China – Measures Concerning Trade in Goods

(DS610)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

January 12, 2024

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

1. The origin of this dispute was in Lithuania's decision in 2021 to open a "Taiwanese Representative Office" in Vilnius. As a matter of foreign policy, the People's Republic of China ("China" or "PRC") opposed this step. While China is entitled to its own position on foreign relations,[1] Lithuania was, of course, well within its sovereign rights to take the step in the first place.

2. What China did next, however, is why we find ourselves here. Specifically, China decided to retaliate against Lithuania with severe trade restrictions. China perpetrated this economic coercion in a pretextual manner through non-transparent measures, hoping to make its retaliation opaque. At the same time, China sent a clear message: *"Change the name and everything will return to normal."* China now continues in this proceeding its attempt to shield its obvious retaliation from World Trade Organization ("WTO") scrutiny. China argues that the European Union ("EU") cannot demonstrate the existence of the unwritten measures at issue precisely because they are unwritten. In so doing, China seeks to enlist the WTO in its efforts at obfuscation. China urges the Panel to apply legal and evidentiary standards that have no basis in the WTO Agreements and would reward—and ultimately encourage further use of—non-transparent measures used to carry out economic coercion.

3. The United States is increasingly concerned with economic coercion of this sort, which is becoming more frequent and significantly undermines the WTO rules-based trade system as well as concepts of sovereignty that underpin it. Other WTO Members also are concerned with the increasing use of trade measures in an opaque or pretextual manner, which benefit from plausible deniability.

4. Fortunately for the stability of the rules-based trading system, the heightened evidentiary and legal standards asserted by China in its defense regarding unwritten measures find no legal basis in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the Panel should reject them.

5. In this dispute, the EU as the complaining party bears the burden of identifying and demonstrating the existence of a "specific measure." Therefore, the Panel must determine whether the EU has identified a specific measure. The Panel must also determine whether the EU has shown that this measure is a measure taken by the responding party and is of the nature as characterized by the EU.

6. As a matter of logic and persuasiveness, the evidence a complainant is required to submit depends on the nature of the claim. There is no special rule under the DSU that requires some sort of special, higher burden in terms of the evidence needed to establish unwritten measures, as suggested in China's submission. Nor is a claim against an unwritten measure subject to some sort of a minimum "evidentiary threshold" in order to raise a presumption of the existence of that

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[1] We reject the statement by the PRC in its submission that the "one-China principle is the consensus of the international community." *See* China's First Written Submission, para. 2. The United States remains committed to our longstanding one China policy, which is guided by the Taiwan Relations Act, the three U.S.-China Joint Communiques, and the Six Assurances.

measure, contrary to China's argument. Such views have no basis in the DSU text. The evidence required to establish a *prima facie* case is that which is "supported by sufficient evidence for it to be taken as proved in the absence of evidence to the contrary." Logically, then, how much evidence is "sufficient" for a particular claim to be made out will depend on the facts and circumstances of the claim or defense.

7. The Panel is charged to assist the Dispute Settlement Body by conducting "an objective assessment of the facts of the case" to "make an objective assessment of the matter before it," as provided in Article 11 of the DSU. Thus, it is for this Panel to consider the totality of evidence, in light of the facts and circumstances, as to whether there was a decision with legal effect to impose trade restrictions on Lithuania. Nothing in the DSU prevents a panel from considering any evidence, including circumstantial, and assessing the probative value of that evidence, or from drawing reasonable inferences on the basis of one or more facts. Where a Member is deliberately attempting to obscure punitive trade restrictions, it would not be uncommon to encounter no written measure, and perhaps little or no direct evidence.

8. A panel may also use its judgment to assess the probative value of different pieces of evidence. For example, where a Member is attempting to obscure punitive trade restrictions through pretext as is clearly the case here, a panel may find "official statements that *explicitly deny* the existence of any unwritten measure" unpersuasive as the panel may very well consider that this is a mere continuation of the obfuscation.

9. Indeed, the constellation of facts—including the timing of significant reductions in imports and no plausible explanation, coupled with a logical connection to a precipitating event as in the case here—may prove comfortably sufficient for establishing the existence of an unwritten measure.

10. The panels in *EC – Approval and Marketing of Biotech Products* and *Argentina – Import Measures* appropriately proceeded in the manner described in assessing the unwritten measures at issue in those disputes. In short, the DSU does not preclude panels from inferring the reality of a situation from circumstantial evidence where that reality is the legal effect of an unwritten measure, nor does it include prescriptive evidentiary rules that invite obfuscation from WTO Members.

11. While as a third party, the United States is not in the position of prosecuting the facts, we note the EU's explanation that the existence of the overarching measure "can be inferred from *inter alia* the measures described" with respect to customs clearance and technical import restrictions and "a series of individual measures attributable to China imposing import restrictions … on the basis of alleged [SPS] concerns" – all of which were put into effect "following the opening of an office of Chinese Taipei in Lithuania." The facts presented by the EU indicate that, in response to Lithuania's action, China's decision was to apply severe trade restrictions across a range of matters so long as Lithuania allows Chinese Taipei to use the name "Taiwanese Representative Office." To the extent the facts show that China's decision to apply these trade restrictions has *legal effect* within China's domestic system, the Panel may consider the unwritten measure established (*i.e.*, the "overarching" measure) and make findings accordingly.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

12. At the heart of this dispute is what the EU has referred to as "the overarching measure"—China's "overarching, systemic restriction on trade with Lithuania" to punish Lithuania for the opening of a "Taiwanese Representative Office in Lithuania." Reviewing the evidence and explanation put forward by the EU, it appears the "overarching measure" is appropriately conceived of as the "underlying measure." That is, the root of any particular restriction applied by China is the underlying decision by China to punish Lithuania through economic measures in response to Lithuania's policy choices. The United States considers therefore that the Panel should make findings on the underlying measure and may not exercise judicial economy with respect to the underlying measure. Indeed, the import restrictions and SPS measures also challenged by the EU are compelling evidence of the existence and operation of the underlying measure that gives rise to those import restrictions and SPS measures.

13. Like the United States, many third parties have noted the serious systemic interests implicated by opaque economic measures meant to punish political decisions opposed by the perpetrator, made worse by attempts to disguise such measures and shield them from WTO scrutiny. When a Member decides to punish another party through non-transparent, evolving economic measures, the underlying measure giving rise to its individual manifestations must be disciplined. It would not be a solution to withdraw one, specific restriction and shift to another—equally problematic—form of economic punishment. Failure to hold such economic coercion to account will only invite more of this worsening problem, and the damage to the international trading system it causes.

14. A decision by a Member to retaliate severely, though not uniformly and with the capacity for evolution of form, is capable of challenge at the WTO. The question for the Panel, then, is whether the EU has proven the existence of the underlying measure, which if it exists as the EU describes, would surely breach China's WTO obligations.

15. In assessing the alleged existence of the overarching measure, the Panel must look at the totality of the evidence. The Panel must consider the interplay between various pieces of evidence. The domestic legal context may inform how unwritten measures operate – for example, where compliance with policy decisions is mandatory under China's domestic legal system and where policy decisions have the force of law – even when communicated orally.

16. In this dispute, there is no disagreement that imports into China from Lithuania dropped severely starting in late 2021. The drop in the total value of imports from Lithuania to China in December 2021 was drastic – 99.85%. And it is undisputed that the import levels have never returned to the consistent level at which they existed prior to the steep drop-off.

17. Contrary to China's argument, the kind of volatility in import levels experienced by Lithuania between November 2021 and January 2022 is neither usual nor "to be expected." There is a temporal link between the two that lends credibility to the alleged cause and effect relationship. The EU points out that the "drastic changes are specific to the trade relationship between China and Lithuania." In short, the EU has supported with ample, objective evidence its explanation of how and why China adopted the underlying measure. The explanation is logical

and consistent with evidence. This satisfies the initial burden placed on the EU as a complaining party.

18. Thus, it remains for China to rebut the EU's affirmative showing. When China does address the EU's evidence and reasoning more concretely in its first written submission, it does so with hypothetical statements rather than concrete rebuttals supported by evidence.

19. Regarding the drop in import levels, China asserts that "trade effects can, in principle, be caused by a myriad of factors unrelated to any government action, such as global disruptions like pandemics or conflict, exchange rates, competitiveness, transportation logistics, upstream supply chain issues, shifts in demand, and so-on." But China does not even attempt to allege—much support with evidence—which, if any, such factors are actually the reason for a steep decline in imports from Lithuania during the relevant time period. Merely asserting that, "in principle," that might not have been the reason, does nothing to undermine the EU's case.

20. China asks the Panel to conclude that some unidentified factors caused Lithuanian imports to nearly dry up overnight despite imports from the EU more broadly exhibiting no such trend; that precipitous decline in Lithuanian imports so close to the opening of the "Taiwanese Representative Office in Lithuania" was mere coincidence; that Lithuanian exports of certain beef, dairy, and alcohol products suffered from SPS concerns all at the same time as one another despite no evidence of similar developments in other export markets; that the confluence of SPS concerns around these products also occurred by coincidence soon after the opening of the opening of the "Taiwanese Representative Office in Lithuania;" and that the apparent non-responsiveness by Chinese authorities regarding the purported SPS concerns was normal.

21. Nothing in the DSU would require the Panel to place greater value on unidentified factors hypothesized by China rather than real evidence and reasonable explanations brought forward by the EU.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THE THIRD PARTIES

22. U.S. Response to Question 1: There is no degree of consistency in the application of an unwritten measure that is *per se* needed to establish its existence. Contrary to China's assertions, there is no special rule under the DSU that requires some sort of special, higher burden in terms of the evidence needed to demonstrate the existence of an unwritten measure. Nor is a claim against an unwritten measure subject to some sort of a minimum "evidentiary threshold" in order to raise a presumption of the existence of that measure, contrary to China's argument. Such views have no basis in the DSU text. Thus, a certain degree of consistency in a measure's application is not *per se* required.

23. Further, the relevant evidence needed to establish a measure's existence may depend on how it is characterized. The evidence required to establish a *prima facie* case, including the existence of a measure, may depend on the complaining Member's description and characterization of the measure and claim.

24. If, for example, a complaining party characterizes the challenged unwritten measure as being uniform in application, then evidence demonstrating non-application would tend to

undermine the existence of the alleged measure so characterized. In that sense the "degree of consistency" may be relevant to determining the existence of a measure. Conversely, if the challenged measure is described as sporadic, unpredictable, and inconsistent, then the "degree of consistency" may have no real relevance, and an example of non-application would say little about the measure's existence. It would be inappropriate to surmise a general rule from such dispute-specific circumstances.

25. U.S. Response to Question 2(a): Under DSU Article 11, the function of the Panel is to assist the DSB in discharging its responsibilities under the DSU, including by making an objective assessment of the applicability of and conformity with the covered agreements. When the DSB establishes a panel, its terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Here, the Panel should make an objective assessment of the matter, including with respect to any measures alleged by the complaining party.

26. At the heart of this dispute is what the EU has referred to as "the overarching measure"—China's "overarching, systemic restriction on trade with Lithuania" to punish Lithuania for the opening of a "Taiwanese Representative Office in Lithuania." Reviewing the evidence and explanation put forward by the EU, it appears the "overarching measure" is appropriately conceived of as the "underlying measure." The United States considers therefore that the Panel must make findings on the underlying measure and may not exercise judicial economy with respect to the underlying measure. Indeed, the import restrictions and SPS measures also challenged by the EU are compelling evidence of the existence and operation of the underlying measure that gives rise to those import restrictions and SPS measures. Accordingly, regardless of the Panel's findings regarding the import restriction measure, the Panel must make findings on the underlying measure, consistent with its terms of reference.

27. U.S. Response to Question 2(b): The United States can discern no implications that would necessarily flow from the Panel finding that the EU has not demonstrated the existence of the import restriction measure.

28. The import restrictions described by the EU's alleged import restriction measure provide factual evidence of the existence and operation of the underlying measure. Even if, for some reason, the Panel found that the EU did not establish a ***legal*** measure as the EU describes the import restriction measure, nothing would preclude the Panel from continuing to consider those underlying ***facts*** as relevant to the Panel's assessment of the existence and content of the underlying measure. Indeed, the Panel would be bound to do so, as it makes an objective assessment based on the totality of the evidence.

29. U.S. Response to Question 3: There is no basis to require an unwritten measure to have future application to be challenged successfully. To be challenged successfully, a measure must exist at the time of panel establishment, and be shown to breach a provision of the covered agreements. Moreover, there is no basis for distinguishing, as a legal matter, between written and unwritten measures. All applicable legal standards and burdens apply equally to written and unwritten measures. In this case, the EU clearly describes the underlying measure as being open-ended. But what matters in any event is its existence at the time of panel establishment.

30. Evidence of "future application" of a measure is not *per se* required; the only relevant requirement is that the measure be in existence at the time of panel establishment. The requirement that the complaining party establish that the measure at issue has legal effect at the time of panel establishment flows from the terms of the DSU. As several past reports have correctly reasoned, to examine a matter that comprises specific measures at issue requires that those measures be in existence when the DSB refers to matter to a panel.

31. It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings. There is no requirement in the DSU for any specific measure at issue to have future applicability.

32. U.S. Response to Question 4: The United States considers that the consequences (or effects or impact) of an alleged unwritten measure may be highly relevant to demonstrating its existence.

33. This dispute provides a good example. The EU has alleged that China targeted Lithuania following the latter's opening of a "Taiwanese Representative Office in Lithuania." China denies this. But the evidence of a precipitous decline in imports from Lithuania to China – 99.85% in value – that followed the opening of the Taiwan Representative Office, is extremely strong evidence of the alleged measure's existence, particularly in the absence of any plausible alternative explanation. Likewise, the evidence showing that Chinese exports from Lithuania never returned to pre-incident levels *prima facie* establishes the continued existence of the measure.

34. U.S. Response to Question 5: *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement") defines an SPS measure by reference to its purpose. Thus, to the extent a measure is allegedly applied to protect human, animal or plant life or health or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests, it constitutes an SPS measure under the SPS Agreement, regardless of whether other purposes exist.

35. Even if a measure is an SPS measure, it can still be challenged under other covered agreements, including the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). SPS measures that do not conform with the SPS Agreement have no presumption of conformity with the GATT. But it is also important to recognize that, even if measures conform with the SPS Agreement, the presumption of GATT conformity only extends to GATT provisions "which relate to the use of SPS measures, in particular the provisions of Article XX(b)."

36. A coercive economic measure may simultaneously have the appearance of a measure that nominally is subject to one type of WTO obligation while breaching another WTO obligation. A measure, the content of which is related to the SPS Agreement may nevertheless serve other purposes. Annex A(1) of SPS Agreement provides a list of purposes to which a measure can be applied to be considered an SPS measure, and illustrates the forms in which such a measure can manifest itself. However, the list does not preclude the possibility that such measure can also be applied in a way that serves other purposes not listed in the Annex A(1) definition. The measure may therefore breach another WTO obligation not related to an SPS purpose.