

**Before the World Trade Organization
Panel Proceedings**

CHINA – MEASURES CONCERNING TRADE IN GOODS

(DS610)

THIRD PARTY ORAL STATEMENT OF AUSTRALIA

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Short Title	Full Case Title and Citation
<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>Korea – Stainless Steel Bars</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020, appealed 22 January 2021
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<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 – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
Member	Member of the World Trade Organization
WTO	World Trade Organization
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures

I. INTRODUCTION

1. Chair, distinguished members of the Panel – good morning. Thank you for this opportunity to participate as a third party in this dispute, and to make an oral statement at this session.

2. Before proceeding to set out Australia's views on the legal issues in this dispute, 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 Charter of the United Nations, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO. There is no other place within the WTO system where the rules-based nature of the organisation is more evident than in the dispute settlement system and through disputes such as the one we are here for today. That is why we cannot talk about the rules without mentioning Russia's gross violation of such rules.

3. Turning now to the matter before the Panel, which raises issues of fundamental importance to the effective functioning and credibility of the rules-based multilateral trading system. One central question in this matter is how the WTO rules respond to measures that are alleged to be unwritten, or otherwise deliberately concealed. If such conduct passes unseen by WTO rules and is permitted to grow unchallenged in the shadows, faith in the rules and the system will erode. The corrosive impact is even greater if such conduct is also designed to pressure, induce or otherwise interfere with a foreign government's exercise of its legitimate sovereign rights or choices, as the EU alleges.

4. I will not repeat all of Australia's written submissions here today. However, I would like to highlight four key points at the outset:

- first, as you're well aware, the task of the Panel includes making an objective assessment of the facts of this case, under Article 11 of the DSU. The Panel should assess the totality of the evidence before it in a logical manner, draw such inferences as may be appropriate, and reach a conclusion as to the existence of any "measures". It must then consider the consistency of those measures with relevant WTO commitments and obligations;

- second, Australia cautions against applying the findings of past panels inflexibly. Contrary to what China appears to have suggested in its first written submission, there are no strict rules or doctrines governing the proof or characteristics of unwritten measures. An unwritten measure is still a "measure". It is a concept which is broad and flexible, and the same legal considerations apply;
- third, as the "trier of facts" it is for the Panel to test and assess the weight, credibility and ultimately the probative value of the evidence before it. This includes the explanations offered by both sides. In making that evaluation the Panel can take into account contextual matters, including the asymmetry of available information and the capability or potential to shield a measure from detection; and
- finally, in Australia's view, WTO rules have sufficient scope and flexibility to appropriately capture, analyse and discipline even disguised measures. The Panel has all the necessary tools at its disposal, and the obligation to apply the relevant rules fully.

II. UNCONTESTED FACTS

5. Australia does not seek to stand in the Panel's role as the "trier of facts". However, certain uncontested facts can now be distilled from the parties' first written submissions and evidence. We set out a summary of what we know:

- Until around the second half of 2021, the volume of trade between Lithuania and China followed an increasing trend.¹
- Then, in July 2021, Lithuania permitted the opening of a so-called "Taiwanese Representative Office in Lithuania". In the EU's words, this "prompted an immediate and robust diplomatic response from China". It culminated with China withdrawing its Ambassador to Lithuania and downgrading Lithuania's Embassy to China.²

¹ European Union's first written submission, para. 31 and Figure 1.

² European Union's first written submission, para. 3.

- China acknowledges its strong diplomatic opposition to the opening of the "Taiwanese Representative Office in Lithuania".³ It denies that this position impacted its trade relationship with Lithuania.⁴
- In early 2021, the Ambassador of China in Lithuania wrote to "Enterprise Lithuania", observing that such matters were "of economic interest to Lithuanian businesses."⁵
- Thereafter, between November 2021 and January 2022, imports from Lithuania into China fell by over 99%⁶ and didn't recover.⁷ By comparison, the value of imports from the EU into China as a whole actually increased slightly, during the same period.⁸
- At the time, companies importing goods from Lithuania into China experienced sudden and unexplained restrictions⁹ in obtaining required customs clearances. Shipments of products covered by certificates issued by Lithuanian authorities were also reportedly being refused customs clearance in China.¹⁰
- The EU actively sought to resolve customs delays with Chinese authorities, but received no substantive response.¹¹
- During the same period, a Spokesperson of China's Ministry of Foreign Affairs stated that "[t]hose who undermine China's sovereignty will pay the price."¹² Meanwhile, the Ambassador of China to the EU confirmed that Chinese buyers didn't want to buy from Lithuania; that Chinese customers were taking actions to punish those companies.¹³ He stated: "[c]hange the name and everything will return to normal."¹⁴

6. The EU argues that these events, and others, demonstrate that "China has utilised and is utilising economic instruments at its disposal to voice its diplomatic discontent and, ultimately, to retaliate."¹⁵ The EU identifies several separate measures in this "progressively

³ China's first written submission, para. 2.

⁴ China's first written submission, para. 4.

⁵ European Union's first written submission, para. 34 and Exhibit EU-4.

⁶ European Union's first written submission, para. 86 and Figure 2. See also, para. 66.

⁷ European Union's first written submission, para. 71.

⁸ See graph at para. 69 of the European Union's first written submission.

⁹ European Union's first written submission, para. 54.

¹⁰ European Union's first written submission, para. 7.

¹¹ European Union's first written submission, Para. 103 – 104.

¹² European Union's first written submission, para. 44 and Exhibit EU-12.

¹³ European Union's first written submission, para. 52 and Exhibit EU-18.

¹⁴ European Union's first written submission, para. 52 and Exhibit EU-18.

¹⁵ European Union's first written submission, para. 4.

supplemented" conduct,¹⁶ and which it says breach China's obligations under either GATT or the SPS Agreement.

7. China on the other hand, denies that its strong diplomatic reaction permeated the trading relationship with Lithuania in any legally-meaningful manner.¹⁷ It asserts that it has "always" administered its imports and exports in a WTO-consistent manner.¹⁸ At the core of China's legal argument as Australia understands it, China denies that the evidence put forward by the EU is sufficient to sustain a challengeable measure under WTO rules.¹⁹ It asserts that the "import restriction" measure and the "overarching measure" therefore don't exist.

8. It is now for the Panel to assess whether the EU has convinced it of the validity of its case - or whether China's submissions have effectively refuted the existence of the measures. In doing so, it may wish to consider which of these two very different explanations is the most plausible, in all of the circumstances.

III. CHINA'S APPROACH AND THE OPERATION OF BURDEN OF PROOF

9. The allegations made by the EU are serious. They raise important issues about the effectiveness of rules that underpin the multilateral trading system. Even having regard only to the facts that are seemingly uncontested, there appears to be a proper basis for the EU to have raised these concerns. Australia notes with concern that China does not appear to have engaged squarely with them in its first written submission.

10. China's approach rests largely on discrediting the evidence and conclusions put forward by the EU. It offers scarce alternative explanation for either the cumulative or granular evidence asserted by the EU. This is despite the fact that any such evidence would more likely be within its remit and control. China's case theory appears to be that the EU has simply invented the measures at issue. China offers no explanation, for example, as to various absences or delays in correspondence identified by the EU.²⁰ Nor why a cluster of import issues suddenly occurred at all. China also provides no satisfactory answer as to why individual traders and service providers, such as FedEx, perceived a general import issue. China simply

¹⁶ European Union's first written submission, para. 5.

¹⁷ China's first written submission, para. 4.

¹⁸ China's first written submission, paras. 3 - 4.

¹⁹ See for example, the structure of China's arguments as set out in paras. 16 and 279 of its first written submission.

²⁰ See for example, European Union's first written submission, paras. 104, 192.

suggests in rebuttal, that the fact that traders took their own responsive actions, severs any causal link to the alleged measure.²¹

11. China speculates on the *possibility* of some alternative scenarios for various categories of evidence. This includes: the multiple steps of customs clearance "that can, in principle, contribute to delay";²² pop-up messages which may occur for a "variety of reasons";²³ and the "many factors which might contribute to a delay at ports".²⁴ Yet China provides no concrete insight into such factors. At most, China makes vague references in its written submission, to disruption due to the global pandemic.²⁵ Such disruption would have inevitably confronted all countries. And while China is not obliged to offer any alternative theory, the absence of plausible explanations is notable, given that any such information would more likely be within China's purview.

12. As a matter of logic, China is clearly better placed than the EU, to shed light on China's underlying intentions, objectives, actions and internal administration. As noted, China in fact *hints* at alternative justifications for the various categories of evidence put forward by the EU. But it does not provide any concrete evidence of any alternative hypotheses. In Australia's view, these circumstances warrant the Panel exercising its authority to seek further information from China. This is because such enquiry may elucidate its understanding of the evidence - including the alternative hypotheses that China alludes to.

13. The Panel is empowered to seek any such additional information *prior* to a complainant establishing its *prima facie* case.²⁶ Australia agrees with Canada's written submission that a panel need not be "frozen into inactivity"²⁷ while the parties discharge their respective burdens of proof in turn. Indeed, a "primary task" of the Panel is to "help the parties resolve their dispute in a prompt and effective manner".²⁸ It may take an active role in fulfilling that task. In Australia's view, the Panel is therefore entitled to seek further information which

²¹ China's first written submission, para. 93.

²² China's first written submission, footnote 44.

²³ China's first written submission, para. 44.

²⁴ China's first written submission, para. 54.

²⁵ See for example, China's first written submission, para. 55.

²⁶ Panel Reports, *Thailand – H-Beams*, para. 7.50; *Argentina – Import Measures*, para. 6.59.

²⁷ Panel Report, *Korea – Stainless Steel Bars*, paras. 7.24 – 7.25 and footnotes therein.

²⁸ Panel Report, *Korea – Stainless Steel Bars*, paras. 7.24 – 7.25.

will assist it to examine China's position and in doing so, to make findings relevant to the complainant's *prima facie* case.

14. As a final point on the burden of proof, Australia recalls "the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel".²⁹ This is engaged where the complainant has put forward *prima facie* evidence in support of its case.³⁰ To quote the panel in *Argentina – Textiles and Apparel*:

It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession.³¹

15. This may inform a panel's exercise of its fact-finding authority under DSU Article 13. If a party is then unable or unwilling to provide such relevant information upon request, the Panel may take this into account in assessing the evidence on record, and conclusions which should be drawn from it.³²

IV. "EXISTENCE" OF A MEASURE UNDER WTO RULES

16. Australia also reiterates from its written submission that the concept of a "measure" under WTO rules is broad. What can constitute a "measure" does not need to fall into a set category.

17. A challengeable "measure" under WTO rules is not a device to restrict Members from bringing claims in good faith. Abusive or trade-restrictive conduct is not rendered "invisible" merely because it doesn't resemble the types of "measures" more typically considered by panels. Let alone, the improperly high test of an "unwritten measure" that China proposes.

18. China argues that the "import restriction" measure and the "overarching measure" simply don't exist, because the evidence doesn't satisfy the artificially high standards that China presents. China effectively sets up a "straw man" through the incorrect legal standards

²⁹ Panel Reports, *Argentina – Textiles and Apparel*, para. 6.40. The Panel's reasoning in this paragraph was not considered on appeal, although the Appellate Body upheld the Panel's examination of the evidence under Article 11 of the DSU on different grounds.

³⁰ Panel Reports, *Argentina – Textiles and Apparel*, para. 6.40.

³¹ Panel Reports, *Argentina – Textiles and Apparel*, para. 6.40.

³² Appellate Body Report, *US – Wheat Gluten*, para. 174.

that it argues are applicable to an unwritten measure. It then relies on that flawed framework to seek to prove that there are no measures.

19. Australia and other third parties have provided the Panel with extensive submissions which challenge China's supposed legal standards for these measures.³³ There is simply no "high bar" for evidence, nor any need for "unwavering consistency" to establish the existence of an unwritten measure.

20. To be clear, Australia is not arguing that a complainant is absolved from proving sufficiently, the existence of a measure that it challenges, merely because such measure is unwritten. A complainant is *always* required to establish its *prima facie* case. But the concept of a "measure", and its associated characteristics, must be interpreted and applied consistently with the "comprehensive nature of the right of Members to resort to [WTO] dispute settlement".³⁴

V. SYSTEMIC IMPLICATIONS

21. I conclude with an observation on the important systemic implications which underpin this dispute.

22. As Australia has consistently said, Members' compliance with the transparency obligations underpinning the WTO Agreements is fundamental to Members' confidence in the rules-based trading system. Unwritten or disguised trade-restrictive measures undermine confidence in the rules and, over time, can exacerbate non-compliance with those rules, eroding Members' confidence in the system as a whole.

23. Such measures are even more concerning if they are pursued in an abusive, arbitrary or pretextual manner, in order to pressure, induce or influence a foreign government into taking, or not taking, a decision or action in order to achieve a strategic political or policy objective. Conduct of this nature undermines the predictability and stability of the trading environment for all Members and it must not be legitimised.

³³ See in particular, the third party written submissions of Australia, paras. 20 – 29; Canada, paras. 28 – 29; Switzerland, paras. 10 – 11; United Kingdom, paras. 16 – 18; and United States, paras. 5 – 8.

³⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

24. Australia notes that the conduct alleged by the EU has been termed "economic coercion" in some submissions in the course of this dispute. The alleged behaviour the EU has described in its submissions has the features of conduct Australia has previously characterised as trade-related economic coercion. As Australia has said, such conduct is inconsistent with fundamental WTO tenets of non-discrimination and the WTO's underlying objective to reduce barriers to trade. We make this point to underscore the seriousness and systemic implications of this dispute, and the importance of addressing and deterring trade-related economic coercion wherever it arises.

25. Given the serious and systemic nature of the issues raised in this dispute, the Panel's reasoning and analysis has the potential to make an important contribution to bolstering Members' confidence and legitimate expectations that such conduct will be appropriately disciplined through the WTO dispute settlement system.

26. Australia thanks the Panel for its careful consideration of this matter.