

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 WRITTEN SUBMISSION OF AUSTRALIA

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Short Title	Full Case Title and Citation
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

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
VCLT	Vienna Convention on the Law of Treaties
TRIPS, or TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights

Abbreviation	Full Form or Description
WTO	World Trade Organization

I. INTRODUCTION

1. Australia welcomes the opportunity to present its views to the Arbitration Panel. Australia considers that this appeal raises important questions regarding the proper legal interpretation and application of the TRIPS Agreement.

2. Australia's submission focuses on the European Union's claim on appeal under the first sentence of Article 1.1 of the TRIPS Agreement. Australia reserves the right to raise other issues at the hearing before the Arbitration Panel.

II. THE EUROPEAN UNION'S CLAIM ON APPEAL UNDER THE FIRST SENTENCE OF ARTICLE 1.1 OF THE TRIPS AGREEMENT

3. Australia agrees with the European Union's claim that the Panel erred in the interpretation of the first sentence of Article 1.1. In Australia's view, the Panel incorrectly excluded the requirement upon Members to ensure their implementation of TRIPS provisions does not interfere with, or undermine, the ability of other Members to uphold their own obligations under the TRIPS Agreement.

4. The Panel's interpretive error is based upon its failure to properly analyse the context of the first sentence of Article 1.1 and the object and purpose of the TRIPS Agreement. That flawed foundation led it to incorrectly find that "nothing" in the text or context of the first sentence of Article 1.1, read in light of its object and purpose, supported the interpretation of that provision as put forward by the European Union, Australia and other third parties.¹

5. At the outset, Australia respectfully submits that the Arbitration Panel should ensure its findings are confined to the specific facts at issue in this dispute. In that regard, a relevant question in the Arbitration Panel's analysis, in addition to the points made below, is whether *the challenged measures before it* interfere with, or undermine, another Member's ability to uphold its obligations under the TRIPS Agreement². Within that context, and without drawing

¹ Panel Report, paras. 7.223 – 7.224.

² Australia also agrees with the point made in the United Kingdom's comments on panel questions to third parties during the Panel phase, para. 8. That is, that the Arbitration Body's analysis must also consider the features of the challenged measures, and "and the particular elements of each of the provisions invoked." Broadly, as Australia has said, Australia considers that the circumstances in which a measure will be capable of undermining another Member's ability to uphold its obligations under the TRIPS Agreement is likely to be limited, and not every ASI will necessarily do (see Australia's responses to the Panel's questions to third parties during the Panel phase, para. 3).

any conclusion on the facts, Australia makes the following submissions on the interpretation of the first sentence of Article 1.1 of the TRIPS Agreement.

A. THE PANEL ERRED IN FINDING THAT "NOTHING" IN THE FIRST SENTENCE OF ARTICLE 1.1 IMPOSES AN OBLIGATION TO REFRAIN FROM UNDERMINING THE ABILITY OF OTHER MEMBERS TO UPHOLD TRIPS OBLIGATIONS

6. As a starting point, in Australia's view, customary principles of interpretation direct a reading of the first sentence of Article 1.1 which requires WTO Members to ensure that their implementation of TRIPS provisions does not interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations.

7. As with the Panel,³ Australia commenced its interpretation of the first sentence of Article 1.1 with the plain meaning of the phrase "give effect to", which is "to render operative". Australia considers that term to mean being "operating or working" or "effective, efficacious; productive of the intended effect".⁴ This plain meaning does not support an interpretation that is confined to domestic implementation.

8. Australia agrees with the European Union's observation that a broader interpretation recognises the drafters' choice to avoid using the distinct terms "implement" or "comply", which selectively convey a more active, performative meaning.⁵ In Australia's view, the selection of the broad language "give effect to" reflects the intention to give a broader reach to the TRIPS Agreement than a Member's own domestic system in isolation.⁶

9. In line with Article 31(1) of the VCLT, an interpretive analysis must also consider the context of treaty language. This includes a structural analysis within the treaty, including the remaining terms of the sentence, paragraph and article at issue as well as the remainder of the treaty (including preamble and annexes).⁷ The types of materials that can be considered

³ Panel Report, para. 7.213. (footnote omitted)

⁴ Oxford English Dictionary online, definition of "to give effect to" and "operative"

https://www.oed.com/dictionary/effect_n?tab=meaning_and_use#5751968;

https://www.oed.com/dictionary/operative_adj?tab=meaning_and_use#33668903 (accessed 9 May 2025).

⁵ European Union's appellant's submission, para. 23.

⁶ See International Law Commission, Draft Articles on the Law of Treaties with Commentaries, Article 27, pg. 221: "... the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them ...".

⁷ See International Law Commission, Draft Articles on the Law of Treaties with Commentaries, Article 27, pg. 221, noting that context includes "not merely the article or sections of the treaty in which the term occurs, but the treaty as a whole."

contextual are broad⁸ but limited by relevance to the language being interpreted⁹ and their relationship to the conclusion of the treaty.

10. In Australia's submission, the relevant context of the remaining provisions of Article 1.1 support an interpretation that "to give effect to" encompasses more than mere formal compliance and extends to an obligation to refrain from undermining the ability of other Members to implement their obligations. In Australia's view, the objectives of the second and third sentences of Article 1.1 – that Members can provide higher levels of protection, and have certain flexibility in how they domestically implement their TRIPS obligations – sit comfortably with the objective of the first sentence of Article 1.1, namely that Members make operative the provisions of the Agreement. The flexibilities provided in the second and third sentences are both clearly conditioned on the requirement that Members *do not undermine their other TRIPS obligations*. Australia considers this would extend to the obligation in the first sentence of Article 1.1 to "give effect to" the provisions of the TRIPS Agreement.¹⁰

11. In totality, Article 1.1 of the TRIPS Agreement reflects a balance between flexibility – both in how Members implement its provisions in their domestic legal systems, and in their freedom to provide more extensive protections than the TRIPS Agreement requires, should they so choose – and the requirement that Members nonetheless "give effect to the provisions of this Agreement".¹¹

12. Under Article 31(1) of the VCLT, the object and purpose of the treaty is also to be taken into account in interpreting its provisions. An indication of a treaty's object and purpose can be found in its preamble and any object and purpose provisions.¹²

⁸ Appellate Body Report, *China – Auto Parts*, para. 151: "[t]he realm of context as defined in Article 31(2) is broad," as it includes all of the text of the treaty and may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

⁹ Appellate Body Report, *China – Auto Parts*, para. 151: " ... for a particular provision, agreement or instrument to serve as *relevant* context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language". (emphasis original)

¹⁰ See Australia's third party written submission during the Panel phase, paras. 37 – 40.

¹¹ Article 1.1, TRIPS Agreement.

¹² Appellate Body Report, *US – Shrimp*, para. 153 (referring specifically to the impact of the Preamble of the WTO Agreement upon the annexed agreements): "[a]s this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed ..."

13. Australia submits that the requirement for "effective" protection of intellectual property rights in the Preamble to the TRIPS Agreement¹³ is relevant to the interpretation of its object and purpose. As Australia has said, "[t]o make the TRIPS Agreement and its protection of [intellectual property rights] 'effective', [intellectual property] protections need to be able to function across all Members' jurisdictions."¹⁴ In the same vein, nor can "effective and appropriate means for the enforcement of trade-related intellectual property rights"¹⁵ be provided, where the ability of Members to do so is undermined.

14. Finally, Article 7 of the TRIPS Agreement (titled "Objectives"), which the Panel recognises,¹⁶ supports Australia's interpretation of the first sentence of Article 1.1. Australia submits that Article 7 requires a balance between "the need to promote effective and adequate protection of intellectual property rights" (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). This balance does not enable Members to breach their obligations, nor to ignore the effect of their measures on the ability of other Members to comply with their own obligations under the TRIPS Agreement.¹⁷

15. Australia agrees with the European Union's conclusion that "taking account of the entirety of the preamble, and of the objectives set out in Article 7 of the TRIPS Agreement", "requires Members to do more than implement the provisions of the TRIPS Agreement within their domestic legal systems"¹⁸ under the first sentence of Article 1.1. In Australia's submission, the TRIPS Agreement cannot work "effectively" if Members' abilities to implement its provisions are undermined.

16. In conclusion, the Panel erred in determining that "[n]othing in the text or context of Article 1.1, first sentence, read in light of the object and purpose of the TRIPS Agreement, indicates that [it] imposes any such additional obligation".¹⁹ In Australia's view, a proper interpretation of the first sentence of Article 1.1, in its context and in light of the object and purpose of the TRIPS Agreement, supports Australia's interpretation.

¹³ Preamble to the TRIPS Agreement, first recital.

¹⁴ Australia's third party written submission during the Panel phase, para. 44.

¹⁵ Preamble to the TRIPS Agreement, second recital, subparagraph (c).

¹⁶ Panel Report, para. 7.230.

¹⁷ Australia's third party written submission during the panel phase, para. 46.

¹⁸ European Union's appellant's submission, para. 44.

¹⁹ Panel Report, para. 7.224.

B. THE PANEL ERRED IN ITS ANALYSIS OF CONTEXT IN INTERPRETING THE FIRST SENTENCE OF ARTICLE 1.1

17. Australia agrees with the Panel that WTO Members must implement provisions of the TRIPS Agreement within their domestic legal systems,²⁰ which "may include preparing and adopting laws and regulations implementing the provisions of the TRIPS Agreement within their domestic legal systems".²¹ However, this does not preclude the scope of the TRIPS Agreement from also applying to aspects of a measure, properly attributed to a Member, which undermine the ability of other Members to uphold their own obligations (i.e., outside of that first Member's domestic jurisdiction).

18. In support of its restrictive interpretation, the Panel appears to rely significantly²² upon the contextual language of the second and third sentences of Article 1.1. Notably, the Panel references the implementation by Members "in their law" or their "own legal system and practice".²³ Australia considers that the Panel erred in concluding that the second and third sentences of Article 1.1 operate to inform the scope of the first sentence in the manner determined by the Panel.²⁴

19. Rather, Australia submits that neither the second nor the third sentence negate the requirement upon Members to "give effect" to the provisions of the TRIPS Agreement in the first sentence of Article 1.1.²⁵ Australia considers that this requirement would include any implementation which undermines another Member's ability to comply with its obligations under the TRIPS Agreement.

20. However, even if the Arbitration Panel were to disagree with Australia's view on the Panel's contextual analysis, the second and third sentences do not narrow the scope of the obligation in the first sentence of Article 1.1 in the manner determined by the Panel.

21. First, the references to "law" and "legal system and practice" would in that case describe the *mechanisms* through which a Member gives effect to the Agreement under the

²⁰ Panel Report, para. 7.222.

²¹ Panel Report, para. 7.219.

²² Panel Report, paras. 7.213 – 7.215. The Panel then examines the context of the TRIPS Agreement to determine that its interpretation does not render the first sentence of Art. 1.1 inutile, then confirms its understanding further through other aspects of the context, object and purpose of the TRIPS Agreement (paras. 7.219 – 7.221).

²³ Panel Report, para. 7.215.

²⁴ Australia's interpretation is summarised at paragraphs 10 – 11, above.

²⁵ Ibid.

first sentence. They do not exclude consideration of the effects of one Member's measures on another Member's ability to uphold their obligations within their own territory.

22. Second, as Australia has said previously, a Member's conduct undertaken within its own domestic legal system may impair the operation or functioning of the provisions of the Agreement beyond its borders.²⁶ The concept that Members are required to "give effect" to the provision of the TRIPS Agreement through measures in their domestic legal jurisdiction is demonstrably distinct from, and therefore not interchangeable with, the scope of the impact of a measure and consequently the potential scope of a Member's obligations under TRIPS.

23. In conclusion, Australia submits that the Panel erred in its interpretation of the first sentence of Article 1.1. The Panel determined that a Member's obligation to give effect to the provisions of the TRIPS Agreement is limited to the effect of a measure solely within the bounds of its own domestic legal system, excluding a consideration of whether it interferes with, or undermines, the ability of other Members to uphold their own obligations under the TRIPS Agreement. In Australia's submission, such an interpretation is not supported by the context of that provision in accordance with customary principles of interpretation.²⁷

C. THE PANEL ERRED IN ITS ANALYSIS OF THE OBJECT AND PURPOSE OF THE TRIPS AGREEMENT

24. Australia agrees with the European Union that the object and purpose of the TRIPS Agreement cannot be inferred solely from paragraphs (b) and (c) of the second recital of the Preamble to that Agreement,²⁸ as the Panel appears to have done. Those selective passages do not, of themselves, shed sufficient light on the scope of Members' obligations as set out in the first sentence of Article 1.1. As Australia notes at paragraphs 13 to 14 above, the stated objectives of the TRIPS Agreement, together with relevant language of the Preamble, support Australia's view that the object and purpose of the TRIPS Agreement encompasses a more multilateral and holistic assessment than the Panel determined.

²⁶ See Australia's third party written submission in the Panel phase, para. 36.

²⁷ The WTO Appellate Body has specifically acknowledged that Articles 31 – 33 of the VCTL are customary rules of interpretation for the purposes of Article 3.2 of the DSU (see e.g., Appellate Body Reports, *Japan – Alcoholic Beverages II*, pg. 10; *China - Autos*, para. 145.)

²⁸ European Union's appellant's submission, para. 42.

25. The Panel appears to have disregarded these arguments without explanation, in its analysis of the object and purpose of the TRIPS Agreement at paragraph 7.221 of its Report. Australia recalls the Appellate Body statement that "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'".²⁹

26. Properly analysed, the object and purpose of the TRIPS Agreement supports a more expansive interpretation of the first sentence of Article 1.1, than that set out by the Panel. That is, it requires a Panel to consider not only how a Member's implementation of TRIPS provisions "gives effect to" the TRIPS Agreement within its own legal system, but also how those actions may conversely undermine the effective operation of the Agreement. Moreover, such proper interpretation does not preclude consideration by a Panel of relevant effects of that implementation outside of the jurisdiction of the implementing Member.

27. In conclusion, Australia submits that the Panel erred in its analysis of the object and purpose of the TRIPS Agreement. The Panel's determination that a Member's obligation to "give effect to" the provisions of TRIPS is limited solely to the effect of any relevant action within the bounds of that Member's own domestic legal systems and territory is not supported by a complete analysis of the object and purpose of the TRIPS Agreement.

D. THE PANEL ERRED IN ITS APPLICATION OF THE PRINCIPLE OF "GOOD FAITH"

28. The Panel's narrow interpretation of the ordinary meaning of the words "give effect to" in the first sentence of Article 1.1 informs its erroneous understanding of the application of the principle of "good faith" in Australia's arguments. Having determined that "[n]othing in the text or context of Article 1.1, first sentence, read in light of the object and purpose of the TRIPS Agreement, indicates that Article 1.1, first sentence imposes any such additional obligation"³⁰ the Panel then proceeded to assess whether the principle of good faith can effectively change that interpretation to impose additional obligations.³¹

²⁹ Appellate Body report, *Korea – Dairy*, para. 81. (footnote omitted; emphasis omitted)

³⁰ Panel Report, para. 7.224. (emphasis added)

³¹ Panel Report, para. 7.226: "...[good faith] is not a principle of interpretation that requires the covered agreements to be interpreted in a manner that accommodates obligations or requirements *that exceed the ordinary meaning of a given provision*, as read in its context, and in light of the object and purpose of the agreement." (emphasis added) See also, para. 7.229.

29. Contrary to what appears to be the Panel's understanding, Australia's interpretation does not circumvent the application of customary rules of interpretation by relying on "good faith". Nor does it seek to impose a new obligation, outside of the ordinary meaning of the first sentence of Article 1.1.³² Australia similarly does not interpret the European Union to be taking any such position in its own arguments.³³ Australia addresses each of those two points in turn.

30. First, as Australia notes above, its interpretive analysis of the first sentence of Article 1.1 is based on that provision's ordinary meaning, in context and in light of the TRIPS Agreement's object and purpose. In Australia's submission, the plain meaning of the words "give effect to" means that Members are to actively make the provisions operative. To achieve this meaning in a multilateral context – as reinforced by the Preamble and also the stated objectives of the Agreement – Members must consider how their actions "give effect" to the operation of the Agreement more broadly. Australia's analysis draws on principles of good faith, including as enshrined in Article 7 of the TRIPS Agreement, and the principle of *pacta sunt servanda* which applies to all WTO Agreements as a matter of customary international law, in support of its interpretation. As Australia observed, a Member cannot give effect to the provisions of the TRIPS Agreement in good faith if it actively hampers another Member's ability to meet their own obligations under the TRIPS Agreement.³⁴

31. The Panel also does seem to accept that principles of good faith, such as *pacta sunt servanda*, have a role in the interpretation of the obligations in the TRIPS Agreement, including Article 1.1. For example, the Panel observes that Article 7, which sets out the "objectives" of the TRIPS Agreement, articulates a "form of the good faith principle" which requires WTO Members to refrain from enacting measures which negate the rights and obligations contained in the TRIPS Agreement.³⁵ The Panel further appears to apply this principle to its interpretation of the requirement for domestic implementation of the TRIPS Agreement under the first sentence of Article 1.1.³⁶ By logical consequence of the Panel's reasoning, the good faith principle supports Australia's view that the first sentence of Article 1.1 requires that

³² See the Panel's interpretation of Australia's arguments at para. 7.224.

³³ See in particular, para. 74 of the European Union's appellant's submission.

³⁴ Australia's third party submission during the Panel phase, para. 44.

³⁵ Panel Report, para. 7.230.

³⁶ Ibid.

Members to ensure their implementation of TRIPS provisions does not interfere with, or undermine, the ability of other Members to uphold their own obligations under the TRIPS Agreement.

32. Second, Australia's interpretation does not import an "additional obligation"³⁷ to refrain from undermining other Members' ability to implement the provisions of the TRIPS Agreement. The Panel's reasoning, that Australia's interpretation creates an "additional" obligation, may be erroneously founded on the assumption that a "negative" obligation, must have a corresponding positive obligation. That is, a requirement to refrain from undermining the operation of the TRIPS Agreement, which extends beyond a Member's borders, must have a corresponding positive obligation (e.g., active implementation of the TRIPS Agreement outside of the relevant Member's borders). That reasoning is also erroneous.

33. The Panel acknowledges that existing substantive rights and obligations carry a corresponding requirement not to negate those rights and obligations.³⁸ However, this relationship does not necessarily define the scope of the TRIPS Agreement. In other words, the jurisdictional bounds of a Member's positive obligation to implement the TRIPS Agreement under the first section Article 1.1 (i.e., within its borders), are not automatically the same as the jurisdictional scope of an obligation not to negate the operation of the TRIPS Agreement (i.e., both within and outside of its borders). A WTO Member can be responsible under the TRIPS Agreement for ensuring that its own implementation measures do not undermine the ability of other Members to uphold obligations under the TRIPS Agreement, while also *not* being accountable for the substantive TRIPS obligations of another Member.

34. In conclusion, Australia's interpretation of the first sentence of Article 1.1 is consistent with, and informed by, principles of good faith, but does not rely upon those principles to establish meaning where it does not otherwise exist.

III. CONCLUSION

35. The claims in the European Union's appeal raise important questions regarding the proper legal interpretation and application of the TRIPS Agreement. In particular, Australia submits that the TRIPS Agreement cannot function effectively within its multilateral context,

³⁷ Panel Report, para. 7.224.

³⁸ Panel Report, para. 7.230.

if Members are permitted to interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations.

36. Australia thanks the Arbitration Panel for the opportunity to submit its views on the issues raised in this appeal.