

# **CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS**

ARBITRATION UNDER ARTICLE 25 OF THE UNDERSTANDING ON RULES AND  
PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

(DS611)

**THIRD PARTY ORAL SUBMISSION OF AUSTRALIA  
AS DELIVERED**

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Short Title	Full Case Title and Citation
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Supercalendered Paper</i>	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/AB/R and Add.1, adopted 5 March 2020, DSR 2020:III, p. 1149
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

## LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
ASI	Anti-suit injunction
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes

## **I. INTRODUCTION**

1. Chair, distinguished Arbitrators, thank you for the opportunity to participate as a third party in this appeal arbitration, and to make a statement today.

2. At the outset, Australia would like to reiterate its ongoing support for Ukraine and to again condemn in the strongest terms Russia's illegal and immoral invasion of Ukraine. Russia's aggression is a gross violation of international law, including the UN Charter, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO.

3. Turning to the matters at hand, I will not repeat Australia's written submissions here today. Rather, I will briefly provide Australia's views on two other key issues of systemic importance raised in this appeal: 1) transparency; and 2) establishing the existence of unwritten measures. I will also make a brief observation on the scope of the Arbitrators' review.

## **II. TRANSPARENCY UNDER ARTICLE 63.1 OF THE TRIPS AGREEMENT**

4. As Australia has said previously, transparency provisions under the TRIPS Agreement are key to its effective operation. Transparency promotes predictability of laws and regulations, allows Members to monitor compliance with the TRIPS Agreement and encourages cooperation between Members.

5. China's appeal of the Panel's interpretation of Article 63.1 seeks to significantly narrow transparency obligations under the TRIPS Agreement, in respect of judicial decisions.

6. China argues that the Panel misinterpreted the term "of general application" in Article 63.1. In China's view, that language creates an "exceptional rule",<sup>1</sup> applying only to judicial decisions with a narrowly-defined and binding "rule-making effect".<sup>2</sup>

7. In Australia's view, China's interpretation is incorrect and has the potential to impair the availability of important and relevant information.

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<sup>1</sup> China's Other Appellate Submission, para. 43.

<sup>2</sup> China's Other Appellate Submission, paras. 44 and 51 – 52.

8. China's argument hinges on its assumption that to be "of general application" a judicial decision must be *elevated* to the same weight and nature as a law or regulation.<sup>3</sup> China identifies two qualities in laws and regulations which it considers to be the relevant benchmark for judicial decisions of general application: they must be "inherently binding for an unspecified number [or group] of parties".<sup>4</sup> In China's view, the only way that a judicial decision can satisfy its standard is by content which "goes beyond" the application of "existing law to different fact patterns to *such a degree* that it sets out new principles or criteria,"<sup>5</sup> and by having a "certain level of authoritativeness to *compel* other courts to adopt [its] reasoning".<sup>6</sup>

9. The premise of China's argument is flawed. There is no contextual or other support for China's assumption that judicial decisions must be identical to laws and regulations, in respect of their binding authority and express coverage.<sup>7</sup> This interpretation ignores the inherent distinctions between the operation and nature of judicial decisions on the one hand, and laws and regulations on the other.

10. Nor is there any support for China's assumption that judicial decisions are "*not* generally applicable by default" *because* they are directed at specific situations involving identified parties.<sup>8</sup> China's consequent requirement for a binding level of authoritativeness would arbitrarily lead to different levels of transparency between different legal systems. In judicial systems without binding precedent, China's interpretation would result in *no* judicial decisions being published.

11. China's interpretation of Article 63.1 creates not merely an "exceptional rule"<sup>9</sup> – but an effective impossibility in some cases, and must be rejected.

12. Australia agrees with the Panel's legal standard that "judicial decisions of general application" need not have binding authority<sup>10</sup> under law. Australia also agrees with the Panel that individual final judicial decisions can be "of general application" if they "establish or revise

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<sup>3</sup> China's Other Appellate Submission, paras. 42 and 51.

<sup>4</sup> China's Other Appellate Submission, paras 51 - 52 and also para. 44. (emphasis added).

<sup>5</sup> China's Other Appellate Submission, para. 43. (emphasis added)

<sup>6</sup> China's Other Appellate Submission, para. 52. (emphasis added)

<sup>7</sup> See China's other Appellate Submission, para. 52.

<sup>8</sup> China's Other Appellate Submission, para. 42.

<sup>9</sup> China's Other Appellant's Submission, para. 43.

<sup>10</sup> Panel Report, para. 7.384.

principles or criteria regarding *a general remedy* applicable in future cases *concerning other parties in a similar situation*."<sup>11</sup>

### III. DETERMINING THE EXISTENCE OF UNWRITTEN MEASURES

13. Finally, we turn to the question of whether the Panel erred in determining that China's unwritten ASI Policy exists.

14. It is critical that the WTO dispute settlement system can adequately identify and discipline unwritten measures.

15. Unwritten measures by their very nature may be challenging to prove, and may manifest through a variety of mechanisms including the exercise of legitimate authority. This may include the interpretation and application of laws and regulations.

16. In this appeal, China argues that the Panel failed to identify any "*distinct* normative content"<sup>12</sup> in the ASI Policy, "independently of written laws and written judicial decisions interpreting those laws".<sup>13</sup>

17. Australia makes two comments on this claim.

18. First, China argues that the ASI Policy is not a "measure" which is challengeable under the DSU, because it does not do "something concrete" independently of the relevant laws and their judicial interpretations.<sup>14</sup> As such, in China's view, that policy is not autonomously "capable of potential inconsistency with the covered agreements".<sup>15</sup>

19. It is well-established that a challengeable measure can be "any act or omission attributable to a WTO Member",<sup>16</sup> whether or not legally binding.<sup>17</sup> Members have considerable discretion in the identification of a challenged measure, consistent with "the comprehensive nature of the right of Members to resort to dispute settlement".<sup>18</sup> In particular, a Member is not required to prove that a measure is "capable of potential

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<sup>11</sup> Panel Report, para. 7.382. (emphasis added)

<sup>12</sup> China's Other Appellate Submission, para. 23. (emphasis added)

<sup>13</sup> China's Other Appellate Submission, para. 23.

<sup>14</sup> China's Other Appellate Submission, para. 23

<sup>15</sup> Ibid. See also, paras. 2, 8 and 10.

<sup>16</sup> See Appellate Body Report, *US — Supercalendered Paper*, para. 5.17 and disputes cited at footnote 62 thereto.

<sup>17</sup> See Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, para. 85 (quoting Appellate Body Report, *Guatemala — Cement I*, footnote 47, para. 69; additional reference omitted).

<sup>18</sup> Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, para. 89. (footnote omitted; emphasis added). See also, Appellate Body Report, *US — Zeroing (EC)*, para. 192.

inconsistency" as part of the examination of the existence of the measure. The question of whether a measure exists is separate to the question of inconsistency – those two issues must remain distinct.<sup>19</sup>

20. Second, while China argues that the Panel misapplied the legal standard for a "measure", in Australia's view China's complaint is substantially directed at the Panel's assessment of the *evidence*. China appears to place determinative weight on the evidence of judicial decisions through which the ASI Policy manifests. As such, China's position appears to be that, as a rule, judicial decisions interpreting and applying laws cannot be evidence of anything except the meaning of the relevant law or regulation that is interpreted,<sup>20</sup> and should inherently be taken as evidence of *no* unwritten measure.

21. A general review of the Panel's assessment of the evidence is beyond the mandate of the Arbitrators, under paragraph 9 of the Agreed Procedures applicable to these proceedings. Nonetheless, for completeness, Australia observes that it is well-established that Panels have discretion in their determination of the credibility and weight ascribed to evidence.<sup>21</sup> Evidence must also be assessed on a case-by-case basis.

22. Australia thanks the Arbitrators for their careful consideration of this matter.

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<sup>19</sup> See Appellate Body Report, *US – Zeroing (EC)*, para. 203.

<sup>20</sup> See in particular, China's Other Appellate Submission, para. 27.

<sup>21</sup> See Appellate Body Reports, *Argentina – Import Measures*, para. 5.176; *EC – Hormones*, para. 132.