] ATNIF 22**

**NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY
SUMMARY PAGE**

**Film Co-production Agreement between the Government of Australia and the Government
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Nature and timing of proposed treaty action

1. Australia signed the *Film Co-production Agreement between the Government of Australia and the Government of the People's Republic of China* (the Agreement) on 27 August 2007. Article 13 of the Agreement provides that the Agreement shall enter into force once the parties have notified each other through an exchange of third person notes that their domestic requirements have been completed. The Agreement shall enter into force on the latter date of these two notifications.

2. It is proposed that Australia provide such notification to the People's Republic of China via diplomatic channels as soon as practicable following tabling of the treaty in Parliament and consideration by the Joint Standing Committee on Treaties (JSCOT).

Overview and national interest summary

3. The purpose of the proposed Agreement is to stimulate industry, employment, technical development and cultural exchange by facilitating film co-productions between Australia and China. The Agreement provides a framework within which the authorities of each country may co-operate to approve the making of films including feature films, animations, documentaries and telemovies.

4. Asia is an increasingly important region for the global film and television industry, and this Agreement will provide greater access to both the Chinese and wider Asian markets for Australian film. It will enable a creative and technical interchange between film personnel, and also has the potential to increase the output of high quality productions through the sharing of equity investment.

5. Under the Agreement a project approved as an official co-production will be regarded as a national production of both Australia and China, and will therefore be eligible to apply for any benefits or programs of assistance available in either country. The production will also be treated as 'local content' in each country for the purposes of audiovisual regulation.

6. The treaty action will further strengthen bilateral relations between Australia and China by building upon existing successful film making partnerships - particularly in the post-production and visual effects (such as computer generated imagery) production sectors. The Agreement will encourage film production companies from both countries to pool their resources and talents for film co-productions, and create a larger distribution network for quality exportable film product in the domestic markets of both countries, as well as the international market.

Reasons for Australia to take the proposed treaty action

7. This Agreement will form part of Australia's International Co-Production Program, the principal purpose of which is to foster cultural and industry development and cultural exchange between co-operating countries. In this environment, co-production agreements are individually negotiated with the aim of sustaining and developing Australian creative resources and production.

8. The objective of the proposed Agreement with China is to facilitate co-productions which:

- increase the output of high quality productions by sharing equity investment with China;
- open up new markets in China and the broader Asian region for Australian film projects;
- share the risk (and cost) of film production;
- establish links with Chinese production and distribution interests;
- facilitate interchange between Australian and Chinese film makers, particularly those in the principal creative positions;
- create employment opportunities for Australian industry personnel; and
- strengthen existing diplomatic ties between Australia and China.

9. Australia-China co-productions will gain financial benefits under the Agreement. In Australia, the main benefits available for co-productions will be their eligibility to be treated as films with a significant Australian content that can therefore access the Australian Screen Production Incentive – Producer Offset under the *Income Tax Assessment Act 1997*, and eligibility to qualify as 'Australian program content' for the purposes of the Australian Content Standard for commercial television broadcasting. Official co-productions will also be able to access direct film agency funding through the Australian Film Commission and the Film Finance Corporation Australia. Similarly, in the People's Republic of China, an official co-production will be considered a Chinese production for the purposes of official financial support and audiovisual regulation.

10. With a population of more than 1 billion people, China is one of the largest and most heavily regulated film markets in the world. Historically, Film China, the State owned film production and distribution company, developed all local Chinese films and bought all foreign films exhibited in China for a low flat fee. In 2002, the Chinese Government announced it would allow private Chinese companies to produce and distribute films independently, and subsequently announced the end of the 50-year State monopoly on the import of foreign films. Nonetheless, China currently allows only 20 foreign films to be exhibited at its box office each year. Under the Agreement official co-production projects will be treated as national films affording them preferential access to China's distribution and exhibition sectors. The Agreement will open up China's rapidly growing film market to Australian product, effectively bypassing the foreign film quota to which other countries remain subject.

11. The Agreement is defined by the notion of reciprocity, a principle applied to ensure that over time there is an over-arching balance of financial and creative participation by both countries, and that the Agreement is of comparable benefit to both countries. The Agreement will help to ensure that an overall balance is achieved between the parties in relation to their

respective contributions including production costs, studio and laboratory usage, and the employment of nationals of both parties in major performing, craft and technical positions related to co-productions under the Agreement.

12. Existing partnerships between Australian and Chinese production companies have resulted in the development of a number of successful film projects, such as the feature films *Hero*, *House of Flying Daggers* and *The Children of Huang Shi*. The proposed Agreement will build on these commercial and collaborative links and provide the impetus to develop high quality projects that may not otherwise be undertaken. With a significant Chinese population in Australia, the Agreement will create further opportunities to develop co-produced films which have cultural relevance to both countries. There is significant industry interest in the Agreement from both Australia and China, and a number of potential co-production projects await its finalisation.

Obligations

13. Pursuant to Article 4.1 and 4.3, in order to qualify as co-production films, productions must receive provisional and final approvals from the competent authorities in both countries (as designated under Article 3). Article 4.4 provides that, in determining such approvals, the competent authorities must apply the rules set out in the Annex, which forms an integral part of the Agreement. Article 4.5 obliges the competent authorities to consider these approvals according to their own policies and guidelines, and to consult with each other to ensure that individual projects qualify under the terms of the Agreement. Where such approval is withheld by one of the competent authorities, Article 4.6 requires that the project not be approved as an official co-production under the Agreement.

14. Once approved as a co-production between Australia and China, Article 2.1 requires that each co-production is entitled to the full enjoyment of all the benefits that are or may be accorded in Australia or China to national films. In respect of each co-production, these benefits accrue to:

- Australian co-producers and Chinese co-producers (Article 2, Article 5, Articles 6.1 and 6.2, Annex (1) and (3)); and
- producers from countries with which Australia or China has a similar treaty and who are co-production partners ('the third country co-producer') in the particular project (Article 6.3).

15. Articles 7 and 8 oblige Australia, subject to its laws, to facilitate the import, free of duties and taxes, of cinematographic equipment for the making of co-productions, and to permit Chinese nationals and residents, or citizens of the country of any third co-producer, to enter and remain in Australia for the purpose of making or exploiting a co-production. China is under the same obligations under Articles 7 and 8 in corresponding circumstances.

16. Article 10 ensures that neither party is bound to permit the exhibition of a completed co-production in their country, and Article 11 provides conditions under which a co-production may be exhibited at an international film festival, including the payment of expenses by each party for the attendance of their own representatives.

17. The Annex specifies the procedural requirements for making co-production projects, including the approval by the competent authorities (under prescribed circumstances) of location filming in (Annex (4)), and the participation of a restricted number of personnel from (Annex (5)), countries other than those of the participating co-producers. In implementing the Agreement, the Annex also sets out the details of the contractual arrangements required between co-producers necessary for the making of co-productions (Annex (10)).

18. In addition, Annex (2) requires that the working conditions in each of the countries of the participating co-producers are comparable. This is also extended in broad terms to the working conditions for approved location filming in countries other than those of the co-producers. Annexes (6), (7) and (12) oblige the competent authorities to ensure that the required financial and creative contributions for each co-production project have been met, and to monitor the overall balance of these contributions over each three year period of the Agreement. The competent authorities are required to work together to rectify any imbalances and to implement measures to reduce the risk of this occurring.

Implementation

19. No new legislative measures are required to implement the obligations under the Agreement.

20. The *Income Tax Assessment Act 1997* allows official co-productions access to tax incentives (the Producer Offset), and the *Migration Act 1958* and regulations allow for entry into Australia of co-production teams as envisaged by the Agreement.

21. For goods the subject of a 'relevant intergovernmental agreement', the *Customs Act 1901* provides for their delivery into home consumption without the need for a formal Customs entry, or the payment of otherwise applicable duty, provided that a security or undertaking is established. Corresponding provisions in *A New Tax System (Goods and Services Tax) Act 1999* extend these arrangements to the otherwise applicable tax. Once in force, this Agreement will constitute a 'relevant intergovernmental agreement' for the purposes of the Customs and Tax Acts. Consequently, no change is required in these Acts to allow for the temporary admission and subsequent export, free of duty and tax, of cinematographic and technical equipment for the making of a co-production as required by Article 7 of the Agreement.

22. The Agreement will be administered by the Australian Film Commission on behalf of the Australian Government as part of Australia's International Co-production Program.

23. There will be no change to the existing roles of the Commonwealth and States/Territories as a result of implementing the treaty action.

Costs

24. While there will be some costs associated with the administration of the proposed Agreement, these costs will be absorbed by the Australian Film Commission.

25. Direct agency funding of Australia-China co-productions through the Australian Film Commission and/or the Film Finance Corporation Australia will be provided from existing funds.

Co-productions funded through the Producer Offset under Division 376 of the *Income Tax Assessment Act 1997* will be a cost in terms of revenue foregone.

Regulation Impact Statement

26. The Office of Best Practice Regulation, Productivity Commission has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

27. Article 12.1 obliges the competent authorities to supervise and review the Agreement, and to advise the parties of any required modifications, while Article 12.2 specifies that amendments can be made with the mutual consent of the parties subject to their respective domestic treaty approval processes.

Withdrawal or denunciation

28. Article 15 specifies that the Agreement shall remain in force initially for three years from the date of its entry into force, and unless either party gives written notice to terminate the Agreement six months before the end of the three years, the Agreement will be automatically renewed for successive three year periods. If written notice to terminate is given by either party six months before the end of any three year period, the Agreement will terminate at the end of those three years. Termination by Australia would also be subject to our domestic treaty approval process.

29. In the event of termination, the Agreement shall continue as if in force in respect of any co-production approved by the competent authorities, but not yet completed prior to the termination.

Contact details

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Film and Creative Industries Branch

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CONSULTATION

1. The Australian Film Commission (AFC) formally commenced negotiation of the *Film Co-production Agreement between the Government of Australia and the Government of the People's Republic of China* (the Agreement) in November 2004. Following a change in procedure in December 2006, the then Department of Communications, Information Technology and the Arts (DCITA) took on the lead role and continued the negotiation process in close consultation with the AFC and the Department of Foreign Affairs and Trade (DFAT). The Agreement text was also provided to the Attorney-General's Department (AGD) for legal clearance at key points in the drafting process.
2. Over the course of the negotiations both DFAT and AGD identified issues relating to text proposed by China which then became the subject of further consideration and negotiation with China. The draft text was subsequently amended with the agreement of China to satisfy these concerns. For example, early in the negotiations China proposed text which imposed obligations on Australia to ensure a film was not distributed anywhere without the authorisation of both the Australian and Chinese competent authorities. This obligation conflicts with Australia's obligations under international law and Australia's position not to endorse the "extraterritorial application" by a State of its laws relating to intellectual property. This particular issue delayed negotiations for many months. Following a visit by Premier Wen to Australia in March 2006 China agreed to the text of Article 10 which allows the competent authorities to restrict the public exhibition of co-production films within their respective countries only.
3. Any clauses in the text relating to other Australian Government portfolios were cleared by the relevant line agencies as required, and although clarification was sought on some points, no substantial concerns were raised, and all agencies were supportive of the Agreement.
4. Approval for Australia to sign the Agreement in August 2007 was received from all the then Australian Government Ministers whose portfolio responsibilities were covered by the Agreement – the Minister for the Arts and Sport, the Minister for Foreign Affairs, the Attorney-General, the Minister for Trade, the Minister for Immigration and Citizenship, the Minister for Justice and Customs, and the Treasurer. The then Prime Minister was informed of the finalisation of the text of the Agreement as part of this Ministerial approval process. Following the 2007 Federal Election the Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP, wrote to the Prime Minister advising that the previous Government had signed the Agreement with the Government of the People's Republic of China and that the domestic treaty approval process was underway.
5. The AFC's Industry Advisory Panel (IAP), and subsequently the Trade and Co-production Forum (TCF) – an industry consultative group convened by the then DCITA (now the Department of the Environment, Water, Heritage and the Arts) – were consulted throughout the negotiations to ensure that the Agreement was in line with current industry practice and

would provide potential benefits to the Australian industry. The TCF (formerly the IAP) comprises representatives of the peak film and digital content industry bodies including:

- Australian Guild of Screen Composers;
- Australian Directors Guild;
- Australian Writers Guild;
- Media, Entertainment and Arts Alliance;
- Screen Producers Association of Australia;
- Ausfilm;
- Australian Interactive Media Industry Association;
- Games Developers Association of Australia;
- Interactive Entertainment Association of Australia;
- Motion Picture Distributors Association of Australia;
- Independent Cinemas Association of Australia; and
- Australian Cinema Exhibitors Coalition.

6. These industry bodies are national organisations that consult widely across all States and Territories. Information about the development of co-production agreements is also regularly updated, and comments invited, in the AFC's public documents.

7. The Agreement covers the making of films including feature films, animation, documentaries and telemovies, however other television production formats (such as drama) were explicitly excluded from the Agreement early in the negotiation process as it was understood that China did not have a competent authority with responsibility for these formats. Following changes to China's television regulation in early 2007, the State Administration of Radio, Film and Television (the Chinese competent authority under the Agreement) became the regulatory body for all television production. Members of the TCF, particularly the Screen Producers Association of Australia, were keen to expand the Agreement to cover the excluded television formats. However, it was considered that reopening negotiations at such a late stage would give China an opportunity to put its case for additional amendments to the text (including on the sensitive censorship articles), and ultimately lead to substantial further delays in the finalisation of the Agreement. Australia indicated that it may seek to amend the Agreement at some point in the future to include the television formats currently excluded

8. State and Territory Governments have been advised of the proposed Agreement through the Standing Committee on Treaties' (SCOT) Schedule of Treaty Action. The Agreement has been on the list of treaties under negotiation, consideration or review by the Australian Government since September 2004. No objections or concerns were raised by the State or Territory Governments as a result of this notification.