

**Before the World Trade Organization**  
**Panel Proceedings**

**CHINA – MEASURES CONCERNING TRADE IN GOODS**

(DS610)

**EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTY WRITTEN  
SUBMISSION, THIRD PARTY ORAL STATEMENT AND RESPONSES TO  
QUESTIONS FROM THE PANEL TO THIRD PARTIES**

12 January 2024

## TABLE OF CONTENTS

<b>TABLE OF CASES</b> .....	<b>2</b>
<b>LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS</b> .....	<b>3</b>
<b>I. AUSTRALIA'S INTEREST IN THIS DISPUTE</b> .....	<b>4</b>
<b>II. THE "UNWRITTEN" NATURE OF A MEASURE HAS SIGNIFICANCE – BUT DOES NOT CREATE A LEGAL RULE</b> .....	<b>5</b>
<b>III. EXISTENCE OF A MEASURE: EVIDENTIARY CONSIDERATIONS</b> .....	<b>6</b>
<b>A. A PANEL'S APPROACH TO THE EVIDENCE IS CASE-SPECIFIC</b> .....	<b>6</b>
<b>B. A PANEL CAN TAKE AN ACTIVE ROLE IN ASSESSING THE EVIDENCE BEFORE IT</b> .....	<b>8</b>
<b>IV. THE UNWRITTEN MEASURES ARE INTERLINKED, BUT NOT DEPENDENT</b> .....	<b>8</b>

## TABLE OF CASES

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<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 – Approval Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<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>Turkey – Pharmaceutical Products (EU)</i>	Final Panel Report as issued to the parties in <i>Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products</i> , attached to Türkiye's notice of recourse to arbitration (WT/DS583/12 and Add.1)
<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 – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131

Short Title	Full Case Title and Citation
<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 – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
<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
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

#### LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Member	Member of the World Trade Organization
WTO	World Trade Organization

## I. AUSTRALIA'S INTEREST IN THIS DISPUTE

1. This dispute raises serious allegations about disguised, trade-restrictive measures, which are designed to evade scrutiny by a panel.<sup>1</sup> Such conduct can erode Members' confidence in the multilateral trading system, contributing to non-compliance with the rules.<sup>2</sup> 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.<sup>3</sup> Australia has consistently raised concerns about this type of conduct, in a range of fora.<sup>4</sup>

2. The unwritten and pretextual nature of the measures which are alleged to have occurred in this dispute also raise challenging questions of evidence and law.<sup>5</sup> Unwritten or concealed measures involve an inherent information asymmetry, with one side of the dispute having limited evidence to prove the existence of such measures.<sup>6</sup> The absence of written proof of the measure also provides an easy point of rebuttal for the other side.<sup>7</sup> Measures which are disguised, progressive and fluctuating may also present challenges for a complainant in framing its claims and properly resolving the dispute, within the rules of the WTO dispute settlement system.<sup>8</sup> The Panel must strike a balance between applying reasonable and appropriate flexibility in its assessment of the dispute, whilst also ensuring adequate evidentiary rigour.<sup>9</sup>

3. In light of these considerations, Australia places great importance on the full assessment of the European Union's measures and claims<sup>10</sup> and the proper interpretation and

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<sup>1</sup> See Australia's third party written submission, para. 2 and footnote therein; oral statement, para. 9.

<sup>2</sup> Australia's oral third party written submission, para. 52; oral statement, para. 22.

<sup>3</sup> See Australia's third party written submission, section V ("Systemic Implications") and in particular para. 23; oral statement, section V ("Systemic Implications"). Such measures would not include measures adopted and maintained in a transparent manner, in good faith, in pursuit of a legitimate public policy objective, such as health and safety or environmental protection, among others: see Australia's third party written submission, fn. 97.

<sup>4</sup> Australia's third party written submission, para. 53 and footnotes therein.

<sup>5</sup> Australia's response to Panel question no. 2(a) to third parties, para. 7; third party written submission, paras. 3, 10.

<sup>6</sup> Australia's third party written submission, para. 3.

<sup>7</sup> Australia's third party written submission, para. 3. See also, Australia's oral statement, paras. 9 – 11.

<sup>8</sup> See for example, Australia's response to Panel question nos. 2(a) and 2(b) to third parties, paras. 8 – 14.

<sup>9</sup> Australia's third party written submission, para. 3.

<sup>10</sup> To the extent required in order to resolve the dispute before the Panel: see Australia's third party written submission, para. 55 and response to Panel question no. 2 to third parties; oral statement, para. 4, bullet point 4.

application of WTO rules to this dispute.<sup>11</sup> In Australia's view, WTO rules can appropriately capture and discipline even disguised measures, where sufficient evidence of their existence is put forward.<sup>12</sup> As part of its objective assessment of this matter under Article 11 of the DSU, the Panel has "ample and extensive authority to undertake and control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts".<sup>13</sup>

## II. THE "UNWRITTEN" NATURE OF A MEASURE HAS SIGNIFICANCE – BUT DOES NOT CREATE A LEGAL RULE

4. A complainant has considerable discretion to identify and define the measures which it seeks to challenge through WTO dispute settlement.<sup>14</sup> The scope of challengeable measures is broad.<sup>15</sup> The concept is not a device to restrict Members from bringing claims in good faith<sup>16</sup> and it must be interpreted and applied consistently with the "comprehensive nature of the right of Members to resort to [WTO] dispute settlement".<sup>17</sup>

5. There are no strict legal rules or standards governing the analysis of unwritten measures, for the purpose of determining their existence as challengeable measures in the WTO dispute settlement system.<sup>18</sup> An unwritten measure is simply a "measure" for that purpose.<sup>19</sup>

6. The only elements which a complainant is always required to prove in order to establish the existence of any "measure" are "attribution" and "precise content".<sup>20</sup> Additional considerations such as "consistency of application" or "future application" are not required to be proven, unless they are a relevant characteristic of the measure at issue.<sup>21</sup> Analytical

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<sup>11</sup> Australia's third party written submission, paras. 56 - 57.

<sup>12</sup> Australia's third party written submission, paras. 56 – 57; oral statement, para. 4, bullet point 4.

<sup>13</sup> Australia's third party written submission, para. 9 and fn. 5, quoting Appellate Body Report, *US – Shrimp*, para. 106.

<sup>14</sup> Australia's third party written submission, para. 13.

<sup>15</sup> Australia's third party written submission, para. 11 and footnotes therein; oral statement, paras. 16 – 17.

<sup>16</sup> Australia's oral statement, para. 17.

<sup>17</sup> Australia's oral statement, para. 20 and fn. 34, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

<sup>18</sup> Australia's third party written submission, para. 28; oral statement, para. 4, bullet point 2.

<sup>19</sup> Australia's oral statement, para. 4, bullet point 2.

<sup>20</sup> Australia's third party written submission, para. 20.

<sup>21</sup> See Australia's response to Panel question no. 1 to third parties, para. 1; response to Panel question no. 3 to third parties, para. 15. See also, Australia's third party written submission, paras 20 – 21, 25 and 28 and fn. 43, quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.112: "the elements a panel needs to review in ascertaining the existence of an unwritten measure will depend on the specific measure challenged and how it is described and characterised by the complainant".

"devices" may be helpful to establish the existence of certain types of measures. But the application of such devices is not mandatory, and their previous usage does not support a broadly-applied model for establishing measures based upon arbitrary characteristics.<sup>22</sup>

7. In Australia's view, any significance to be attributed to the "unwritten" nature of a measure will be of an evidentiary nature,<sup>23</sup> not a legal and mandatory nature.<sup>24</sup> Allegations of unwritten or *de facto* measures are likely to be supported by circumstantial evidence.<sup>25</sup> The indirect nature of such evidence will invariably inform a panel's approach to the analysis of the existence of the measure at issue, to some extent.<sup>26</sup> But it does not create a rule.<sup>27</sup>

### III. EXISTENCE OF A MEASURE: EVIDENTIARY CONSIDERATIONS

#### A. A PANEL'S APPROACH TO THE EVIDENCE IS CASE-SPECIFIC

8. It is well-established that "precisely how much and precisely what kind of evidence will be required to establish [a presumption that what is claimed is true] will necessarily vary from measure to measure, provision to provision, and case to case."<sup>28</sup> It does not follow from this that panels should take a consistent approach to the evidence applicable to persistent features of measures,<sup>29</sup> or that the standard of proof to establish the existence of a measure changes in response to the nature of a measure.<sup>30</sup> Rather, a panel should carefully assess the evidence of the existence of a measure in light of the circumstances of the particular case<sup>31</sup> and in totality.<sup>32</sup>

9. In particular, while the evidence of an unwritten measure may tend towards being circumstantial in nature, that factor does not support a specific legal standard for the evidence of unwritten measures.<sup>33</sup> Just like direct evidence, a single piece of circumstantial evidence

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<sup>22</sup> Australia's third party written submission, paras. 26 – 27.

<sup>23</sup> In addition to the unique systemic importance of the allegedly disguised, unwritten measures challenged in this dispute, as set out in paragraphs 1 – 3 of this Executive Summary, above.

<sup>24</sup> In the sense of any strict legal rule or requirement applicable to the existence of unwritten measures. See Australia's third party written submission, para. 43: "these features are not dispositive of any legal standard." (footnote omitted)

<sup>25</sup> Australia's third party written submission, para. 43 and fn. 76, quoting Panel Reports, *EC – Approval Marketing of Biotech Products*, para. 7.522.

<sup>26</sup> In that connection, see paragraphs 10 – 11 below. See also, Australia's third party written submission, paras. 41 – 43.

<sup>27</sup> Australia's third party written submission, para. 43; response to Panel question no. 4 to third parties, paras. 24 – 25.

<sup>28</sup> Australia's third party written submission, para. 41 and fn. 75, quoting Appellate Body Report, *US – Wool Shirts and Blouses*, para. 14.

<sup>29</sup> Australia's third party written submission, paras. 21, 23 – 24.

<sup>30</sup> Australia's third party written submission, paras. 15 – 17, 23 – 29.

<sup>31</sup> Australia's third party written submission, para. 40.

<sup>32</sup> Australia's third party written submission, paras. 36 – 39.

<sup>33</sup> Australia's third party written submission, para. 43: "these factors are not dispositive of any legal standard".

may still be relied upon to establish a fact.<sup>34</sup> The key question is whether the evidence before a panel is sufficient to establish a fact - whether that is done through 1 or 900 exhibits<sup>35</sup> and whether that evidence is circumstantial or otherwise. There is no requirement of a "high bar",<sup>36</sup> a high volume of evidence,<sup>37</sup> nor any standard of consistency,<sup>38</sup> applicable to unwritten measures.<sup>39</sup>

10. However, circumstantial evidence may present challenges for a panel, in properly assessing the meaning and weight to be ascribed to such evidence. That can "only be determined in the specific circumstances of each case."<sup>40</sup> In undertaking this analysis, a panel should engage in a "cumulative appreciation of all of the evidence", assessing the probative value of circumstantial evidence in light of other evidence.<sup>41</sup> As the Appellate Body has stated, "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference".<sup>42</sup>

11. In that connection, the context of an unwritten measure can be particularly important to inform a panel's consideration of the evidence of the existence of unwritten measures. For example, the allegedly pretextual nature of an unwritten measure may suggest that certain evidence – such as that which seeks to rely upon the very circumstances through which the measure is allegedly disguised - is of limited probative value in analysing that measure's existence.<sup>43</sup> In a similar vein, the possibility that a Member could "insulate itself from effective discipline" may also inform a panel's assessment of the weight of certain

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<sup>34</sup> Including the fact of the existence of a measure. See Australia's third party written submission, paras. 40 and fn. 74 quoting Appellate Body Report, *Argentina - Import Measures*, para. 5.176, 43 and fn. 78, quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.522. See also, Australia's response to Panel question no. 4 to third parties, para. 24.

<sup>35</sup> Australia's third party written submission, paras. 15, 18 and 40. In relation to circumstantial evidence, see also, Australia's third party written submission, para. 43 and fn. 79, quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.522. See also, Australia's response to Panel question no. 4 to third parties regarding the relevance of evidence of "consequences of an alleged unwritten measure to demonstrating its existence".

<sup>36</sup> Australia's third party written submission, para. 19.

<sup>37</sup> Australia's third party written submission, para. 19.

<sup>38</sup> Australia's third party written submission, paras. 24 – 25; response to Panel question no. 1 to third parties, para. 1.

<sup>39</sup> Australia does, however, acknowledge the Appellate Body's statement that "particular rigour" is required in the context of unwritten norms: see Australia's third party written submission, para. 19 and footnotes therein.

<sup>40</sup> Australia's third party written submission, para. 43 and fn. 79, quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.522.

<sup>41</sup> Australia's third party written submission, paras. 37 - 38 and fns. 64 and 65, quoting Appellate Body Report, *US – Continued Zeroing*, para. 337. See also, Australia's response to Panel question no. 4 to third parties, para. 25 and fn. 44.

<sup>42</sup> Australia's third party written submission, fn. 62, quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 154. (emphasis original)

<sup>43</sup> Australia's third party written submission, para. 42; response to Panel question no. 1 to third parties, paras. 2 – 3, 6.

circumstantial evidence.<sup>44</sup> It is appropriate for a panel to give consideration to the "overall situation as an integrated whole" in its approach to the evidence before it.<sup>45</sup>

## **B. A PANEL CAN TAKE AN ACTIVE ROLE IN ASSESSING THE EVIDENCE BEFORE IT**

12. Proving the existence of a challenged measure is part of the complainant's well-established and mandatory burden in establishing its *prima facie* case.<sup>46</sup> This does not mean that a panel is "frozen into inactivity" while the complainant seeks to discharge that burden.<sup>47</sup>

13. A panel is empowered to seek additional information which will elucidate its understanding of the evidence before it, at any time, pursuant to Article 13 of the DSU.<sup>48</sup> It may take account of any failure to provide requested information, in assessing the evidence on record and conclusions which should be drawn from it.<sup>49</sup>

14. In Australia's view, the Panel is entitled to seek further information which will assist it to examine China's arguments in its first written submission and in doing so, to make findings relevant to the European Union's *prima facie* case.<sup>50</sup> This includes information on the hypothetical justifications which have been suggested by China, in response to the European Union's evidence in support of the existence of the unwritten measures.<sup>51</sup>

## **IV. THE UNWRITTEN MEASURES ARE INTERLINKED, BUT NOT DEPENDENT**

15. The relationship between the unwritten measures<sup>52</sup> is a key factor in the Panel's order of analysis between those measures<sup>53</sup> and the availability of judicial economy in relation to claims as between those measures.<sup>54</sup>

16. The threshold issue of whether a panel is entitled to exercise judicial economy with respect to any claim "is a legal question, and it turns on whether such a ruling would be

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<sup>44</sup> Australia's third party written submission, para. 39; oral statement, para. 4, bullet point 3.

<sup>45</sup> Australia's third party written submission, para. 39 and fn. 72, quoting Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.23.

<sup>46</sup> Australia's third party written submission, paras. 13 - 14 and footnotes therein.

<sup>47</sup> Australia's oral statement, para. 13 and fn. 27, quoting Panel Report, *Korea – Stainless Steel Bars*, paras. 7.24 – 7.25. (footnotes omitted)

<sup>48</sup> Australia's third party written submission, paras. 48 – 49; oral statement, paras. 12 – 13.

<sup>49</sup> Australia's third party written submission, para. 51; oral statement, para. 15.

<sup>50</sup> Australia's oral statement, para. 13.

<sup>51</sup> Australia's oral statement, paras. 9 – 12.

<sup>52</sup> Reference to the "unwritten measures" means the overarching measure and the import restriction measure as described in the European Union's first written submission, unless the context suggest otherwise.

<sup>53</sup> Australia's third party written submission, para. 45 and fn. 88.

<sup>54</sup> Australia's response to Panel question no. 2 to third parties, paras. 9 – 14.



superfluous from the perspective of implementation."<sup>55</sup> In Australia's view, the European Union's characterisation of the relationship between the unwritten measures does not support a finding that the Panel is entitled to exercise judicial economy on claims *as between* those measures.<sup>56</sup>

17. Based on the European Union's description of the measures, Australia understands that the individual measures are manifestations of the overarching measure, but do not *comprise* the overarching measure.<sup>57</sup> This means that any affirmative finding concerning a claim in respect of one of the measures would not necessarily lead to the "modification or withdrawal of the other [measure]" such that findings concerning that other measure would then be "superfluous".<sup>58</sup> On the same basis, any finding by the Panel that the import restriction measure does not exist as a challengeable measure, does not support a consequential finding that the overarching measure also does not exist.<sup>59</sup>

18. The claims brought by the European Union engage challenging "questions of great practical interest" around the existence and operation of the unwritten measures.<sup>60</sup> The implementation of the unwritten measures is also allegedly fluctuating and sporadic. In light of these factors, as well as China's denial of the very existence of the unwritten measures, there is a risk that implementation of any findings in relation to a single claim will not resolve the dispute.<sup>61</sup> Accordingly, Australia submits that the Panel should exercise its mandate in such a way as to provide as much clarity to the parties as possible in respect to claims concerning the unwritten measures, by declining to exercise judicial economy in that regard.<sup>62</sup>

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<sup>55</sup> Australia's response to Panel question no. 2(a) to third parties, para. 9 and fn. 19, quoting Final Panel Report as issued to the parties, *Turkey – Pharmaceutical Products (EU)*, para. 7.265.

<sup>56</sup> Australia's response to Panel question no. 2(a) to third parties, para. 9 and fn. 18.

<sup>57</sup> Australia's response to Panel question no. 2(b) to third parties, para. 12.

<sup>58</sup> Australia's response to Panel question no. 2(b) to third parties, para. 9 and fn. 20, quoting Final Panel Report as issued to the parties, *Turkey – Pharmaceutical Products (EU)*, para. 7.265.

<sup>59</sup> Australia's response to Panel question no. 2(b) to third parties, para. 10.

<sup>60</sup> Australia's response to Panel question no. 2(a) to third parties, para. 7. See also, paragraph 2 of this Executive Summary, above.

<sup>61</sup> Australia's response to Panel question no. 2(a) to third parties, para. 8.

<sup>62</sup> Australia's response to Panel question no. 2(a) to third parties, para. 8.