China – Measures Concerning Trade in Goods

(DS610)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL TO THE THIRD PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING

December 18, 2023

TABLE OF REPORTS

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Argentina – Import Measures (Panel)	Panel Reports, *Measures Affecting the Importation of Goods,* WT/DS438/R / WT/DS444/R / WT/DS445/R and Add. 1, adopted 26 January 2015, as modified by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods,* WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Chicken Cuts (AB)	Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Selected Customs Matters (AB)	Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, adopted 11 December 2006
Guatemala – Cement I (AB)	Appellate Body Report, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted 25 November 1998
US – Carbon Steel (AB)	Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

QUESTION 1

In your view, what degree of consistency, if any, in the application of an unwritten measure is needed to establish its existence?

U.S. Response to Question 1:

1. There is no degree of consistency in the application of an unwritten measure that is *per se* needed to establish its existence.

2. Contrary to China's assertions, there is no special rule under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) that requires some sort of special, higher burden in terms of the evidence needed to demonstrate the existence of an unwritten measure.[1] 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.[2] 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.

3. Further, the relevant evidence needed to establish a measure's existence may depend on how it is characterized. 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.[3] As a matter of persuasiveness, the Member making the claim has the burden to provide sufficient evidence for a panel to find that the measure exists as a matter of fact, and how that measure breaches the relevant WTO provisions. 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.

4. 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

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[1] *See* China's First Written Submission, paras. 17-34 (attempting to impose additional requirements by arguing that a complainant seeking to prove the existence of an unwritten measure must adduce (1) evidence of repeated and highly consistent instances of regulatory conduct over some period of time and (2) evidence that those instances are connected across time by an organized policy, rule, or norm.). Notably, the phrase "the evidentiary threshold for proving the existence of an unwritten measure is high" is derived from Appellate Body Report language from *US – Zeroing (EC)* and not found in the DSU.

[2] *See* China's First Written Submission, paras. 17-34. Moreover, the phrase "the evidentiary threshold for proving the existence of an unwritten measure is high" is derived from Appellate Body Report language from *US – Zeroing (EC)* and not found in the DSU.

[3] *See US – Wool Shirts and Blouses (AB)*, p. 14 (a prima facie case is "sufficient to raise a presumption that what is claimed is true"; "precisely how much and precisely what kind of evidence will be required to establish such a presumption" will depend on the claim); *see also EC – Sardines (AB)*, para. 270.

about the measure's existence. It would be inappropriate to surmise a general rule from such dispute-specific circumstances.

QUESTION 2

Australia, in paragraph 55 of its third-party submission, and Canada, in paragraph 25 of its third-party oral statement, argue that the Panel's assessment of the import restriction and the overarching measure is necessary and important to resolve this dispute.

(a) What is the value added in the Panel making findings with respect to the European Union's claims concerning both the overarching measure and the import restriction measure?

U.S. Response to Question 2(a):

5. Under DSU Article 11, the function of the Panel is to assist the Dispute Settlement Body ("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.[4] Here, the Panel should make an objective assessment of the matter, including with respect to any measures alleged by the complaining party.

6. 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"[5] 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 must make findings on the underlying measure and may not exercise judicial economy with respect to the underlying measure. Indeed, the import restrictions and sanitary and phytosanitary ("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.

7. 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

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[4] The text of the DSU (Articles 7.1, 4.4, and 6.2) controls the Panel's terms of reference in this dispute, and it is on that basis that the Panel must consider the scope of the matter the DSB referred to it for examination.

[5] EU's First Written Submission, para. 10.

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.

8. 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.

> **(b) In your view, what would be the implications of a finding by the Panel that the European Union has not demonstrated the existence of the import restriction measure to the Panel's assessment of the existence and content of the overarching measure?**

U.S. Response to Question 2(b):

9. 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.

10. 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[6] based on the totality of the evidence.

QUESTION 3

> **In your view, to be challenged successfully, should an unwritten measure have future application? If so, how can that be demonstrated?**

U.S. Response to Question 3:

11. No. 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.

12. 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 the abstract, an unwritten measure, like a written measure, could be time limited by its own terms. Or an unwritten measure, like a written measure, could have open-

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[6] DSU, Art. 11.

ended application. In this case, the EU clearly describes the underlying measure as being open-ended.[7] But what matters in any event is its existence at the time of panel establishment.

13. The Panel's contemplation of future application may derive from the Parties' discussion of "general and prospective application." To reiterate what was stated in the U.S. third party written submission, "general and prospective application" is simply a descriptive analytical phrase used by certain past adjudicators to describe certain measures challenged "as such," and it does not govern the entire spectrum of challengeable measures under WTO dispute settlement.[8] The United States considers that the concepts of "rule or norm" and "general and prospective application"— addressed in the parties' submissions with regard to the existence of an "overarching" unwritten measure[9]—are not necessary elements to establish an unwritten measure; those concepts are not based in the DSU text.

14. As stated in response to Question 1, there is no special rule under the DSU that requires any special, higher burden in terms of the evidence needed to demonstrate the existence of an unwritten measure or its "future application."[10] Such views have no basis in the DSU text. Thus, 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.

15. 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. Specifically, when the DSB establishes a panel, the panel's 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.[11] Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[12] 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.[13]

[7] EU's First Written Submission, paras. 569 and 580.

[8] *See* U.S. Third Party Written Submission, para. 9; *Argentina – Import Measures (AB)*, para. 5.109.

[9] *See* China's First Written Submission, para. 281 (asserting that the EU must prove the particular features of "rule or norm" of "general and prospective" application); EU's First Written Submission, para. 569.

[10] *See* China's First Written Submission, paras. 17-34 (attempting to impose additional requirements by arguing that a complainant seeking to prove the existence of an unwritten measure must adduce (1) evidence of repeated and highly consistent instances of regulatory conduct over some period of time and (2) evidence that those instances are connected across time by an organized policy, rule, or norm.). The United States understands the concept of "future applicability" to have the same meaning as the prospective application of the challenged measure described in the panel's terms of reference.

[11] DSU, Art. 7.1.

[12] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

[13] *EC – Chicken Cuts (AB)*, para. 156 ("The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."); *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review

16. 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.

QUESTION 4

What, if any, would be the relevance of the consequences of an alleged unwritten measure to demonstrating its existence?

U.S. Response to Question 4:

17. The United States considers that the consequences (or effects or impact) of an alleged unwritten measure may be highly relevant to demonstrating its existence.

18. 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.

QUESTION 5

Annex A(1) of the SPS Agreement defines SPS measures as "[a]ny measure applied … to protect" human, animal or plant life or health from certain SPS risks or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests. Can a measure that is "designed to punish" a WTO member at the same time have the objective of protecting human, animal, plant life or health or the territory of a Member against an SPS risk within the meaning of Annex A(1) of the SPS Agreement and thus qualify as an SPS measure under that Agreement?

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of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id*., para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.

U.S. Response to Question 5:

19. Yes. *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.

20. 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"). Article 2.4 of SPS Agreement states that the conformity of SPS measures with the SPS Agreement presumes conformity of obligations under the "provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)." This makes clear that 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)." Where a measure allegedly is designed to punish by restricting importation or sales, for example, it may still be found to breach Article X1:1 of the GATT, regardless of whether it is an SPS measure and regardless of its conformity with the SPS Agreement.

21. 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.