

China – Measures Concerning Trade in Goods

(DS610)

**ORAL STATEMENT OF THE UNITED STATES OF AMERICA
AT THE THIRD-PARTY SESSION OF
THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

November 28, 2023

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. At the heart of this dispute is what the European Union (“EU”) has referred to as “the overarching measure”—China’s “overarching, systemic restriction on trade with Lithuania”¹ 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.

3. 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

¹ EU First Written Submission (“FWS”), para. 10.

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.

4. 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.

5. In assessing the alleged existence of the overarching measure, the Panel must look at the totality of the evidence. The Panel cannot look at each piece of evidence in isolation² as China’s analysis suggests; rather, the Panel must also 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.³ Furthermore, as we noted in our third party written submission, the Panel can and must make reasonable inferences from circumstantial evidence, and there are not different legal standards that attach to allegations of unwritten measures.

6. In this dispute, there is no disagreement that imports into China from Lithuania dropped severely starting in late 2021. As the European Union and several of the third parties have pointed out in their submissions, the drop in the total value of imports from Lithuania to China in

² See, e.g., Australia Third Party Submission, para. 34; New Zealand Third Party Submission, para. 6; Japan Third Party Submission, para. 20.

³ See Exhibit USA-1.

December 2021 was drastic – 99.85%. This is plainly shown in the data of the General Administration of Customs of the People's Republic of China.⁴ 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.

7. 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."⁵ The European Union alleges that this unusual and consequential development is the result (and evidence) of a Chinese measure to punish Lithuania for the opening of the "Taiwanese Representative Office in Lithuania." 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."⁶ In support of this, the EU provides EU-wide import data for the same period, providing evidence that the sharp drop in Lithuanian imports was not reflective of some broader trend.⁷ The EU also points to contemporaneous understandings of what was taking place⁸ as well as the suspicious manner in which alleged SPS violations were handled, characterized by an extreme non-responsiveness by China.

⁴ See EU's FWS, paras. 85-86.

⁵ See China's FWS, paras. 100-101 (including Figure 1 "Year-on-year dollar value of imports from countries with similar import volumes to Lithuania from 2004 to 2022 (Date Source: GACC)").

⁶ EU's FWS, para. 86.

⁷ See EU's FWS, paras. 68-70.

⁸ See, e.g., Exhibit EU-42.

8. 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.

9. China may attempt to offer a more compelling explanation for the developments, or at minimum undermine the EU’s affirmative case by, for example, bringing forward contradictory evidence. China’s response instead attempts to fault the EU for not submitting enough pieces of evidence, and argues for heightened legal standards in cases of unwritten measures. As the United States and others have already explained, there is no basis for such heightened legal standards. Rather, the Panel must look at the totality of the evidence, including circumstantial evidence, to fulfil its function to make an objective assessment of the facts,⁹ including the existence of a measure.

10. 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. For example, in response to EU allegations of “import restrictions,” China asserts that “pop-up messages can arise in an online data-entry system for a variety of reasons, including errors when inputting data into the online system on the users’ end.”¹⁰ But China, which operates the online system, never even attempts an explanation for why pop-up messages frustrated *Lithuanian*

⁹ DSU Art. 11; *see* Oxford English Dictionary, “objective” (adjective, definition I.8.a: “Of a person or his or her judgement: not influenced by personal feelings or opinions in considering and representing facts; impartial, detached.”).

¹⁰ China’s FWS, para. 44.

imports at that time, nor did it bring forward evidence to show others faced the same rate of errors.

11. 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.”¹¹ 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. The EU has already put forward an affirmative showing, with evidence, that the severe drop in imports from Lithuania resulted from China’s underlying measure in response to the opening of the “Taiwanese Representative Office in Lithuania.” Merely asserting that, “in principle,” that might not have been the reason, does nothing to undermine the EU’s case.

12. 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

¹¹ China’s FWS, para. 87.

opening of the “Taiwanese Representative Office in Lithuania;” and that the apparent non-responsiveness by Chinese authorities regarding the purported SPS concerns was normal.

13. 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.

14. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views and looks forward to responding to the Panel’s questions.

USA-1

Selected Statements Regarding Unwritten Measures in China

China has asserted elsewhere that compliance with its policy decisions is mandatory under China's domestic legal system and that its policy decisions have the force of law.¹ In a dispute before the United States Supreme Court, for instance, evidence and statements from MOFCOM and other experts sought to establish that China relies on unwritten measures as part of "a long-standing system in China as a way of thinking and acting that still exists in China"² and criticized "plaintiffs [who] trivialize China's organs of regulations where those organs differ in structure or function from ones more familiar to the plaintiffs".³ In that case, the expert report went on to explain that:

Many official requirements are also transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction. Regardless of form, to the extent that these directions come from people in superior authority they are no less binding and obligatory on subordinates and the companies than any other type of "law".⁴

The expert report also explains that the existence of written documents:

does not demonstrate a lack of compulsion or regulation, but rather is inherent in the idea that the parties were mandated to engage in self-discipline to achieve basic policies, but had freedom in deciding the manner in which coordination was to be achieved consistent with national goals.⁵

The expert report further explains that:

Chinese governmental control is a quite different process from what takes place in other countries, and the fact that directives are oral . . . does not change the forcefulness or compulsion which attaches to such directives when given in China – especially when such directives are given to companies . . . whose officials receiving such directives are party members and appointees. . . . The fact that they exist, and that the enterprises are so closely intertwined with the government, gives force to the regulatory system.⁶

¹ See Joint Appendix submitted to the U.S. Supreme Court in *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 138 S. Ct. 1865 (2018) (No. 16-1220), available at https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf. Pursuant to Rule 26 of the U.S. Supreme Court Rules, the Joint Appendix contains, inter alia, "any . . . parts of the record that the parties particularly wish to bring to the Court's attention." See U.S. Supreme Court Rules, Rule 26 (Joint Appendix).

² See Report of Professor Shen Sibao ("Expert Report"), Joint Appendix at 141; *id.* at 136 ("I have been retained by Defendants in this case as a Chinese legal expert to furnish this Report to explain the nature of the regulatory system that operated in China").

³ See Statement of Ministry of the People's Republic of China ("MOFCOM"), Joint Appendix at 131.

⁴ Expert Report, Joint Appendix at 141.

⁵ Expert Report, Joint Appendix at 139.

⁶ Expert Report, Joint Appendix at 176.

The expert report emphasizes that:

It is important to understand that the mandatory policy goals themselves were neither subject to debate, nor could they be ignored. The policy of the government was mandatory and participation in the process designed to implement that policy was mandatory.⁷

The expert report also explains:

It is also important to note that in China, having established the broad regulatory framework through regulations, directives and implementing orders are frequently given in an oral fashion.⁸

When asked by the U.S. Supreme Court how China could reconcile these assertions with “the representation of China to the World Trade Organization” which “seems directly contrary to its position here”, China’s representative stated that “the right answer to that problem is” to “take it up with the World Trade Organization and -- and let that organization deal with those issues.”⁹

⁷ Expert Report, Joint Appendix at 139.

⁸ Expert Report, Joint Appendix at 176.

⁹ See Transcript of Oral Argument, *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 138 S. Ct. 1865 (2018) (No. 16-1220) at 39-41, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1220_8nj9.pdf.