

Before the World Trade Organization
Panel Proceedings

CHINA – MEASURES CONCERNING TRADE IN GOODS

(DS610)

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

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TABLE OF CONTENTS

TABLE OF CASES3

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS6

I. INTRODUCTION7

II. ESTABLISHING THE EXISTENCE OF THE MEASURES8

III. THRESHOLD CONSIDERATIONS9

A. THE CONCEPT OF A "MEASURE" IS BROAD AND FLEXIBLE9

B. THE STANDARD OF PROOF DOES NOT CHANGE BECAUSE A MEASURE IS "UNWRITTEN"10

C. THE ELEMENTS TO BE PROVEN, AND HOW TO PROVE THEM, ARE CASE-SPECIFIC13

IV. EVIDENTIARY CONSIDERATIONS16

A. A PANEL MUST ASSESS THE EVIDENCE "IN TOTALITY"16

B. THE PANEL MAY SEEK FURTHER INFORMATION21

V. SYSTEMIC IMPLICATIONS23

VI. CONCLUSION25

TABLE OF CASES

Short Title	Full Case Title and Citation
<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>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>Brazil – Re-treaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada - Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC – Approval and 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>EC - Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EU – Cost Adjustment Methodologies II (Russia)</i>	Panel Report, <i>European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)</i> , WT/DS494/R and Add.1, circulated to WTO Members 24 July 2020, appealed 28 August 2020
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767

Short Title	Full Case Title and Citation
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<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>Japan - Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
<i>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 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>Russia – Tariff Treatment</i>	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
<i>Russia – Railway Equipment</i>	Appellate Body Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/AB/R and Add.1, adopted 5 March 2020
<i>Russia – Railway Equipment</i>	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/R and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
<i>US – Anti-Dumping and Countervailing Duties (Korea)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available</i> , WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed 19 March 2021
<i>US - Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<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

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 – 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
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body 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 - Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – 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 – Supercalendered Paper</i>	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/AB/R and Add.1, adopted 5 March 2020
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
<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
<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

Short Title	Full Case Title and Citation
US – Zeroing (EC)	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

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
DSB	Dispute Settlement Body
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
Panel Request	Request for the establishment of a panel by the European Union, WT/DS610/8.
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
USDOC	United States Department of Commerce
WTO	World Trade Organization

I. INTRODUCTION

1. Australia expects it to be the common view of all WTO Members that Members should not use or threaten measures affecting trade in an abusive, arbitrary or pretextual manner to pressure, induce or otherwise interfere with a foreign government's exercise of its legitimate sovereign rights or choices. Such measures may be unwritten, while others may be disguised as legitimate government regulatory or public policy measures, purportedly unrelated to the strategic objective they are intended to advance.

2. These proceedings raise serious allegations about disguised, trade-restrictive measures, which are designed to evade scrutiny by a panel.¹ In analysing these allegations the Panel must exercise due care in its interpretation of the evidence of the measures, to ensure the proper discharge of its mandate under Article 11 of the DSU.

3. An allegation that there is a measure that is in unwritten form, the existence of which is entirely denied by the respondent, raises significant challenges for the Panel. It would be incompatible with the Panel's function to simply accept the denial, or to simply assume the existence of the measure. The Panel must assess, weigh and draw conclusions from the evidence to make findings as to whether the alleged measure exists. There is an inherent information asymmetry in a situation where there is an unwritten or concealed measure. One side of the dispute has limited evidence to prove the existence of such measures, while the absence of written proof of the measure provides an easy point of rebuttal for the other side. The Panel must strike a balance between applying reasonable and appropriate flexibility, which recognises the challenges an unwritten measure presents for a complainant, whilst also ensuring the evidentiary rigour required in any WTO dispute is applied.

4. Australia addresses these challenges by presenting its view on how the Panel should approach the key evidentiary questions that a panel needs to consider, in assessing whether the challenged measures exist. Australia does not present any position on the specific facts of this dispute.

¹ See for example, the European Union's first written submission, para. 84 in relation to the import restriction and para. 569 in relation to the overarching measure; Panel Request, para. 1 of section 1.

II. ESTABLISHING THE EXISTENCE OF THE MEASURES

5. The European Union challenges the following three measures:

- i. An "**overarching measure**", which is more fully characterised in section 6 of the European Union's first written submission;
- ii. an "**import restriction**" measure, which is more fully characterised in section 4 of the European Union's first written submission; and
- iii. "**SPS measures**", which are more fully characterised in section 5 of the European Unions' first written submission.

6. China asserts that the European Union has failed to show that the overarching measure,² or import restriction measure,³ exist. China does not challenge the existence of the SPS measures.

7. Accordingly, a key issue in this dispute is whether the evidence presented by the European Union establishes the existence of the challenged measures, which is a threshold requirement under WTO rules. The analysis of this issue includes enquiries directed both at whether each alleged measure constitutes a measure that is *capable of challenge* through WTO dispute settlement,⁴ and also whether each measure has been proved to exist, in an evidentiary sense.

8. Section III of this submission summarises the relevance of "measures" under the WTO system, followed by an examination of how the Panel should properly determine *what* must be established by the complainant in order to prove a challengeable measure, and to *what standard*. Then in section IV, given the challenges raised by the circumstances of these allegations, Australia presents comments on the treatment of evidence.

² See for example, China's first written submission, para. 319.

³ See for example, China's first written submission, paras. 109 – 111.

⁴ This includes an assessment of *what* must be established to prove a measure. There is also the related question of whether a measure is challengeable under the relevant provision of the covered agreement(s). Australia's submission does not address that point.

III. THRESHOLD CONSIDERATIONS

9. At the outset, Australia observes that:

[T]he DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ***ample and extensive authority to undertake and to 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.*** That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* ...".⁵

10. Allegations relating to unwritten or concealed measures of the type alleged by the European Union present challenges for a panel, but these are not insurmountable. The Panel has significant control over the fact-finding process in this dispute, including discretion to inform its understanding of all of the evidence.⁶ As a consequence, any ambiguity which might arise from the evidence of those measures is not the end of the Panel's analysis. WTO rules which guide a panel's examination of the existence of a measure and its supporting evidence are sufficient to assist the Panel in resolving the matter. Australia begins this analysis with an overview of the fundamental importance and role of a "measure" in WTO dispute settlement.

A. THE CONCEPT OF A "MEASURE" IS BROAD AND FLEXIBLE

11. Australia recalls that "[t]he scope of measures that can be challenged in WTO dispute settlement is [...] broad",⁷ encompassing both written and unwritten measures.⁸ "[I]n principle, ***any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings***",⁹ whether or not legally binding.¹⁰

⁵ Appellate Body Report, *US – Shrimp*, para. 106 (bold emphasis added; other emphasis original). The Appellate Body's conclusion is based on the operation of Articles 12 and 13 of the DSU.

⁶ For further, please see section IV.B on Article 13 of the DSU, below.

⁷ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17 and disputes cited at footnote 63 thereto.

⁸ A prominent example of an unwritten measure is Appellate Body Reports, *Argentina – Import Measures*.

⁹ See Appellate Body Report, *US – Supercalendered Paper*, para. 5.17 and disputes cited at footnote 62 thereto.

¹⁰ See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 85 (quoting Appellate Body Report, *Guatemala – Cement I*, footnote 47, para. 69; additional reference omitted).

12. This flexibility in the scope of the content of challenged measures:

[I]s consistent with ***the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations...under the covered agreements, and to clarify the existing provisions of those agreements.'*** As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgment as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits.¹¹

13. So, while the concept of a "measure" is critical to defining the scope of dispute settlement,¹² there is considerable discretion left to Members to identify "measures". Australia would urge the Panel to ensure that, in applying any analytical tools to the enquiry as to the existence of a measure, it does not inadvertently curtail the scope of measures which can be brought before it. Those analytical tools are considered further below. Importantly, it remains up to the complainant to prove the fact of the measure *which it has identified*, to the satisfaction of a panel.

B. THE STANDARD OF PROOF DOES NOT CHANGE BECAUSE A MEASURE IS "UNWRITTEN"

14. Australia recalls that "in all cases under the WTO/GATT dispute settlement system - and, indeed, [...] under most systems of jurisprudence - it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof."¹³ This includes proving the existence of a challenged measure,¹⁴ which is part of the complainant's well-established and mandatory¹⁵ burden in establishing its *prima facie* case.¹⁶ It is a separate enquiry to the

¹¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. (footnote omitted; emphasis added). See also, Appellate Body Report, *US – Zeroing (EC)*, para. 192.

¹² See Articles 3.3, 4.4 and 6.2 of the DSU, which refer to "measures".

¹³ Panel Report, *Japan – Film*, para. 10.29 (referring to Appellate Body Report, *US - Wool Shirts and Blouses*, p. 14). See also, Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134 and footnote 172 thereto.

¹⁴ Appellate Body Report, *US – Gambling*, para. 141: "The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."

¹⁵ See Appellate Body Report, *US – Gambling*, para. 139: "A panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case." (footnote omitted)

¹⁶ "[A] *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." (Appellate Body Report, *EC – Hormones*, para. 104). As to the burden of proof as it intersects with a panel's fact-finding authority under Article 13 of the DSU, please see paragraph 48, below.

question of "how and why" a measure may be inconsistent with the covered agreements,¹⁷ which is also part of the complainant's burden in establishing a *prima facie* case.

15. The standard of proof to establish the existence of a measure does not expand or contract in response to the nature of the measure itself. That standard requires a party to "adduce[] evidence sufficient to raise a presumption that what is claimed is true [...]".¹⁸ At that point, "the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."¹⁹

16. While the concept of "sufficiency" is inherently fact-specific, that should not be confused with any kind of flexibility in the standard itself. The Appellate Body in *US – Zeroing (EC)* referred to a "high" threshold and "particular rigour" in the context of unwritten measures.²⁰ However, those comments were observations on the process of examination to be undertaken by a panel in the relevant circumstances,²¹ not the overall legal standard. Read in context, they are clearly not comments on the relevant standard of proof or type and volume of evidence which must be adduced to prove the existence of unwritten measures. In fact, the Appellate Body's reference in that dispute to a "high" threshold was not a specific reference to the "evidentiary threshold" at all. Nor was it a comment on the standard applicable to *unwritten* measures. It was merely a comment on the multiple elements to be "clearly establish[ed]" to substantiate the existence of a "rule or norm".²²

¹⁷ See Appellate Body Report, *US – Zeroing (EC)*, para. 203: "[T]he Panel did not, in its analysis, clearly distinguish between the issue of ascertaining the existence of the challenged measure, which is especially important when unwritten measures are at issue, and **the separate examination of its consistency with the relevant provisions of the covered agreements.**" (emphasis added; footnote omitted)

¹⁸ Appellate Body Report, *US - Wool Shirts and Blouses*, p. 14. See also, Appellate Body Report, *US - Large Civil Aircraft (2nd complaint)*, para. 713: "As initial trier of facts, a panel must [...] base its findings on a sufficient evidentiary basis [...]" (footnote omitted)

¹⁹ Appellate Body Report, *US - Wool Shirts and Blouses*, p. 14. (footnote omitted)

²⁰ See Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also, Panel Reports, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.26; *Russia – Railway Equipment*, para. 7.946 and disputes cited in footnote 730 thereto.

²¹ Australia addresses that process of examination at section III.C of this submission.

²² Appellate Body Report, *US – Zeroing (EC)*, para. 198. The full text of that paragraph is: "In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systemic application of the challenged 'rule or norm'. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such." (emphasis original; footnote omitted)

17. In the same vein, the Appellate Body's statements in *US – Zeroing (EC)* do not support any general principle that "serious" challenges require some kind of "higher" evidentiary threshold or standard of proof.²³ Rather, as the Appellate Body observed in that dispute, the three constituent elements²⁴ to be "clearly established" to prove the existence of a "rule or norm" are the "high threshold".²⁵

18. In its first written submission, China relies upon the volume of exhibits submitted by complainants in past disputes to support its claims of a "high" evidentiary threshold.²⁶ But there is no requirement for any particular volume of evidence to be presented. What is required is simply evidence sufficient to meet the standard of proof, whether that is done through 1 or 900 exhibits.

19. Australia does, however, acknowledge the Appellate Body's clear statement that "particular rigour" is required in the context of unwritten norms.²⁷ This is subsequently clarified as a requirement for "careful[] examin[ation]" of the evidence.²⁸ It does not mean that a high volume of evidence is required. It means that evidence should be invariably "solid"²⁹ and not merely tending towards an abstract conclusion. A complainant should not be subjected to some kind of abstract "high bar" or "high threshold" of evidence as contended by China³⁰ merely because one of the characteristics of a measure is that it is unwritten or because it is a grave allegation. The challenges inherent in proving the existence of an unwritten measure sufficiently, and the gravity with which "serious" allegations may be viewed, do not change the standard of proof for such a task. While the evidentiary

²³ Contrast with China's first written submission, para. 286. China cites Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172, in support of its submission at paragraph 286. The cited passage observes that "as such" challenges are "serious challenges", in the context of the panel's terms of reference. That paragraph is not relevant to China's submission on this point.

²⁴ These three elements are "attribution", "precise content" and "general and prospective application". See Appellate Body Report, *US – Zeroing (EC)*, para. 198.

²⁵ The full quote of paragraph 198 of Appellate Body Report, *US – Zeroing (EC)*, is extracted at footnote 23, above.

²⁶ See China's first written submission, paras. 22 – 23.

²⁷ Appellate Body Report, *US – Zeroing (EC)*, para. 198: "Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' [...]" (emphasis original)

²⁸ *Ibid.*

²⁹ See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217. While this paragraph relates to the seriousness of certain allegations of inconsistency with covered agreements, Australia acknowledges in a general sense that "serious" allegations "should not be brought lightly" and "must be supported by solid evidence", as stated in that paragraph.

³⁰ China's first written submission, para. 34.

requirements may be more complex (or "rigorous") relative to written measures, the standard of proof itself is no different.

C. THE ELEMENTS TO BE PROVEN, AND HOW TO PROVE THEM, ARE CASE-SPECIFIC

20. It is well-established that in substantiating the existence of a measure "a complainant must establish that [a] measure is **attributable** to the respondent, as well as the **precise content** of the challenged measure."³¹ Beyond that,

[T]he constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged **will be informed by how such measure is described or characterised by the complainant**. Depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence.³²

21. Critically, this means that the Panel should look to the alleged measure itself, in order to answer the fundamental question of how that measure needs to be assessed. The Panel should not be influenced by findings of fact in earlier disputes in the manner contended by China.³³ There is no such thing as a "typical" measure in this context, and nor are such comparisons determinative.

22. As a preliminary matter, Australia understands that China challenges the evidence in support of the "precise content" of two of the measures, based on its interpretation of the characteristics of those measures.³⁴ China suggests that in light of this challenge, "attribution is moot [...]".³⁵ The substance of this dispute therefore lies in specifically *what* must be established to prove the unique measures in this dispute, and *how*. Australia's submissions do not address "attribution" further.

23. The question of *what* must be established "sufficiently", in order to prove the existence of a measure, is a question of fact. This is because, as set out at paragraph 20 above, it is a question to be answered on the basis of the characterisation of the challenged measure itself. It is a case-specific enquiry. It is not a question which should be answered on the basis

³¹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17. (emphasis added) See also, Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108.

³² Appellate Body Reports, *Argentina – Import Measures*, para. 5.108 (emphasis added). See also, Appellate Body Report, *US – Anti-Dumping Methodologies (China)* para. 5.123 (footnote omitted) and Panel Reports, *Russia – Tariff Treatment* para. 7.296; *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.703.

³³ See for example, China's first written submission, para. 27.

³⁴ China's first written submission, para. 29.

³⁵ *Ibid.*

of the past practice of panels, as applied to certain key words by which a measure may be described. As the Appellate Body has stated:

Factual findings made in prior disputes do not determine facts in another dispute. [...] The finders of fact are [...] obliged to make their own determination afresh and on the basis of all the evidence before them.³⁶

24. Examples from prior disputes may be informative and illustrative, but they must not determine the Panel's analytical approach or conclusions in subsequent disputes. No two disputes are the same, and a range of different factual circumstances will inform a panel's assessment of the evidence before it. As a result, there is there no basis for the rule that China attempts to derive from the approach of panels in past disputes, namely that:

[I]n order to prove the existence of an independent unwritten measure, a complainant must adduce *evidence of repeated and highly consistent instances* of regulatory conduct, in given circumstances, over time [and] *evidence that those instances are connected* across time by an organised policy, rule, norm or other directive attributable to the Member concerned.³⁷

25. Nor can past disputes provide any valid basis for a broad rule that a complainant must prove "*unwavering consistency* in the operation of the alleged unwritten measure over time."³⁸

26. Of course, panels may look to past decisions for guidance. In that regard, previous panels have repeatedly engaged helpful analytical "devices",³⁹ to establish the existence of certain types of measures.⁴⁰ Such tools set out defined and, in some instances, well-established pathways which will "normally"⁴¹ be sufficient to prove the relevant characteristics of the measure in question. Such analytical devices may be applied where a panel deems it useful to do so, and when the device relates to the nature of the challenged measure. But use of such devices is not mandatory, and they do not supplant the fundamental

³⁶ Appellate Body Report, *US – Continued Zeroing*, para. 190.

³⁷ China's first written submission, para. 30. (emphasis original)

³⁸ As suggested by China in its first written submission, para. 107. (emphasis original)

³⁹ See Appellate Body Report, *US – Continued Zeroing*, para. 179.

⁴⁰ By way of example, panels commonly examine the existence of measures through the heuristic device of "norms or rules", which are challenged "as such". Yet, while this is a well-established category of a measure which may be assessed under WTO rules, those "distinctions are not always useful or appropriate to define the elements that must be substantiated for purposes of proving the existence and nature of a measure at issue." (see Appellate Body Reports, *Argentina – Import Measures*, para. 5.109). A complainant is under no obligation to "categorize its challenge as either 'as such' or 'as applied'" (see Appellate Body Reports, *Argentina – Import Measures*, para. 5.110).

⁴¹ See Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

assessment of the facts that Australia describes above. They are tools which may assist – but which do not dictate – a panel's enquiry as to the characteristics to be proven.

27. Importantly, this means that any consistent use of such analytical devices should not be interpreted as a requirement to continue using a similar process to prove *any* particular characteristics of a measure. The Panel must look to the characterisation of the measure itself in order to assess whether the consideration of any heuristic device is useful and relevant.

28. There are simply no uniform requirements which a claimant must necessarily satisfy to prove the existence of an *unwritten* measure.⁴² As the Appellate Body has stated, "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 characterized by the complainant [...]"⁴³

29. Finally, Australia observes that the European Union makes submissions on the characteristics of the "general" and "prospective" nature of the overarching measure.⁴⁴ China argues that the European Union's evidence with respect to the overarching measure does not satisfy these criteria.⁴⁵ Consistent with Australia's submissions above, prior disputes are illustrative, but not determinative, in setting out the means through which a complainant may prove the characteristics of a measure. The Appellate Body confirmed this approach in *US – Anti-Dumping Methodologies (China)*. After considering previous treatment of the terms "general and prospective" application, it stated:

The examination of whether a rule or norm has general and prospective application may vary from case to case. We do not exclude that additional factors may be relevant in this assessment depending on the particular facts and specific circumstances of the case at hand.⁴⁶

30. In any event, the Panel should carefully assess China's submissions on the meaning of these terms. With respect to "general application", the Appellate Body has suggested "that a rule or norm has 'general application' to the extent that it affects an unidentified number of economic operators".⁴⁷ Australia considers that this principle is more helpful than China's

⁴² Save for the elements noted above at paragraph 20.

⁴³ Appellate Body Reports, *Argentina – Import Measures*, para. 5.112. (emphasis added)

⁴⁴ European Unions' first written submission, paras. 578 – 580.

⁴⁵ China's first written submission, paras. 286 – 288; 308 – 317.

⁴⁶ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.

⁴⁷ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130.

reference to "a measure [...] 'addressed to a *specific company* or *applied to a specific shipment*'",⁴⁸ in this context. The provision of illustrative examples, which "demonstrate"⁴⁹ the existence of the overarching measure, does not mean that the effect of the overarching measure was limited to those cases, in Australia's view.

31. With respect to a measure's "prospective application", a "rule or norm" has prospective application to the extent that it applies in the future."⁵⁰ However, Australia reiterates that there is no fixed standard or approach which must be satisfied in order to establish the prospective application of a measure.⁵¹

32. China submits that the prospective application of a measure "cannot be made absent robust proof that the measure actually will be applied in the future."⁵² This is inconsistent with the Appellate Body's interpretation of the level of 'certainty' of prospective application that is required. In *US– Anti-Dumping Methodologies (China)*, the Appellate Body stated that "[a] complainant would not be able to show 'certainty' of future application, because any measure, including rules or norms, written or unwritten, may be modified or withdrawn in the future."⁵³ Australia submits that the standard China appears to propose - of "robust proof" of "actual" future application - is by its very nature, impossible to satisfy.

IV. EVIDENTIARY CONSIDERATIONS

A. A PANEL MUST ASSESS THE EVIDENCE "IN TOTALITY"

33. Australia turns now to the question of *how* to assess the evidence of the relevant constituent elements of a measure. For the import restriction measure, China asserts that that "[n]one of [the] categories of evidence, taken individually or collectively, meets the 'high threshold' for proving the existence and precise content of the unwritten measure that the EU alleges to exist."⁵⁴

34. However, in seeking to establish this conclusion, and despite commenting on the "collective" impact of the evidence, China approaches the body of evidence submitted by the

⁴⁸ China's first written submission, para. 287 (quoting Panel Report, *US – Underwear*).

⁴⁹ European Union's first written submission, paras. 64, 567.

⁵⁰ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132. (footnote omitted)

⁵¹ Please see paragraph 29 of this submission, above.

⁵² China's first written submission, para. 313. (emphasis added)

⁵³ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

⁵⁴ China's first written submission, para. 34.

European Union through a series of individual assessments.⁵⁵ China considers each category of evidence in a segregated manner, and not cumulatively. Australia submits that the Panel should take a more holistic approach to the evidence.

35. As a starting point to this analysis, Australia recalls that a panel's mandate under Article 11 of the DSU requires it to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case [...]".⁵⁶ The Appellate Body has stated that "[i]n carrying out this mandate, a panel has the duty to examine and consider all the evidence before it [...] and to evaluate the relevance and probative force of each piece thereof."⁵⁷ A panel must not wilfully distort, misrepresent or disregard evidence.⁵⁸ "Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record."⁵⁹ Within the constraints of Article 11 of the DSU, Australia makes three submissions which may inform the Panel's analysis.

36. ***First: the Panel should consider the evidence in totality.*** As the Appellate Body has stated, and in addition to the requirements set out at paragraph 35 above, Article 11 of the DSU also:

[R]equires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence. ***A particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence.***⁶⁰

37. The Panel in *Argentina – Import Measures* stated that such a "holistic consideration" need only encompass evidence which has "probative value".⁶¹ However, a holistic or "global" analysis of

⁵⁵ See China's first written submission, paras. 36 – 94.

⁵⁶ Article 11 of the DSU.

⁵⁷ Appellate Body Report, *Korea – Dairy*, para. 137.

⁵⁸ Appellate Body Report, *EC – Hormones*, para. 133.

⁵⁹ Appellate Body Report, *US – Carbon Steel*, para. 142. (footnote omitted)

⁶⁰ Appellate Body Report, *US – Continued Zeroing*, para. 331. (emphasis added)

⁶¹ Panel Reports, *Argentina – Import Measures*, para. 6.71. The panel's approach to the evidence was not overturned on appeal.

the evidence may also inform the probative value and weight of each piece of evidence itself.⁶²

So,

Even if [a] Panel were correct in assessing the value of individual pieces of evidence, and in concluding that no single piece of evidence demonstrated an asserted fact at issue, it [is] not proper for it to [foreclose] the possibility that the consideration of all of the evidence taken together might be sufficient proof of [a] fact.⁶³

38. A panel must engage in a "cumulative appreciation of the evidence".⁶⁴ This requires an assessment of the value and meaning of certain evidence *in the light of* other evidence.⁶⁵ Such analysis necessarily invites a panel to consider the "*inferences* that might reasonably [be] drawn" from the totality of the evidence.⁶⁶ Depending on the circumstances, such a "holistic" analysis of the evidence may incorporate a consideration of the temporal relationship between certain incidents set out in the evidence⁶⁷ and the repetition of incidents.⁶⁸ Australia submits that it is not sufficient for a panel merely to conclude, as China argues, that "the isolated instances of technical difficulties and delay at customs are not capable of evidencing any kind of systemic unwritten import restriction [...]".⁶⁹ The Panel must consider the cumulative meaning and impact of the evidence.

39. If the Panel determines that the complainant must adduce sufficient evidence of a "broader objective" as part of its *prima facie* case, Australia cautions against assessing the facts of this case in too "narrow and formalistic [a] manner".⁷⁰ Determining the existence of

⁶² See Panel Reports, *Argentina – Import Measures*, para. 6.71, rejecting a challenge to the general probative value of newspaper or magazine articles. The panel observed, "they can be useful sources of information, particularly when dealing with unwritten measures and when corroborating facts asserted through other forms of evidence", citing a case of the International Court of Justice. See also, Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 154: "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 [...]". (emphasis original)

⁶³ Appellate Body Report, *US – Continued Zeroing*, para. 337.

⁶⁴ *Ibid.*

⁶⁵ See for example, the Appellate Body's analysis of margin calculation programs and tables showing detailed calculations in *US – Continued Zeroing*, para. 337; the panel's determination of the meaning to be derived from statistics in Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.533.

⁶⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 154 (emphasis original). While that passage addressed the panel's examination of an investigating authority's findings, Australia considers that it is relevant to the general analysis of evidence in support of a fact.

⁶⁷ For example, in Appellate Body Report, *US – Continued Zeroing*, para. 191, the Appellate Body was satisfied as to the fact that the measure would likely continue to be applied, in light of the "density" of relevant factual findings.

⁶⁸ Panel Reports, *Argentina – Import Measures*, para. 6.79: "Consistent public statements made on the record by a public official cannot be devoid of importance [...]"

⁶⁹ China's first written submission, para. 301.

⁷⁰ Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.15. The quoted observation broadly relates the analysis of the factual question set out at paragraph 8.19 of that Panel Report. The panel's observations, as cited in this submission, were not specifically addressed on appeal, although the panel's ultimate findings were upheld.

the broader underlying "objective" of a measure may be particularly challenging, in light of the likely information asymmetry inherent in such a task. In that regard, Australia observes that a Member could effectively "insulate itself from effective discipline" if it was "careful enough to sever any self-evident formal link [to a breach of a claim]"⁷¹. Consistent with the above submissions, it is appropriate for the Panel to give careful consideration to this "overall situation as an integrated whole" in its judgment of the facts regarding this criterion.⁷² The general relevance of possible self-interest to a panel's assessment of evidence is demonstrated by the panel's analysis of certain statements in *EC and certain member States – Large Civil Aircraft*.⁷³

40. For completeness, the requirement to consider evidence in "totality" under Article 11 of the DSU does not necessarily require a panel to support its findings with an overwhelming body of evidence. Rather, and "[d]epending on the circumstances of a particular case, a single piece of evidence may constitute sufficient proof" of a fact.⁷⁴ A panel must ultimately regard the sufficiency of evidence on a case-by case basis. This leads to Australia's next submission.

41. ***Second: the type and quality of evidence that a Panel will regard as probative and persuasive will change depending on the type of measure in issue.*** 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."⁷⁵

42. Australia submits that, where the nature of the alleged measure is that it has been deliberately concealed, and written records of it avoided, such that proof of it will necessarily be based on circumstantial evidence, this should inform the Panel's approach to that evidence.

⁷¹ Ibid, para. 8.15.

⁷² Ibid, para. 8.23. That dispute addressed the panel's examination of the US tax regime, including the relevant legal standard applicable, and is distinguishable from the current dispute on its facts. However, the panel's general analytical reasoning in paras. 8.14 – 8.23 may be helpful.

⁷³ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1919. Albeit, the panel in that dispute determined that it would still "take this evidence [which may have involved a 'degree of self-interest'] into account" but "making our own judgments as to its weight and probative value".

⁷⁴ Appellate Body Reports, *Argentina - Import Measures*, para. 5.176.

⁷⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14. See also, Appellate Body Reports, *Russia – Railway Equipment*, para. 5.187; *Japan – Apples*, para. 159.

43. The Panel in *EC – Approval and Marketing of Biotech Products* observed that "where the existence of a *de facto* measure is alleged", it is "often inevitable that Complaining Parties base their complaints largely on circumstantial evidence".⁷⁶ Such circumstantial evidence may therefore be "relied on, together with other evidence, to establish facts."⁷⁷ In that case, the Panel was not persuaded by the argument that circumstantial evidence could not be relied upon *alone* to establish a fact, finding instead that such evidence could be used cumulatively for that purpose.⁷⁸ The Panel further clarified that circumstantial evidence such as "statements by individual government officials and similar evidence **must be given proper weight, which weight can only be determined in the specific circumstances of each case.**"⁷⁹ This accords with Australia's earlier submissions on the relevance of unwritten measures and grave allegations: while a panel must not take these lightly, these features are not dispositive of any legal standard.⁸⁰ Rather, they may influence the Panel's preparedness to place weight on circumstantial evidence.

44. **Finally: a panel has discretion in its approach, treatment and assessment of the evidence.** While the Panel must consider all of the evidence, and in totality, it otherwise has discretion in assessing the relevance of evidence to its reasoning,⁸¹ "selecting the evidence it relies upon to establish certain facts"⁸² and deciding "what weight to ascribe" to evidence.⁸³ Panels also have authority to employ inferential reasoning necessary for the proper assessment of circumstantial evidence.⁸⁴

⁷⁶ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.522.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* See also, Appellate Body Reports, *US – Countervailing Duty investigation on DRAMS*, paras. 149 – 152; *US – Continued Zeroing*, para. 357.

⁷⁹ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.522.

⁸⁰ See section III.B of this submission, above.

⁸¹ Appellate Body Reports, *EC – Hormones*, para. 132; *Brazil – Re-treaded Tyres*, para. 202. See also, *Korea – Dairy*, paras. 135 – 136.

⁸² Appellate Body Reports, *Argentina- Import Measures*, para. 5.176. See also, Appellate Body Report, *US – Shrimp*, para. 104: "[A] panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof." (emphasis original)

⁸³ Appellate Body Report, *US – Shrimp*, para. 104.

⁸⁴ Panel Report, *Argentina – Textiles and Apparel*, para. 6.39: "For international disputes it seems normal that tribunals, in evaluating claims, are given considerable flexibility. Inference (or judicial presumption) is a useful means at the disposal of international tribunals for evaluating claims. In situations where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met." While this quote relates to the analysis of inconsistency with a covered agreement, Australia submits that it is relevant in general, to the approach which a panel may take to evidence before it.

45. Panels "enjoy a margin of discretion to structure their assessment as they see fit".⁸⁵ They "are afforded a certain degree of latitude to tailor the sequence and order of analysis, which, however, is informed by the specific claims, measures, facts and arguments at issue."⁸⁶ China asserts that "[i]f that first unwritten measure [i.e. the import restriction measure] does not exist, the EU has, by definition, also failed to prove the existence of the 'overarching' unwritten measure, as it defines it."⁸⁷ But it is not a foregone conclusion that, where a measure such as the import restriction measure cannot be proven in isolation, the evidence of an interlinked, overarching measure must also automatically fail as a consequence. The Panel's order of analysis in assessing the existence of a measure should be guided by the measure itself⁸⁸ and it must consider the evidence in totality.

46. Drawing together the strands of these submissions, Australia submits that a panel's approach to and assessment of the evidence of the existence of a measure must be guided by the characteristics of the measure - not by the fact that it is "unwritten". Under appropriate circumstances – as assessed on a case-by-case basis – a panel may need to engage in inferential reasoning on the basis of circumstantial evidence in order to make findings regarding the existence of a measure. Where it does so, a panel's assessment of the totality of the evidence before it may also include factors such as the temporal relationship between the incidents set out in the evidence, the repetition of certain incidents and, ultimately, the plausibility of proven events occurring in short succession without the existence of an overarching measure.

B. THE PANEL MAY SEEK FURTHER INFORMATION

47. In a dispute characterised by an asymmetry of information between the complainant and respondent, one mechanism available to a panel is to seek information pursuant to Article 13 of the DSU. Australia does not take a position on whether such a request would be warranted in this dispute, but in this section summarises its view of the relevant principles to assist the Panel in considering whether this mechanism may be of assistance.

⁸⁵ Appellate Body Report, *Russia – Railway Equipment*, para. 5.235.

⁸⁶ *Ibid.*

⁸⁷ China's first written submission, paras. 293.

⁸⁸ See Appellate Body Report, *Russia – Railway Equipment*, para. 5.235.

48. Even after reviewing all of the evidence in totality, a panel may require further information in order to fully evaluate the probative value of that evidence and "elucidate its understanding of the facts and issues in the dispute before it":⁸⁹

[W]hile a panel cannot make the case for a party, Article 11 requires a panel to test evidence with the parties, and to seek further information if necessary, in order to determine whether the evidence satisfies a party's burden of proof. ***As the Appellate Body has explained, '[a] panel may, in fact, need the information sought in order to evaluate evidence already before it' so as to make an objective assessment of whether the complaining party has established a prima facie case [...]***⁹⁰

49. Article 13 of the DSU confers a right on panels to seek information from any source, and at any time, which they deem appropriate to adjudicate a dispute.⁹¹ In *Canada – Aircraft*, the Appellate Body stated that:

[A] panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis.⁹²

50. If a panel exercises its right under Article 13.1 of the DSU to request information from a party, that party must "respond promptly and fully to any request [...] for such information as the panel considers necessary and appropriate."⁹³ The Appellate Body in *Canada – Aircraft* stated that the term "'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather a merely exhortative, sense. "Members are, in other words, under a duty and an obligation to 'respond promptly and fully'

⁸⁹ Appellate Body Report, *US – Continued Zeroing*, para. 347: "Once the Panel set out [the relevant standard], we see no indication that it got to the heart of the matter concerning the probative value of evidence before it [...] In our view, the Panel required evidence that was authenticated as USDOC documents, but then did not take the necessary steps to elicit from the parties information that might, in the words of the Panel 'elucidate its understanding of the facts and issues in the dispute before it.'" See also, Appellate Body Report, *US – Shrimp*, para. 104.

⁹⁰ Appellate Body Report, *US – Continued Zeroing*, para. 347. (emphasis added; footnote omitted) See also, Appellate Body Report, *Japan – Agricultural Products II*, para. 129 regarding the panel's finding of an "alternative measure" which was not argued by the complainant: "[...] this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice [...] to help it understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party."

⁹¹ See also, Appellate Body Report, *Japan – Agricultural Products II*, paras. 128 – 131, regarding the panel's "significant investigative authority" under both Article 13 of the DSU and Article 11.2 of the *SPS Agreement*.

⁹² Appellate Body Report, *Canada – Aircraft*, para. 192.

⁹³ Article 13.1 of Dispute Settlement Understanding.

to requests [...]".⁹⁴ A respondent therefore has a "duty and an obligation"⁹⁵ to respond in full to any request by a panel for information that a panel considers appropriate.

51. If a party is unable or unwilling to provide information requested by a panel, that may have implications for how a panel assesses the material before it. The Appellate Body observed in *US – Wheat Gluten*, "[w]here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn."⁹⁶ This suggests that if any party fails to provide information requested by a panel, then that failure is a fact that can be taken into account by that panel in assessing the evidence on record and conclusions which should be drawn from it.

V. SYSTEMIC IMPLICATIONS

52. Finally, taking a systemic view, Australia considers the issues raised in this dispute to be of the utmost importance to the effective functioning and credibility of the rules-based multilateral trading system. The WTO system relies on Members' consent to accept certain rules and concessions in return for access to concessions and adherence by others to those rules. Inevitably, and as envisaged by the system's architects, Members will disagree from time to time on whether another Member is complying with those undertakings. That is what the dispute settlement system is designed to address. However, transparency is the glue that holds the system together. If measures are deliberately designed to avoid scrutiny, particularly where there is a pattern of this type of behaviour, Members' vital confidence in the rules and the system is undermined. Over time, this can exacerbate non-compliance with the rules and erode confidence in the system as a whole, putting at risk the predictability and stability of the trading environment for all Members.

53. The threat to the system is further exacerbated by measures that are pursued in an abusive, arbitrary or pretextual manner, in order to advance an extraneous strategic or policy objective.⁹⁷ Australia has consistently raised concerns about such trade restrictive and

⁹⁴ Appellate Body Report, *Canada – Aircraft*, para. 187.

⁹⁵ Appellate Body Report, *Canada – Aircraft*, para. 187.

⁹⁶ Appellate Body Report, *US – Wheat Gluten*, para. 174.

⁹⁷ 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.

disruptive measures in a range of fora, including the WTO, and through statements.⁹⁸ Such measures may be unwritten, while others are disguised as legitimate government regulatory or public policy measures, purportedly unrelated to the strategic objective they are in fact intended to advance.

54. The WTO cannot legitimise such measures. This would simply incentivise such practices. The rules must not be blind to those who act in the shadows. Their measures, even if unwritten or disguised, must be regarded as inconsistent not only with WTO rules but with the WTO's key tenet of non-discrimination, and indeed with the WTO's underlying objective of reducing barriers to trade.⁹⁹

55. Australia recognises that, by their nature, such measures are extremely challenging to address. However this is a challenge with which panels must grapple. In light of these considerations, Australia submits that the full assessment of the characteristics and evidence relating to the import restriction measure and the overarching measure is necessary and important to resolve this dispute. Australia urges the Panel not to exercise judicial economy in its analysis of the existence of those measures.

56. Australia draws no conclusions regarding the particular facts of this case. However, it urges the Panel to bear in mind its systemic implications in considering how measures of the nature that the European Union has alleged can ever be addressed, when in fact they do exist. This dispute potentially serves as a test case for the capacity of WTO rules to accommodate an issue of vital concern and importance. While due care must be exercised, Australia considers that WTO rules have sufficient flexibility to appropriately analyse, capture and discipline even disguised measures, where sufficient evidence of their existence is put forward. In Australia's view, a pathway to combat such measures is not only available, it is essential to the ongoing functioning and health of the WTO system.

⁹⁸ See, for example, "Joint Declaration Against Trade-Related Economic Coercion and Non-Market Policies and Practices" dated 9 June 2023, available at: www.foreignminister.gov.au.

⁹⁹ See, for example, Preamble to the Marrakesh Agreement, para. 4: "*Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations*".

VI. CONCLUSION

57. The allegations in this dispute raise important systemic questions about the capacity of the WTO system to respond to alleged measures that have been deliberately crafted to avoid scrutiny. In Australia's view, the current rules provide the flexibility to respond, whilst ensuring the due process entitlements of the respondent – provided they are interpreted to give effect to the flexibility they were always intended to have. In that regard, as the Appellate Body has stated:

WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.¹⁰⁰

58. Australia thanks the Panel for the opportunity to submit these views.

¹⁰⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 31 (referring to Article 3.2 of the DSU).