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CHINA – ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

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<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

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<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R , adopted 17 June 2011, DSR 2011:VII, p. 3753
<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
<i>US – Shrimp II (Viet Nam)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/AB/R , and Corr.1, adopted 22 April 2015, DSR 2015:III, p. 1271
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<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

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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
NPC	National People's Congress
SEP	Standard essential patent
SPC	The Supreme People's Court of the People's Republic of China
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. Australia welcomes the opportunity to present its views to the Panel. Australia considers that these proceedings raise important questions regarding the legal interpretation and proper application of key provisions of the TRIPS Agreement.

2. The TRIPS Agreement is the most comprehensive multilateral agreement on intellectual property.¹ As such, Australia considers it is of critical systemic importance that the TRIPS Agreement functions effectively. This requires that each Member fully implement the TRIPS Agreement in their domestic jurisdiction, and that each Member does not undermine other Members' ability to do the same.

3. In this submission, Australia will not speak to every one of the European Union's claims. Rather, it will address:

- the legal standard and evidentiary threshold to establish and characterise an unwritten measure; and
- 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).

4. Australia reserves the right to raise other issues at the third party hearing before the Panel.

II. UNWRITTEN MEASURES

5. Australia notes from previous findings of WTO panels and the Appellate Body² that cases challenging unwritten measures are becoming more common. Australia observes that

¹ "The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property" available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 24 August 2023).

² Panel Reports, *US – Anti-Dumping Methodologies (China)*; *US – Supercalendered Paper*; Appellate Body Reports, *US – Zeroing (EC)*; *US – Zeroing (Japan)*; *US – Continued Zeroing*; *US – Shrimp II (Viet Nam)*; *US – Anti-Dumping Methodologies (China)*; and *US – Supercalendered Paper*.

the elusiveness of such measures is of wider systemic concern to the functioning of the rules-based order. Considering the growing need for the WTO dispute settlement system to effectively discipline unwritten measures, Australia will focus on two important factors in this dispute. First, the evidentiary threshold required to demonstrate the existence of an unwritten measure, and second, 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

6. Unwritten measures by their nature entail complex evidentiary considerations. 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".³ As the Appellate Body noted in *US – Continued Zeroing*, a panel is not absolved from examining evidence in its totality where there is no direct evidence establishing a fact or claim.⁴

7. In this dispute, the European Union summarises its evidence of China's unwritten measure as comprising:

- a) the temporal overlaps and the similarities of the five decisions;
- b) the designation of some of these decisions as "typical cases" and their promotion by the SPC and the Intermediate People's Courts and the Guangdong Province Communist Party Political and Legal Committee; and
- c) the calls from the SPC and the NPC's Standing Committee to continue using and improving the anti-suit injunction system.⁵

8. Australia acknowledges that China has challenged both the existence and meaning of some of this evidence, as well as its impact in establishing the existence and content of the alleged unwritten measure.⁶ Without taking a position as to the evidence itself, Australia

³ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.26, citing Appellate Body Report, *US – Zeroing (EC)*, para. 198.

⁴ Appellate Body Report, *US – Continued Zeroing*, para. 336. See also paras. 331 and 357.

⁵ European Union's first written submission, para. 235.

⁶ China's first written submission, paras. 127-149.

wishes to submit its views on the probative weight to be given to sources of evidence, such as those relied on by the European Union in this dispute, in demonstrating the existence of alleged unwritten measures.

9. Previous WTO panel reports have found that an unwritten measure can be determined from secondary sources of evidence including policy documents, administrative guidelines and statements of government officials.

10. For example, in *Argentina – Import Measures* an overarching measure was established using evidence that included statements by Argentine officials, articles in newspapers, statements by company officials, and reports prepared by market intelligence agencies.⁷ On appeal, the panel's "holistic" method of analysing the content of the measure together with the operation of its components, was also upheld. The Appellate Body found in support of this decision that "the combined operation of the [individual elements] is a defining element of the content of the [single] measure".⁸

11. In *US – Zeroing (EC)*, the existence of the measure was supported by the fact it was referred to in the Anti-Dumping Manual, which was a written guideline used by the US Department of Commerce.⁹ Similarly, in *US – Anti-Dumping Methodologies (China)*, the panel derived the content of the challenged anti-dumping methodology from several Department of Commerce documents, including a Policy Bulletin and 100 anti-dumping determinations in which the alleged methodology was applied.¹⁰

12. Further, in *EC – Approval and Marketing of Biotech Products*, the evidence establishing the measure included various documents and statements referring to the

⁷ Panel Report, *Argentina – Import Measures*, para. 6.43.

⁸ Appellate Body Reports, *Argentina – Import Measures*, para. 5.133. See by analogy, European Union's first written statement, para. 233, explanation of the "systematic" operation of the unwritten measure; China's first written statement, para. 76, arguments.

⁹ Appellate Body Report, *US – Zeroing (EC)*, para. 202.

¹⁰ Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.309–7.311.

measure, including statements by individual Commissioners and State officials, Council and European Parliament documents, and the European Communities' statements at the WTO.¹¹

13. In light of such decisions, 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.

14. Australia submits that if the Panel finds the evidence submitted by the European Union shows Chinese government endorsement and encouragement of the approach to 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. In Australia's view this applies particularly in relation to the designation of some of the ASI decisions as "typical cases" and their promotion by the SPC, the Intermediate People's Courts, and the Guangdong Province Communist Party Political and Legal Committee, as well as in relation to calls from the SPC and NPC's Standing Committee to continue using and improving the ASI system. If the Panel is satisfied as to the existence of such an underlying policy, then Australia submits 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"

15. Next Australia turns to the legal standard to be applied in characterising an unwritten measure as one of "general and prospective application" or "ongoing conduct".

1. *General and prospective application*

16. Australia agrees with both parties that a measure may be found to have "general and prospective application" if it reflects a deliberate policy, going beyond the mere repetition of the application of the measure in specific instances.¹² The measure will have "general

¹¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.515 and 7.532.

¹² European Union's first written submission, para. 246; China's first written submission, paras. 151 and 154; and Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.34.

application" to the extent it affects an unidentified number of economic operators,¹³ and will have "prospective application" to the extent that it applies in the future.¹⁴

17. As both parties have pointed out, prospective application can be demonstrated through a variety of factors, which may vary from case to case.¹⁵ Both parties refer to the Appellate Body in *US – Anti-Dumping Methodologies (China)*, who stated:

...The existence of an underlying policy, which is implemented by the rule or norm, is a relevant element in establishing the prospective nature of that rule or norm. In addition, the more frequent, consistent, and extended the repetition of conduct is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy. In this regard, the Appellate Body has explained that relevant evidence may include proof of the systematic application of the challenged rule or norm. Where ascertainable, the design, architecture, and structure of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm.¹⁶

18. One factor noted by the European Union is the expectation created among economic operators that the measure will be applied in the future. In this respect, Australia notes the European Union's reference to recent judgements outside China that have been allegedly influenced by the risk of Chinese courts continuing to apply its ASI policy.¹⁷

19. Australia agrees with China that to establish general and prospective application, a number of WTO cases rely on the absence of instances of non-application of the measure.¹⁸

¹³ 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.

¹⁴ 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.

¹⁵ European Union's first written submission, para. 248; China's first written submission, paras. 152 and 154; and Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

¹⁶ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

¹⁷ European Union's first written submission, para. 275 and fn 260.

¹⁸ Appellate Body Report, *US – Zeroing (EC)*, para. 201; China's first written submission, para.157.

However, Australia submits this 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**

20. As acknowledged by both parties, previous WTO panels and the Appellate Body have found that to prove the existence of ongoing conduct, one must establish its repeated application and that it is "likely to continue in the future".¹⁹

21. 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. As the Appellate Body states in *US – Continued Zeroing*:

...The density of factual findings in these cases, regarding the continued use of the zeroing methodology in a string of successive proceedings pertaining to the same anti-dumping duty order, provides a sufficient basis for us to conclude that the zeroing methodology would *likely* continue to be applied in successive proceedings whereby the duties in these four cases are maintained.²⁰

22. The Appellate Body in *US - Supercalendered Paper* clarified that a formal decision to demonstrate ongoing conduct is not required. They relevantly stated:

... We see no error in the Panel's conclusion that the evidence adduced by Canada sufficiently establishes that the challenged conduct is *likely* to continue. In particular, we agree with the Panel that the consistent manner in which the USDOC refers to the alleged OFA-AFA measure, the frequent reference to previous applications of the alleged measure in USDOC determinations, the fact that the USDOC refers to the alleged measure as its 'practice', and

¹⁹ European Union's first written submission, paras. 277-278; China's first written submission, para. 162; Appellate Body Reports, *US – Supercalendered Paper*, para. 5.17; *Argentina– Import Measures*, paras. 5.104-5.105 and 5.107-5.108; *US – Continued Zeroing*, para. 191; and Panel Report, *US–Orange Juice (Brazil)*, paras. 7.175-7.176.

²⁰ Appellate Body Report, *US – Continued Zeroing*, para. 191. (emphasis added).

the USDOC's characterization of a departure from the alleged measure as an 'inadvertent error' all support the conclusion that the alleged measure is *likely* to continue to apply".²¹

III. INTERPRETATION OF THE TRIPS AGREEMENT

23. In Australia's view, there are two TRIPS provisions that are foundationally important to this dispute, as well as to the functioning of the TRIPS Agreement generally. These are Article 1.1, particularly the requirement for parties to "give effect" to the provisions of the TRIPS Agreement, and the Agreement's transparency requirements in Article 63.

24. Article 1.1 of the TRIPS Agreement reflects a balance between flexibility – both in how Members implement its provisions in their domestic legal systems,²² and in their freedom to provide more extensive protections than TRIPS requires, should they so choose²³ – and the requirement that Members nonetheless "give effect to the provisions of this Agreement".²⁴ Australia submits that this balance, and in particular the importance of not undermining the effect of TRIPS obligations, is at the heart of this case.

25. In order for Members to assess whether this balance is being effectively struck, transparency is key. Indeed transparency is a cornerstone of the whole WTO system. Without it, obligations are worth little more than the paper they are written on. In the context of the TRIPS Agreement, given the flexibilities provided to Members in how they implement their obligations, transparency takes on particular significance.

26. Australia considers that the general rule of interpretation under Article 31 of the VCLT should guide the interpretation of the TRIPS Agreement, as it constitutes a customary rule of international law.²⁵ Consequently, in addition to examining the text's ordinary meaning in good faith,²⁶ Australia agrees with the both parties²⁶ that the object and purpose of the TRIPS

²¹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.44. (emphasis added).

²² Article 1.1 TRIPS Agreement.

²³ Article 1.1 TRIPS Agreement.

²⁴ Article 1.1 TRIPS Agreement.

²⁵ Article 3.2 DSU; Appellate Body Report, *US – Gasoline*, para. 16–17.

²⁶ Article 31 Vienna Convention.

Agreement should aid in its interpretation,²⁷ including as expressed in the preamble, together with Articles 7 (Objectives), and Article 8 (Principles).²⁸

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

27. Several of the European Union's claims refer to Article 1.1 of the TRIPS Agreement, and in particular, the Article's first sentence that Members shall "give effect" to the provisions of the Agreement.²⁹

28. Article 1.1 of the TRIPS Agreement provides in full (emphasis added):

Members shall *give effect to* the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

29. Essentially, the European Union proposes 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 Members³⁰ and should not undermine the authority of other Members' judicial authorities in this regard.³¹

30. China considers that such an interpretation would render TRIPS extraterritorial in its application, requiring Members to not only give effect to the provision of the Agreement within their own territory, but also within the territory of other Members.³²

²⁷ European Union's first written submission, paras. 308-310; China's first written submission, para. 200.

²⁸ Panel Report, *Australia—Tobacco Plain Packaging*, paras. 7.2402, 7.2407 and 7.2408; Appellate Body, *Australia—Tobacco Plain Packaging*, para. 6.658.

²⁹ European Union's first written submission, sections. 6, 7, 9.

³⁰ European Union's first written submission, paras. 311-312, 322 and 375.

³¹ European Union's first written submission, paras. 463 and 464.

³² China's first written submission, para. 208.

31. For its part, China argues that the first sentence of Article 1.1 is nothing more than a reiteration of the principle of *pacta sunt servanda*,³³ the rule that agreements and stipulations, especially those in treaties, must be observed.³⁴ As such, China considers that the phrase "Members shall give effect to the provisions of this Agreement" should be interpreted to simply mean "the provisions of the Agreement are obligations where stated".³⁵

32. Australia considers that the principle of *pacta sunt servanda* is well established and indeed recognised as customary international law.³⁶ Australia also notes that the first sentence of TRIPS Article 1.1 appears to be unique among the WTO covered agreements. In no other agreement did negotiators consider it necessary to make such a statement, nor to reiterate the customary international law principle of *pacta sunt servanda*. 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*.

33. Australia considers that the ordinary meaning of Article 1.1³⁷ is the correct starting point for its interpretation. To "give effect to" means "to render operative", with the term "operative" being "characterized by operating or working; being in operation or force; (also) exerting force or influence, or active in producing or having the power to produce effects; productive of something".³⁸

³³ China's first written submission, para. 209.

³⁴ *Black's Law Dictionary*, 7th edn, B. Garner (West Publishing Co, 1999), p. 1133.

³⁵ China's first written submission, para. 209.

³⁶ C. Binder and J. Hofbauer, "The Pacta Sunt Servanda Principle or the Limits of Interpretation - The Gabčíkovo-Nagymaros Case Revisited", in S Forlati, M Mbengue & B McGarry, (eds.), *The Gabčíkovo-Nagymaros Judgment and its Contribution to the Development of International Law (Brill, Forthcoming)* (2019), p. 2; "Sources of International Law: An Introduction" available at: https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (accessed 24 August 2023).

³⁷ Article 31 Vienna Convention.

³⁸ Oxford Dictionaries online, definition of "to give effect to" and "operative"
<https://www.oed.com/search/dictionary/?scope=Entries&q=to+give+effect+to;>
<https://www.oed.com/search/dictionary/?scope=Entries&q=operative> (accessed 24 August 2023).

34. Given this ordinary meaning, Australia submits that to "give effect to" the provisions of the TRIPS Agreement, Members are required to actively make the provisions operative – making them operational or functioning. To achieve this meaning in a multilateral context, Australia submits that it is not enough for a Member to consider their own domestic legal system in isolation. They should also consider how their actions "give effect" to (or conversely, undermine) the provisions of the Agreement more broadly.

35. In accordance with Article 1.1, in Australia's view Members must ensure their implementation of TRIPS provisions does not interfere with, or undermine, the ability of other Members to uphold their own TRIPS obligations. The provisions of the TRIPS Agreement *cannot* be fully operative when one Member undermines another Member's ability to uphold its obligations, such as the availability of effective enforcement under Part III of the TRIPS Agreement. Any such interference *fails to give effect* to the provisions of the TRIPS Agreement.

36. Australia does not agree with China that such an interpretation would require that Members take on "obligations not only in respect of conduct within their own territory, but also in respect of conduct within the territory of other Members".³⁹ Such interference is not conduct within the territory of other Members, but in fact stems from conduct undertaken within a Member's own domestic system (in this case allegedly China) which directly impacts on other Members' (in this case EU Members) ability to uphold their obligations within their own territories.

37. Australia agrees with China that it is important to consider the provision's context within the TRIPS Agreement, in particular the remaining text of Article 1.1. In China's view, the second and third sentence of Article 1.1 confirm the "territorial delimitation" of the first sentence.⁴⁰ In addressing that view, Australia will comment on the rationale of the second and third sentences.

38. The second sentence of Article 1.1 provides that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this

³⁹ China's first written submission, para. 206.

⁴⁰ China's first written submission, para. 202.

Agreement, provided that such protection does not contravene the provisions of this Agreement." Australia considers this could be distilled to "TRIPS is a floor, not a ceiling". 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.⁴¹

39. The third and final sentence of Article 1.1 provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". Australia submits this is a recognition that different Members' laws concerning IP do not need to be "harmonised"⁴² – Members instead have flexibility in determining how to best meet their obligations within their own legal systems.⁴³ However, this flexibility does not mean a Member can use the differences in their legal system to not comply with their obligations or implement a "lower standard".⁴⁴ As such, despite the flexibility in how a Member may choose to implement the TRIPS Agreement, they cannot negate the Article 1.1 requirement to "give effect" to the provisions of the TRIPS Agreement. Australia considers that this would include any action which undermines another Member's ability to comply with its TRIPS obligations.

40. Australia submits that 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 TRIPS.

⁴¹ Panel Report, *China – Intellectual Property Rights*, para. 7.513; *Canada – Patent Term*, para. 6.87.

⁴² Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.2682.

⁴³ Appellate Body Report, *India – Patents (US)*, para. 59.

⁴⁴ Panel Report, *China – Intellectual Property Rights*, para. 7.513; *Canada – Patent Term*, para. 6.87.

41. Lastly, as part of the VCLT analysis Australia submits that the wider context of the TRIPS Agreement's object and purpose should be considered.

42. To "elucidate" the meaning of the Article 1.1 obligation, the European Union refers to the first and second recitals of the preamble.⁴⁵ The European Union highlights that:

The first recital of the preamble to the TRIPS Agreement stresses the WTO Members' desire to reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights. To this end, the second recital recognizes the need for new rules and disciplines concerning "(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights" and "(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems".⁴⁶

43. China also refers to the second preambular clause:

...As set forth in the second preambular clause, the object and purpose of the TRIPS Agreement is to establish "rules and disciplines concerning ... the provision of adequate standards and principles" relating to "the availability, scope and use of trade-related intellectual property rights" and to provide for "effective and appropriate means for the enforcement" of these rights, "taking into account differences in national legal systems". The purpose of requiring each Member to implement these minimum standards within its domestic legal system, and the reason why the TRIPS Agreement forms part of the multilateral trading system in the first place, is to "reduce distortions to international trade" resulting from the ineffective and inadequate protection of intellectual property rights "and to ensure that measures and procedures to enforce intellectual property rights" within the territory of individual Members "do not themselves become barriers to legitimate trade."⁴⁷

44. 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

⁴⁵ European Union's first written submission, para. 308.

⁴⁶ European Union's first written submission, para. 309.

⁴⁷ China's first written submission, para. 200.

for Article 1.1 to be interpreted in a multilateral context. To make the TRIPS Agreement and its protection of IPRs "effective", IP protections need to be able to function across all Members' jurisdictions. Australia disagrees that such an interpretation would amount to a "supranational system governing the recognition, enforcement, and adjudication of private intellectual property rights and disputes relating to those rights".⁴⁸ Australia agrees that a Member cannot be held accountable for the autonomous actions of another Member, which fail to meet that other Member's TRIPS obligations. However, Australia also considers that 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 TRIPS obligations (i.e. any such failure should indeed be autonomous, not the result of the deliberate actions of other Members). This interpretation is supported by the preamble's second recital (c) in recognising the differences in national legal systems but noting again the need for enforcement protections to be "effective".

45. The European Union also refers to Article 7 (Objectives) of the TRIPS Agreement in support of its interpretation of Article 1.1.⁴⁹ Australia submits that Article 7 requires a good faith balancing of rights and obligations for Members. As the panel in *United States – Section 211 Omnibus Appropriations Act of 1998* observed:

...Article 7 of the TRIPS Agreement states that one of the objectives is that "[t]he protection and enforcement of intellectual property rights should contribute...to a balance of rights and obligations." We consider this expression to be a form of the good faith principle. ...Members must therefore implement the provisions of the TRIPS Agreement in a manner consistent with the good faith principle enshrined in Article 7 of the TRIPS Agreement".⁵⁰

46. 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). Australia submits that this balance does not enable Members to breach their obligations, nor

⁴⁸ China's first written submission, para. 16.

⁴⁹ European Union's first written submission, para. 310.

⁵⁰ Panel Report, *US – Section 211 Appropriations Act*, para. 8.57.

to ignore the effect of their measures on the ability of other Member's to comply with their own TRIPS obligations.

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

47. The European Union contends that China has failed to comply with the TRIPS Agreement's transparency obligations outlined in Article 63.1 and Article 63.3.⁵¹

48. Article 63.1 of the TRIPS Agreement provides (emphasis added):

Laws and regulations, and *final judicial decisions* and administrative rulings of *general application*, made effective by a Member *pertaining to the subject matter of this Agreement* (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) *shall be published, or where such publication is not practicable made publicly available*, in a national language, *in such a manner as to enable governments and right holders to become acquainted with them*. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

49. Article 63.3 of the TRIPS Agreement provides (emphasis added):

Each Member shall *be prepared to supply*, in response to a written request from another Member, *information of the sort referred to in paragraph 1*. A Member, having reason to believe that *a specific judicial decision* or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to *be given access to or be informed in sufficient detail of such specific judicial decisions* or administrative rulings or bilateral agreements.

50. In Australia's view, transparency is fundamental to the functioning of the multilateral trading system. As the WTO has stated, the importance of transparency in the TRIPS Agreement is three-fold.⁵² First, to promote *predictability* of laws and policies on a Member's

⁵¹ European Union's first written submission, paras. 603 and 647-649.

⁵² "three-fold" available at: https://www.wto.org/english/tratop_e/trips_e/ipenforcement_e.htm (accessed 24 August 2023).

protection and enforcement of IPRs. Australia submits this is especially important in respect of publishing judicial decisions which allow Members (and IP owners) to know how other Members are applying their domestic IP laws during litigation. Second, transparency allows Members to monitor the operation of and *compliance* with the TRIPS Agreement. Without adequate information through transparency of law and policies, Members cannot be confident that other Members are adequately fulfilling their TRIPS obligations. Australia submits this is especially important as the TRIPS Agreement is a minimum standard agreement, and Members have built-in flexibilities in how they implement obligations, as demonstrated by the discussion of Article 1.1 above.⁵³ Lastly, transparency *encourages co-operation*, as Members can discuss issues, which in turn potentially avoids the need to resort to formal dispute settlement procedures.

51. Given the importance of transparency to the functioning of the TRIPS Agreement, there are two key elements to the Article 63 obligations on which Australia wishes to submit its views – the scope of the obligations and the level of transparency required.

52. First, to determine the scope of the transparency obligations, 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.

53. Australia notes that the word "final" does not feature in the "equivalent"⁵⁴ transparency obligations for judicial decisions in Article X:1 of the GATT. Australia agrees with the European Union that the term's ordinary meaning should be interpreted as "not to be altered or undone".⁵⁵ In Australia's view this means that if a judicial decision has no further rights for appeal or review⁵⁶ and pertains to the subject matter of the TRIPS Agreement, it is covered by the transparency obligations. This is regardless of whether a Member has a civil or

⁵³ Australia's third-party submission, paras. 27-46.

⁵⁴ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.887.

⁵⁵ European Union's first written submission, para. 617.

⁵⁶ European Union's first written submission, paras. 626-629 where it discusses the three decisions in this dispute as being final decisions.

common law system, as the decision only has to have "a degree of authoritativeness issued by certain...judicial bodies" rather than be legally binding under law.⁵⁷ Both the European Union and China agree that a final judicial decision will be of "general application" where the case "establish[es] or revise[s] principles or criteria applicable in future cases".⁵⁸

54. Second, once the scope for the transparency obligations is determined, the level of transparency required must also be examined. Australia submits that for Article 63.1 this 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.

55. Australia agrees with the European Union that to "publish" or make "publicly available... in such a manner as to enable governments and right holders to become acquainted with them" requires that the judicial decision be "generally available through an appropriate medium rather than simply making them publicly available".⁵⁹ Further, the term "to supply" in its ordinary meaning refers to "to make available for use".⁶⁰

56. Australia submits 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/or supply the requested information with sufficient detail. As the panel stated in *US – Countervailing and Anti-Dumping Measures (China)*, in the context of legislation:

... the term 'laws' as it appears in Article X:1 must be construed to include the entire piece of legislation as well as any individual parts or provisions that make up these laws. Were it otherwise, Members could meet their obligations under Article X:1 by promptly publishing laws that do not contain all parts or provisions....⁶¹

⁵⁷ European Union's first written submission, para. 615; China's first written submission, paras. 328-330; and Panel Report, *EC – IT Products*, para. 7.1027.

⁵⁸ European Union's first written submission, para. 618; China's first written submission, para. 325; and Panel Report, *Japan – Film*, para. 10.388.

⁵⁹ European Union's first written submission, para. 621; Panel Report, *EC – IT Products*, para. 7.1084.

⁶⁰ European Union's first written submission, para. 670.

⁶¹ Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.27.

57. Australia submits the equivalent level of transparency for judicial decisions means it is not enough that a Member only publish some or partial decisions or provide summaries / extracted guidelines of such decisions. 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.

58. Australia submits 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

59. The European Union's claims in this dispute raise important questions regarding the proper legal interpretation and application of the TRIPS Agreement. As the most comprehensive multilateral agreement on intellectual property, Australia reiterates the importance to the wider trading system of the TRIPS Agreement functioning effectively.

60. Australia has submitted its views on the legal standards and evidentiary threshold to establish and characterise an unwritten measure. In particular, Australia has addressed the probative weight to be given to sources of evidence, such as those relied on by the European Union in this dispute, in demonstrating the existence of alleged unwritten measures. The nature of unwritten measures requires that a panel consider secondary sources, and successive WTO panels have relied on such sources to determine the existence of an unwritten measure. The Panel should consider whether the evidence submitted by the European Union establishes 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 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 into the future.

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

62. First, Article 1.1 is not simply a reiteration of *pacta sunt servanda*, but rather 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.

63. Second, given the flexibilities afforded to Members in how their implement their TRIPS obligations, Australia's submission has addressed the importance of transparency obligations. In Australia's view, where there is no further right of appeal or review and a judicial decision pertains to the subject matter of the TRIPS Agreement, it is covered by the Article 63 obligations. To comply with these obligations, a Member must publish the judicial decision in full and / or supply the requested information with sufficient detail. In Australia's view, these transparency provisions are not simply an adjunct to the TRIPS Agreement's key obligations. Rather they are fundamental to its proper functioning.

64. Australia thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.