

**Before the World Trade Organization
Panel Proceedings**

CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

(DS611)

THIRD PARTY EXECUTIVE SUMMARY OF AUSTRALIA

21 November 2023

TABLE OF CASES

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<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R , adopted 20 March 2009, DSR 2009:V, p. 2097
<i>EU – Cost Adjustment Methodologies II (Russia)</i>	Panel Report, <i>European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)</i> , WT/DS494/R and Add.1, circulated to WTO Members 24 July 2020, appealed 28 August 2020
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R , adopted 22 April 1998, DSR 1998:IV, p. 1179
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R , adopted 19 February 2009, DSR 2009:III, p. 1291
<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 – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Panel Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R , adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683

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<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R , adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
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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
GATT	General Agreement on Tariffs and Trade 1994
IP	Intellectual property
IPR	Intellectual property rights
SEP	Standard essential patent
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

I. INTRODUCTION

1. These proceedings initiated by the European Union raise important questions of legal interpretation and proper application of key provisions of the TRIPS Agreement.

2. Australia's submissions have focussed on the legal standard and evidentiary threshold to establish and characterise an unwritten measure and key provisions relating to the proper interpretation of the TRIPS Agreement with respect to the requirement for Members to "give effect" to the TRIPS Agreement (Article 1.1), as well as transparency requirements (Article 63).

II. UNWRITTEN MEASURES

3. Australia observes that the elusiveness of unwritten measures is of wider systemic concern to the functioning of the rules-based order. Australia's submissions focus on two important factors in this dispute: firstly, the evidentiary threshold required to demonstrate the existence of an unwritten measure, and secondly, the legal standard to be applied in characterising it as one of "general and prospective application" or "ongoing conduct".

A. EVIDENTIARY THRESHOLD FOR UNWRITTEN MEASURES

4. Australia recalls that where a measure is not expressed in a written document, "a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported measure".¹

5. Australia submits that the Panel should consider the *collective weight* of the European Union's evidence in establishing the existence and content of the unwritten measure.

6. Australia submits that if the Panel finds the evidence submitted by the European Union shows Chinese government endorsement and encouragement of the approach to

¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.26, citing Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also, Appellate Body Report, *US – Continued Zeroing*, para. 336. See also paras. 331 and 357.

issuing ASIs in SEP disputes, the Panel should consider whether this indicates an underlying policy to prohibit patent holders from asserting their IPRs in other jurisdictions.

7. If the Panel is satisfied as to the existence of such an underlying policy, then Australia submits that the Panel should consider this factor as an important element in the possible existence of an unwritten measure.

B. "GENERAL AND PROSPECTIVE APPLICATION" OR "ONGOING CONDUCT"

1. *General and prospective application*

8. Australia observes that a measure will have "general application" to the extent it affects an unidentified number of economic operators,² and will have "prospective application" to the extent that it applies in the future.³

9. Australia recalls jurisprudence emphasising that prospective application can be demonstrated through a variety of factors, which may vary from case to case.⁴

10. Australia submits that the absence of instances of non-application of a measure⁵ is only one factor that a panel should consider, and instances of non-application do not necessarily disprove the existence of an unwritten measure of general and prospective application.

2. *Ongoing conduct*

11. Australia submits that where there is a "likelihood" of future application, the evidentiary threshold for establishing ongoing conduct will be met. It is clear that absolute certainty in future application is not required.

² European Union's first written submission, para. 247; China's first written submission, paras. 152 and 154; and Panel Report, *US – Underwear*, para. 7.65.

³ European Union's first written submission, para. 247; China's first written submission, paras. 153-154; Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras.172 and 187; and *US - Corrosion-Resistant Steel Sunset Review*, para. 82.

⁴ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

⁵ Appellate Body Report, *US – Zeroing (EC)*, para. 201; China's first written submission, para.157.

III. INTERPRETATION OF THE TRIPS AGREEMENT

12. Australia considers that the general rule of interpretation under Article 31 of the VCLT should guide the interpretation of the TRIPS Agreement.⁶

A. "GIVING EFFECT" TO THE TRIPS AGREEMENT (ARTICLE 1.1)

13. Australia considers that to "give effect" to the TRIPS Agreement in accordance with Article 1.1, it is not enough to simply give effect to IPRs in a Member's own jurisdiction. Members should also refrain from adopting or applying measures that would restrict IP owners from exercising their rights in the territories of other Members⁷ and should not undermine the authority of other Members' judicial authorities in this regard.⁸

14. Not every ASI will interfere with another Member's ability to comply with the TRIPS Agreement.⁹ It would need to be considered on a case-by-case basis to determine whether it undermined another Member's ability to comply with the TRIPS Agreement, in breach of Article 1.1.

15. Given principles of customary international law will be taken as read, particularly such a fundamental principle to treaty interpretation as the notion that an obligation is in fact an obligation, Australia considers that the first sentence of Article 1.1 is unlikely to be a simple reiteration of *pacta sunt servanda*. Further, while Australia's interpretation of the first sentence of Article 1.1 may reflect elements of the *abus de droit* doctrine, it is not essential for that doctrine to be explicitly recognised as enshrined in that sentence for its proper interpretation.

16. Australia recalls that TRIPS provides minimum standards of protection, and Members are given the freedom to implement higher standards, provided that in doing so they do not contravene the provisions of the Agreement.¹⁰

⁶ Article 3.2 DSU; Appellate Body Report, *US – Gasoline*, para. 16–17.

⁷ European Union's first written submission, paras. 311-312, 322 and 375.

⁸ European Union's first written submission, paras. 463 and 464.

⁹ Korea's third-party oral statement, para. 9-11.

¹⁰ Panel Report, *China – Intellectual Property Rights*, para. 7.513; *Canada – Patent Term*, para. 6.87.

17. Australia submits that the wider context of the TRIPS Agreement's object and purpose should be considered as part of the VCLT analysis. In Australia's view, "the need to promote *effective* and adequate protection of intellectual property rights" (emphasis added) in the preamble's first recital reaffirms the need for Article 1.1 to be interpreted in a multilateral context.

18. Australia observes that Article 7 (Objectives) of the TRIPS Agreement requires a good faith balancing of rights and obligations for Members.¹¹

19. Australia submits that Article 7 requires a balance between "the need to promote effective and adequate" protection of IPRs (as per the first recital of the preamble) against a Member's rights to take measures to protect important public interests (as per Article 8).

B. TRANSPARENCY IN THE TRIPS AGREEMENT (ARTICLE 63.1 AND 63.3)

20. In Australia's view, transparency is fundamental to the functioning of the multilateral trading system. As the WTO has stated, transparency in the TRIPS Agreement is required to promote predictability, compliance, and encourage co-operation.¹² Australia submits its view on two key elements to the Article 63 obligations – the scope of the obligations and the level of transparency required.

21. Australia recalls that the meaning of "final judicial decisions... of general application... pertaining to the subject matter of this Agreement", as expressed in Article 63.1 and incorporated by reference into Article 63.3, is required to determine the scope of the transparency obligations. Firstly, Australia understands the term 'final' to ordinarily mean, "not to be altered or undone". Subsequently this means that if a judicial decision has no further rights for appeal or review¹³ and pertains to the subject matter of the TRIPS Agreement, it is covered by the transparency obligations.¹⁴ Next, Australia recalls that final

¹¹ Panel Report, *US – Section 211 Appropriations Act*, para. 8.57.

¹² "three-fold" available at: https://www.wto.org/english/tratop_e/trips_e/ipenforcement_e.htm (accessed 24 August 2023).

¹³ European Union's first written submission, paras. 626-629 where it discusses the three decisions in this dispute as being final decisions.

¹⁴ European Union's first written submission, para. 617.

judicial decisions and administrative rulings will be of "general application" where it "establish[es] or revise[s] principles or criteria applicable in future cases".¹⁵

22. Australia submits that the level of transparency required for Article 63.1 is contingent on the meaning of "published" or "made publicly available...in such a manner as to enable governments and right holders to become acquainted with them". For Article 63.3, the meaning of "supply" and "be given access to or be informed in sufficient detail" must be established.

23. Australia observes that to fulfil the level of transparency required in Article 63.1 and 63.3, a Member must publish the judicial decision in full and supply the requested information with sufficient detail.

24. Australia submits that the equivalent level of transparency for judicial decisions means that full judgements with reasoning are needed to meet the requirement for Members and interested parties to become familiar with, and have adequate knowledge of, whether and how a Member's laws comply with the TRIPS Agreement.

25. Australia understands that this interpretation of the transparency obligations is also supported by the object and purpose of the TRIPS Agreement. Transparency through publication and supply of information under Article 63 assists with the desire in the first recital of the preamble to "promote effective and adequate protection of intellectual property rights" as well as "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems".

IV. CONCLUSION

26. Australia has submitted its views on the legal standards and evidentiary threshold to establish and characterise the existence of an underlying policy to deter patent holders from asserting their IPRs in other jurisdictions. In considering whether there is a measure of general and prospective application, the Panel should consider whether that underlying policy has

¹⁵ European Union's first written submission, para. 618; China's first written submission, para. 325; and Panel Report, *Japan – Film*, para. 10.388.

been systemically applied, the extent of administrative guidance that it will continue to be applied in the future, as well as whether an expectation has been created that it will be applied in future. While instances of non-application will be relevant to this consideration, this is only one factor and Australia does not consider it would necessarily disprove the existence of an unwritten measure. In terms of considering whether there is ongoing conduct, a panel need only determine whether its application is likely to continue.

27. Australia has also outlined its understanding of the obligations contained in two key provisions of the TRIPS Agreement.

28. First, Article 1.1 requires that Members make operative the Agreement's provisions. Australia's view is that for the TRIPS Agreement to function "effectively", although granted freedom in their methods of implementation, Members cannot not interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations.

29. Second, under the transparency provisions in Article 63 Members must, as a matter of course, publish judicial decisions in full and if requested supply that information with sufficient detail. Transparency provisions are not simply an adjunct to the TRIPS Agreement's key obligations. Rather they are fundamental to its proper functioning.