National Interest Analysis [2011] ATNIA 4

with attachment on consultation

Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films, done at Pretoria on 18 June 2010

[2010] ATNIF 40

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY
SUMMARY PAGE

Agreement between the Government of Australia and the
Government of the Republic of South Africa concerning the Co-Production of Films,
done at Pretoria on 18 June 2010

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Nature and timing of proposed treaty action

1. Australia signed the *Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films* ('the Agreement') done at Pretoria on 18 June 2010. The Republic of South Africa advised on 5 October 2010 that South Africa has fulfilled its domestic requirements for entry into force of the treaty.

2. Article 20 of the Agreement provides that the Agreement shall enter into force once the parties have notified each other through diplomatic channels that their domestic requirements have been completed. The Agreement shall enter into force on the latter date of these two notifications. It is proposed that Australia provide such notification to South Africa 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 South Africa. The Agreement provides a framework within which the relevant authorities of each country may cooperate to approve the making of a broad range of films including feature films, television, video recordings, animations and digital format productions.

4. South Africa's film industry is growing rapidly and increased South African Government support, to encourage the creation of local content and to attract overseas productions to film in South Africa, has made it increasingly competitive internationally. The Australian film industry supported the negotiation of the Agreement from the outset, noting that as South Africa's film industry grew, so too would the mutual benefits for production activity and cultural exchange between the two countries. This Agreement will open up new markets for Australian films and enable a creative and technical interchange between film personnel. It 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 South Africa, and will therefore be eligible to apply for any benefits or programs of assistance available in either country.

6. The treaty action will further strengthen bilateral relations between Australia and South Africa by building upon existing interest between film makers to open up new markets for

jointly developed Australia-South Africa film projects. The Agreement will also 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 be the eleventh co-production arrangement that Australia has entered into under the auspices of Australia's International Co-production Program ('the Program'), the principal purpose of which is to foster cultural and industry development and cultural exchange between cooperating countries. In this environment, co-production arrangements are individually negotiated with the aim of sustaining and developing Australian creative resources and production. Australia is currently party to eight bilateral film co-production treaties (with the United Kingdom, Canada, Italy, Ireland, Israel, Germany, Singapore and China) and two Memoranda of Understanding (France and New Zealand). Since the inception of the Program in 1986, 127 co-productions with a total budget of approximately $1.16 billion have gone into production.

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

- increase the output of high-quality productions by sharing equity investment with South Africa;
- open up new markets both in South Africa and internationally for Australian film, television, animation and digital format productions;
- share the risk (and cost) of film production;
- establish links with South African production and distribution interests;
- facilitate interchange between Australian and South African film makers, particularly those in the principal creative positions;
- create employment opportunities for Australian industry personnel; and
- strengthen existing diplomatic ties between Australia and South Africa.

9. Official Australia-South Africa 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 funding through Screen Australia. Similarly, in South Africa an official co-production will be considered a South African production for the purposes of official financial support and audiovisual regulation.

10. Since South Africa's first post-apartheid elections in 1994, the country's burgeoning film industry has been recognised and actively supported by the South African Government as a sector with excellent potential for growth. In 1995 when South Africa first became a viable location for film production, the industry employed around 4,000 people. Employment in the sector had grown to approximately 30,000 people by 2008, reflecting the increase in both local and foreign film production levels over that period. The production of South African feature films, for example, increased from one film in 2000 to 24 films in 2009 with a total of 74 feature films produced between 2005 and 2009.

11. The growth of the sector can be attributed to a large extent to the range of industry-specific incentives offered by the South African Government to attract foreign

investment and to encourage the creation of local product with both domestic and broader international audience appeal. Joint Australia-South Africa film projects developed under the Agreement will have access to direct funding and tax incentives specifically targeted to support official co-productions in South Africa. The Agreement with South Africa will also provide Australian film makers with increased access to the South African and broader regional and international markets. Since the scope of the Agreement covers the production of film, television, video recordings, animations and other digital format projects, Australian producers will be able to collaborate with the full range of potential co-production partners in South Africa.

12. The Agreement is defined by the notion of reciprocity, a principle applied to ensure that over time there is an overarching 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 creative (ie. directors, writers), performing, craft and technical positions related to film co-productions made under the Agreement.

13. The Agreement will build on existing partnerships between Australian and South African film makers and provide the impetus to develop high-quality projects that may not otherwise have been undertaken. The historic and current links between the two countries should facilitate the development of co-productions which have cultural resonance with audiences in Australia and South Africa, and potentially with the international market more broadly. There is ongoing industry interest in the Agreement from both sides, and potential co-production projects await its entry into force.

14. There are no censorship issues or any other restrictions on freedom of expression in South Africa which would impact on the content of co-productions or hinder the cultural and creative exchange between Australia and South Africa under the Agreement.

Obligations

15. Pursuant to Article 3.1, proposals for the making of co-production films must be submitted to the Competent Authorities of each party (as designated under Article 2) for provisional approval prior to the commencement of production. Article 3.3 provides that, in considering the approval of proposed co-productions, the Competent Authorities may stipulate additional conditions to ensure that individual projects qualify under the terms of the Agreement. Where such approval is withheld by one of the Competent Authorities, Article 3.4 requires that the project not be approved as a co-production under the Agreement. Article 3.5 ensures that neither party is bound to permit the public exhibition of a completed co-production.

16. Once approved as a co-production between Australia and South Africa, Article 6 requires that each co-production is entitled to all the benefits that are or may be accorded in Australia or South Africa to national films. In respect of each co-production, these benefits accrue to:

- Australian co-producers and South African co-producers (Articles 4 and 6.2); and

- producers from countries with which Australia or South Africa has a similar treaty and who are co-production partners (‘the third country co-producer’) in the particular project (Articles 5 and 6.3).

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

18. Articles 9 and 17 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 consult informally on an annual basis in order to identify and rectify any such imbalances. Where the approval of a project as a co-production will affect this overall balance, Article 17.2 allows either Competent Authority to withhold such approval.

19. Articles 10 to 13 and Article 15 specify the procedural requirements for making co-production projects. These include the approval by the Competent Authorities (under prescribed circumstances) of location filming in, and the participation of a restricted number of personnel from, countries other than those of the participating co-producers (Articles 10 and 11 respectively).

20. Article 14 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.

21. Article 16 obliges both parties to apply their respective laws for the purposes of taxation, subject to the provisions of any tax convention between Australia and South Africa.

22. The Annex, which forms an implementing arrangement (not legally binding) to be read in conjunction with the Agreement (as outlined under Article 18), names the Competent Authorities of each party, specifies the approval process, and sets out the detail of the contractual arrangements between co-producers necessary for the making of co-productions.

Implementation

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

24. 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.

25. For goods the subject of a ‘relevant intergovernmental agreement’, the *Customs Act 1901* provides for their delivery into home consumption as goods temporarily imported, without the need for the goods to be entered for that purpose, or the payment of 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 Goods and Services Tax. Once in force, this Agreement will constitute a 'relevant intergovernmental agreement' for the purposes of both the Customs and Tax Acts. Consequently, no change is required in these Acts to allow for the temporary admission, free of duty and tax, upon the giving of a security or undertaking, of cinematographic and technical equipment for the making of a co-production as required by Article 7 of the Agreement.

26. The Agreement confirms that both countries can apply their domestic tax laws, subject to the terms of any tax treaty in force between Australia and South Africa which impacts on either country's taxing rights. The current tax treaty between Australia and the Republic of South Africa is the *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* which was signed in Canberra on 1 July 1999 and entered into force on 21 December 1999 [1999] ATS 34, as amended by the *Amending Protocol* signed in Pretoria on 31 March 2008 with entry into force on 12 November 2008 [2008] ATS 18. The tax treaty applies to Australian and South African income tax and includes rules which limit taxing rights over various types of income, as well as rules for reducing any double taxation where both countries exercise their right to tax.

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

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

Costs

29. While there will be some costs associated with the administration of the proposed Agreement, these costs will be absorbed by Screen Australia.

30. Direct agency funding of Australia-South Africa co-productions through Screen Australia will be provided from existing funds. Extending access to the Producer Offset in Division 376 of the *Income Tax Assessment Act 1997* to co-productions with South Africa is expected to involve a small expense. This expense is estimated to be not zero, but rounded to zero, each year across the forward estimates period.

Regulation Impact Statement

31. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

32. Article 19 specifies that amendments to the Agreement can be made with the mutual consent of both parties through an exchange of notes.

33. The Annex to the Agreement does not create legally binding obligations and any modifications to it will be jointly determined by the Competent Authorities and confirmed in writing. Any such modifications shall conform to the provisions of the Agreement (Article 18).

Withdrawal or denunciation

34. Article 21 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 through diplomatic channels to terminate the Agreement six months before the end of the three years, the Agreement will automatically be 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 the domestic treaty approval process.

35. In the event of termination, pursuant to Article 6.4, 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

Film Incentives and International Section
Culture Division
Office for the Arts, Department of the Prime Minister and Cabinet

ATTACHMENT ON CONSULTATION

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CONSULTATION

36. Negotiation of the *Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films* ('the Agreement') commenced in May 2006 with the then Department of Communications, Information Technology and the Arts (DCITA) taking the lead role in close consultation with the former Australian Film Commission (now Screen Australia) and the Department of Foreign Affairs and Trade (DFAT) throughout the negotiation process. The Agreement text was also provided to the Attorney-General's Department (AGD) for legal clearance at key points in the drafting process. Any clauses in the text relating to other 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.

37. In August 2009 the then Australian Government Ministers whose portfolio responsibilities were covered by the Agreement – the then Minister for the Environment, Heritage and the Arts, the then Minister for Foreign Affairs, the Treasurer, the Attorney-General, the then Minister for Trade, the then Minister for Immigration and Citizenship, and the Minister for Home Affairs – agreed that treaty action be taken to enter into the Agreement. The then Prime Minister was informed of the finalisation of the text of the Agreement as part of this ministerial approval process. Authorisation for Australia to sign the treaty was provided by the Federal Executive Council on 7 September 2009.

38. The Trade and Co-production Forum (TCF) – an industry consultative group convened initially by DCITA and subsequently by the Department of the Environment, Water, Heritage and the Arts (from the 2007 Federal Election until 2010 Federal Election) and now by the Office for the Arts (since the 2010 Federal Election) – was consulted at all stages of 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 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.

39. 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 Screen Australia's public documents.

40. The development of the Agreement text was based on a template which resulted in a smooth and non-controversial negotiation process, if a somewhat protracted one. One issue which took some time to resolve concerned securing South Africa's agreement to the duty free importation of equipment for the making of a co-production as proposed by Australia under Article 7 of the Agreement. The inclusion of this provision was supported by the Australian Customs and Border Protection Service which noted that, like Australia, South Africa is a party to the *Customs Convention on the Temporary Importation of Professional Equipment* [1968] ATS 6 which applies, amongst other things, to cinematographic equipment. Following confirmation from the South African Revenue Service that domestic legislation is in place to enable South Africa to meet its obligations under this Convention, various formulations of the wording of the provision were exchanged between Australia and South Africa until agreement was finally reached on the text now included at Article 7.

41. Early in the negotiation process South Africa indicated that it does not recognise 'arrangements of less than treaty status' – such as Australia's film co-production Memoranda of Understanding (MOU) with France and New Zealand – which are not binding under international law. Australia's preference (and that of the TCF members) was that the Agreement allow for the possibility of third party co-productions with France and New Zealand via Australia's MOUs with these countries. South Africa maintained its position with respect to this issue, and as a result Article 5 of the Agreement restricts the participation of third party co-producers to countries with which Australia or South Africa have treaty level agreements. However, this issue may be resolved by South Africa's negotiation of separate co-production treaties with France and New Zealand respectively. A co-production treaty between South Africa and France allowing third party co-productions came into force on 4 November 2010, and South Africa is currently negotiating a co-production treaty with New Zealand which is also likely to provide for third party co-productions and which is expected to come into force later in 2011. The treaties, when taken in conjunction with Article 5 of the Agreement, will enable Australian co-producers to participate as third party co-producers in projects with South Africa and either France or New Zealand.

42. 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 February 2006. No objections or concerns were raised by the State or Territory Governments as a result of this notification. This NIA was also circulated to the SCOT contact representatives on treaty related matters.