China – Measures Concerning Trade in Goods

(DS610)

THIRD PARTY SUBMISSION OF THE UNITED STATES

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TABLE OF REPORTS

Short Title	Full Title and Citation
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 – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
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
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
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

THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

1. The United States welcomes the opportunity to provide its views on this dispute, in particular because it potentially could have far-reaching systemic effects.

2. 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.

3. 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.[2] At the same time, China sent a clear message: *"Change the name and everything will return to normal."*[3] 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.

4. 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

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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.

[2] *See* Office of the United States Trade Representative, *Statement From USTR Spokesperson Adam Hodge on the EU's Request For WTO Consultations with China* (Jan. 27, 2022), available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/january/statement-ustr-spokesperson-adam-hodge-eus-request-wto-consultations-china (expressing deep concern about China's discriminatory trade practices against Lithuanian goods and EU products with Lithuanian content and an intent to work to address the PRC's coercive economic behavior); *see also* Office of the United States Trade Representative, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body* (Jan. 27, 2023), available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body ("We are disappointed that China has not lifted its restrictions relating to goods and services of Lithuania and the European Union. We are also concerned at the lack of transparency on the basis for these restrictions. Accordingly, the United States continues to call on China to lift these coercive economic measures. The United States intends to participate in this dispute as a third party.").

[3] *See* EU First Written Submission, para. 52 (quoting statement by China's Ambassador to the EU).

increasing use of trade measures in an opaque or pretextual manner, which benefit from plausible deniability.[4]

5. 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.

6. In this dispute, the EU as the complaining party bears the burden of identifying and demonstrating the existence of a "specific measure."[5] 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[6] and is of the nature as characterized by the EU.

7. However, China attempts 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.[7] Moreover, China argues that there is a "high bar" for what is acceptable evidence or an "evidentiary threshold" for a complainant to demonstrate the existence of an unwritten measure. The United States notes that these supposed requirements are nowhere supported by the text of the DSU.

8. 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.[8] 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.[9] Such views have no basis in the DSU text. The

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[4] *See, e.g.*, WTO Council for Trade in Goods, Minutes of Meeting held 3-4 April 2023 (G/C/M/145), Item 40 ("China – Implementation of Trade Disruptive and Restrictive Measures – Request from Australia") (statements by Australia, the EU, the United States, the United Kingdom, Chinese Taipei, Japan, Canada, and New Zealand). *See also, e.g.*, WTO Council for Trade in Goods, Minutes of Meeting held 6-7 July 2023 (G/C/M/146), Item 9 ("China – Implementation of Trade Disruptive and Restrictive Measures – Request from Australia") (reiterating concerns expressed at the April 2023 WTO Council for Trade in Goods meeting).

[5] *See* DSU Arts. 6.2, 7.1.

[6] *See* DSU Arts. 3.3, 4.2.

[7] *See* China's First Written Submission, para. 30.

[8] *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.

[9] *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.

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."[10] 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.[11]

9. Moreover, 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[12]—are not necessary elements to establish an unwritten measure; those concepts are not based in the DSU text. The phrases "rule or norm" and "general and prospective application" are simply descriptive analytical phrases used by certain past adjudicators to describe certain measures challenged "as such," and they do not govern the entire spectrum of challengeable measures under WTO dispute settlement.[13] What ultimately matters is whether there has been a decision with *legal effect* within the domestic system of the Member that is being challenged.

10. 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.

11. 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.[14]

12. 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

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[10] Oxford English Dictionary, "prima facie case": *Law.* "A case that is supported by sufficient evidence for it to be taken as proved in the absence of evidence to the contrary; also in extended use."

[11] *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.

[12] *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.

[13] *See Argentina – Import Measures (AB)*, para. 5.109.

[14] China's First Written Submission, para. 81 (emphasis in original) (contrasting with official statements in evidence submitted in *Argentina – Import Measures* explicitly acknowledging of existence of the unwritten measure).

as in the case here—may prove comfortably sufficient for establishing the existence of an unwritten measure.

13. 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.

14. In *Argentina – Import Measures*, the complainants alleged that Argentina imposed a set of unpublished trade-related requirements for importers. In that dispute, the panel agreed with the United States that "challenging an unwritten measure does not involve a different burden of proof than when challenging a written measure, although it may result in a larger volume of evidence necessary to prove the existence of the measure."[15] Nonetheless, the panel did not impose an evidentiary threshold like the one being suggested by China, and there is no basis in the DSU text that would support such an evidentiary threshold. The panel noted:

> Were panels to request an extremely high level of detail in the definition of the content of unwritten measures, this could make it almost impossible in practice to challenge such types of measures. This is more so in cases where one of the purported characteristics of the challenged measure is precisely its lack of transparency and the broad discretion that the authorities have in its implementation. This could affect the right of WTO Members to bring a challenge against a measure under the DSU. In any event, what is crucial is that, based on the available evidence, both a panel and the respondent party have a clear understanding of the components and the operation of the challenged measure.[16]

15. The evidence in that dispute reviewed by the panel included statements by Argentine officials in governmental press releases, speeches, interviews, and other news reports; statements by company officials in earnings calls and reports, news reports, press releases, and in affidavits; other news reporting; trade publications; and surveys of companies doing business in Argentina.

16. In *EC – Approval and Marketing of Biotech Products*, the complaining parties alleged that the EC had imposed a moratorium on the approval of biotech products. The panel in that dispute concluded that the question with respect to the existence of an unwritten measure is the same question that applies to the examination of any other fact asserted by a Member in a dispute: "whether the evidence supports the Complaining Parties' assertion."[17] The panel then went on to methodically consider the evidence, which included press releases, fact sheets and other statements of the European Commission; speeches and news reports concerning statements of Commissioners; and statements by member State officials.[18] The panel concluded that this evidence supported the complaining parties' assertion that the EC applied a moratorium during

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[15] *Argentina – Import Measures (Panel)*, para. 6.323.

[16] *Argentina – Import Measures (Panel)*, para. 6.324 (citation omitted).

[17] *EC – Approval and Marketing of Biotech Products*, para. 7.456.

[18] *EC – Approval and Marketing of Biotech Products*, paras. 7.522-7.531.

the relevant time period and that such evidence, together with other evidence submitted in the dispute, was sufficient to establish the existence of the moratorium.[19]

17. 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.

18. Here, the EU explains that, in response to Lithuania's decision in 2021 to open a "Taiwanese Representative Office in Lithuania" in Vilnius, China decided to retaliate against Lithuania with severe trade restrictions until such time as Lithuania "put right its mistakes on the Taiwan-related issues."[20] 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 trade restriction" (or 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."[21]

19. 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.

20. The United States thanks the Panel for its consideration of the U.S. views on issues raised in this dispute.

[19] *EC – Approval and Marketing of Biotech Products*, para. 7.1272.

[20] *See* EU First Written Submission, para. 48 (quoting PRC statement).

[21] *See* EU First Written Submission, paras. 22-25.