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The WTO's National Security Exception and Its Implication to the China-EU Dispute: With Special References to Lithuania's Taiwan Representative Office

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In the multilateral trading systems under the WTO, the national security exception plays a crucial role in balancing trade liberalisation against the security interest of a sovereign nation. The proper use of the national security exception is of particular importance in the disputes with mixed political, diplomatic and military elements. The EU has recently accused China of breaching WTO obligations by taking restrictive trade measures against Lithuania, thereby affecting free trade between the EU and China. This paper argues that the allegation would be frustrated by the application of the WTO's national security exception, as the dispute is rooted in Lithuania's breach of its commitment to the One-China principle, which is crucial to China's sovereignty and territorial integrity. Outside the WTO ruling system, a unilaterally imposed international sanction would be insufficient to alleviate the dispute between China and Lithuania and would lead to a deadlock in the multilateral trading system.

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I. Introduction

As Francis Fukayama indicated in "The End of History and the Last Man," "the nation will continue to be a central pole of identification, even if more and more nations come to share common economic and political forms of organization."[1] The WTO, established in 1995 with the spirit of multilateralism, now faces challenges brought on by unilateralism. Certain countries pursue their political objectives by imposing unilateral economic sanctions. Since the escalation of the conflict in Ukraine, the US, the EU and other countries have implemented a series of sanctions against Russia involving finance, transportation, aviation services, import and export trade and many other fields. In response to the physical war between Ukraine and Russia, it appears that an economic war is being waged against Russia. Economic disputes do not involve solely economic interests but always contain the political, diplomatic and even military concerns of the parties involved.

To clearly delimit the boundaries of the WTO, drafters of the General Agreement on Tariffs and Trade (GATT) 1994 inserted a national security exception to the WTO obligations. Article XXI of GATT 1994 makes it clear that the protection of "essential security interest" can justify a non-performance of WTO obligations.[2] Other WTO agreements, such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Trade-Related Investment Measures (TRIMS)[3] contain similar exceptions. The standards for invoking national security exceptions are crucial to maintaining the established multilateral trading system.

On January 27, 2022, the EU requested the WTO dispute consultations with China concerning alleged Chinese restrictions on the import and export of goods and the supply of services to and from Lithuania and countries with a link to Lithuania.[4] The request was circulated to the WTO members on January 31.

The outcomes of the consultations initiated by the EU will, of course, largely depend on the proven facts. However, the focus of this article is not to prove the authenticity of the evidence, but to examine the legal issues arising from the conflict

between countries' WTO obligations on maintaining the stability of multilateral trading systems and their demands on protecting the national security interests. Therefore, this research endeavors to evaluate the implication of the national security exceptions in the EU-China dispute, and mainly focuses on answering the following questions: Does the dispute concern China's essential security interest so that it falls within the WTO national security exception? Besides seeking remedies in the WTO, whether using a self-determined anti-coercion instrument can be an effective way to resolve the current China-EU dispute? Examining the criteria of applying the national security exception in the on-going trade disputes of the two primary global powers is of particular importance for strengthening the law-based international economic order in this conflict-riddled world.

II. China–Lithuania Diplomatic Crisis

A. Breach of the One-China Commitment

In the China–Lithuania Joint Communiqué of 1991, Lithuania recognised the One-China principle, stating that "the government of the People's Republic of China is the sole legal government of China and Taiwan is an inalienable part of the Chinese territory." The One-China principle is not only accepted between China and Lithuania, but also recognized by the United Nations. In the General Assembly Resolution 2758, the UN confirmed the One-China principle and recognized the People's Republic of China (PRC) as the "only legitimate representative of China to the United Nations" and removed "the representatives of Chiang Kai-shek" from the United Nations.[5] Resolution 2758 is cited again by the UN Secretary-General Antonio Guterres after the US House Speaker Nancy Pelosi visited Taiwan on August 2, 2022.[6] Under the One-China principle, Taiwan may only join non-governmental organisations or expand non-official relations with other countries under the name of "Chinese Taipei."[7] In fact, Taiwan has set up unofficial representative offices in other countries and regions under the name of "Taipei Representative Office" (e.g., in the UK) or "Taipei Economic and Cultural Representative Office" (e.g., in the US).

In Lithuania, meanwhile, the Taiwanese Representative Office was established on November 18, 2021. This was the first time that a representative office had been

set up using the name "Taiwanese" rather than "Taipei" in a country holding official relations with the People's Republic of China (PRC). Although both the EU and the government of Lithuania alleged that the Taiwanese Representative Office was meant only to provide a "more intense economic, cultural and scientific relationship" between the EU and Taiwan, China repeatedly and resolutely opposed the move. Nevertheless, Lithuania accepted the established Taiwanese Representative Office in its territory, which was treated by China as a blow to the foundation of China–Lithuania diplomatic relations. Accordingly, China downgraded its diplomatic relations with Lithuania, demoting the position of its diplomat in Lithuania from ambassador to *chargé d'affaires*.[8]

Taiwan, however, treated its representative office in Lithuania as a *de facto* diplomatic office and the establishment of this office as a diplomatic success. Tsai Ing-wen, the president of the Democratic Progressive Party, expressed on Twitter that it was to establish a close democratic partnership with Lithuania. Lithuania has gained support from not only the EU but also the US, which expressed its willingness to enhance economic co-operation with Lithuania and showed "strong support for Lithuania in the face of political pressure and economic coercion from the People's Republic of China."[9]

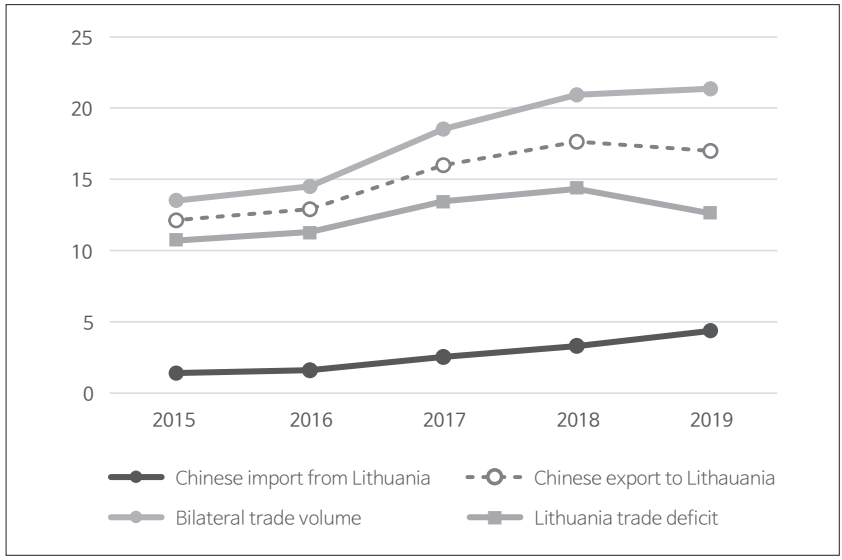
With the support of the EU and the US, Lithuania keeps the political interaction with Taiwan, which continuously heightens the tension between China and Lithuania. Lithuania is the only EU country to publicly endorse the Pelosi's controversial visit to Taiwan.[10] Moreover, disregarding China's large-scale military drills around the Taiwan Strait and sanctions against Pelosi, Lithuania's Deputy Minister of Transport and Communications Agne Vaiciukevičiūtė officially visited Taiwan immediately after Pelosi's visit, which is "pouring fuel on the fire" to the deadlock of the China-Lithuania relations.[11]

B. Lithuania's Strategic Considerations

The PRC and the Republic of Lithuania established official relations in 1991. Over the past 30 years, the two countries have signed 17 economic agreements, protocols, memoranda of understanding and action plans and have engaged in extensive co-operation in the fields of trade, science and technology, culture and transportation.[12] Attracted by China's huge economic market, Lithuania has actively responded to China's Belt and Road Initiative and increased its exports to China

(Figure 1). Because of the considerable differences between Lithuania and China in terms of market size and general economy, Lithuania has sustained a bilateral trade deficit with China. China is Lithuania's biggest trade partner in Asia. Furthermore, tightened economic relations lead to a "particle" diplomatic policy that Lithuania held against China, under which the ideological differences of two countries, if any, was handled at the level of China-EU relations.

Figure 1: Scale of China–Lithuania Bilateral Trade in 2015–2019[13]



Notes: The unit of measurement is USD 10 million.

This has significantly changed since 2019, when Lithuania's State Security Department classified China as a threat based on China's quest for economic and political dominance, which increased Lithuania's risk of losing control over strategic sectors, including resources, critical infrastructure and Lithuanian information systems. Lithuania has also viewed China's expanding geopolitical influence as a threat, because it renders Lithuania's relations with the EU and other Western countries uncertain, especially given China's close political and military relations with Russia, another influential party in the international arena.[14] Lithuania has responded to such developments with diplomatic actions displaying stronger

opposition to China, especially on certain Chinese red-line issues, including those with respect to Hong Kong, Xinjiang and Taiwan.[15] The substantial changes to Lithuania's foreign policy as pertains to China have also affected China's investment in Lithuania; for example, in addition to the failure of the Huawei 5G project in this country, China also dropped its investment into Lithuania's Port of Klaipeda because of national security concerns. For its part, Lithuania withdrew from the "17+1" summit, an economic co-operation plan initiated by China.

The degradation of relations between China and both Lithuania and the EU provides important context for Lithuania's decision to accept an official representative office in its country under the denomination of "Taiwan." Based on the historical review of the political and economic relationship between Lithuania and China, three reasonable conclusions may be drawn. First, Lithuania's acceptance of the establishment of the Taiwanese Representative Office is not merely an issue of naming but an intentional breach of Lithuania's commitment to the One-China principle. Second, the Taiwanese Representative Office issue is not an isolated act but one in a series of Lithuanian political actions. These actions constitute active interference with Chinese internal affairs rather than passive reactions or countermeasures. Third, the action reveals that, different from its previous attitude towards China, Lithuania now seeks steady political relations with the EU and a positive role in transatlantic solidarity as well as a decrease in its economic engagement with China to lower its financial and economic dependence on China. Based on these conclusions, Lithuania's acceptance of the Taiwan Representative Office has a clear political objective, as is evident in its hostile attitude towards China, which has already profoundly changed Lithuania's diplomatic and economic relations with China. As is demonstrated in Figure 1, Lithuania's imports from China have been declining since 2018, long before the diplomatic crisis between the two countries arose.

III. The EU's Request for Consultations against China and Its Impact

On January 27, 2022, the EU submitted a request for consultations with China to the WTO. The EU alleged that since the final quarter of 2021, importers of products

originating in Lithuania and/or transiting through Lithuanian ports and/or having some other link to Lithuania had been encountering restrictions on customs clearance for their goods to enter Chinese territory. Specifically, the restrictions were: (i) error messages appearing on the IT systems used to input the data necessary to secure customs clearance from Chinese customs authorities; (ii) containers being blocked in Chinese ports pending customs clearance; and (iii) failures on the part of the Chinese customs authorities to process requests for customs clearance in due time or at all.[16]

Based on these events, the EU alleged that China had taken the following measures: banning or restricting importations of the products at issue from the EU, banning or restricting exports of the products at issue from China to the EU and imposing restrictions or prohibitions on the supply of services from the EU or by a service supplier from the EU in the territory of China or with respect to EU consumers of services provided by Chinese service suppliers.[17] These measures appear to nullify or impair the benefits accruing to the EU directly or indirectly under GATT, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Trade Facilitation Agreement (TFA) and the GATS. Up until today, however, the EU has not provided any additional details of the measures at issue, and there is no progress regarding the consultation.

The WTO consultations procedure is mainly regulated by Article 4 of the DSU. Consultations are the first step in the WTO dispute settlement mechanism, a necessary stage for establishing adjudicating panels and other follow-up procedures. The initiation of the DSU consultations procedure, which is different from the general consultations or negotiation over trade problems between two member countries, places trade disputes under the multilateral supervision of the WTO. Article 3.7 of the DSU imposes an obligation to the WTO members, which requires them to bring any claim prudently, aiming at a "fruitful" and "positive solution to a dispute." Article 3.10 further requires engaged parties to behave "in good faith in an effort to resolve the dispute," and avoid using dispute settlement procedures as "contentious act."[18] As per general rules of DSU, before starting a consultation, it is the obligation of the EU to establish a *prima facie* case, i.e. successfully proving that the measures in question have actually happened and are inconsistent with the relevant covered agreements. The EU shall also evaluate as to whether the consultation with China may achieve a satisfactory outcome, forcing China to change the measures, if

any, under the WTO multilateral trade system. However, the fact that EU-China consultation remains in limbo seems to suggest that the consultation may not be an effective way to resolve the disputes of the both parties.

Beside the complaining party, other non-disputing parties can not only join in the consultations after declaring their "substantial trade interest" in the consultations (pursuant to GATT 1994, the GATS[19] or the corresponding provisions in other covered agreements), but also join as a third party in the follow-up panel adjudication. Australia, the US, Japan, Canada, the UK and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu have submitted requests to the DSB to join in the consultations. They may therefore become third parties to the panel process if initial consultations fail to settle the EU–China trade dispute.[20]

Unlike other joint consultations or third parties' engagement in WTO dispute settlements, the requests to join consultation by the five countries and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu in the China-EU dispute indicate a clear political purpose. This resembles a political hunt against China, aiming to build worldwide momentum in jointly supporting Lithuania against China's alleged coercion.

IV. The Role of the National Security Exception in the EU-China Dispute

A. National Security Exception: Demarcation of Real Trade Dispute

The GATT established a strong and prosperous multilateral trading system after the Second World War, for the purpose of promoting freer trade at the national level. However, the GATT's framers were aware of the necessity of safeguarding nations' essential security and thus attempted to strike a balance between trade liberalisation and essential national security. As a result, they provided an exception to all obligations assumed under the GATT in Article XXI, Security Exceptions:

> Nothing in this Agreement shall be construed:
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests;
> (b) to prevent any contracting party from taking any action which it considers

necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[21]

Petros Mavroidis commented on the balance function of Article XXI, stating: "We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."[22] However, as Article XXI(b) involves the self-judgment of nations invoking the exception, which may lead to unstable and unpredictable international trade order under the WTO and GATT, it has been invoked relatively infrequently. Furthermore, the adjudicating panels and the WTO Appellate Body have recognised national sovereignty as a principal beyond their reach, and they are therefore inclined to give a strict interpretation of "essential security interests."[23]

Nonetheless, with the aggressive practice of the US in invoking national security exception to justify the steel and aluminium tariffs,[24] or to defence measures for banning Huawei, a global leader in 5G, from its telecommunications market, a domino effect is created wherein other nations began to re-orient their investment or trade policies, either to react to the abused use of the national security exceptions of their trading partners, or to stay in line with their geo-political allies.[25] These unilateral measures threat the established WTO multilateral trading systems. Meanwhile, in recent disputes at the WTO, parties who invoked the national security exception clause (Article XXI of the GATT) alleged that the clause is a "self-judging" one and panels shall have no jurisdiction to review any measure that a member state consider necessary for protecting its national security.[26] Panels are thus forced to give proper interpretation of Article XXI of the GATT and address the issues critical to the effectiveness of the WTO regime: the jurisdiction to review Article XXI of the GATT and the standard of review. [27]

In the landmark rulings of two recent cases, panels of the DSB addressed certain important issues that had previously been unclear. The significance of the *Russia–*

Ukraine case[28] and the *Saudi Arabia* case[29] lies in the two standards used by the panels, namely (i) the objective standard used to review the circumstances regarding each of the three subsections of Article XXI(b) and (ii) the subjective standard used to review the "necessity" of the disputed actions and the purpose of the actions as protecting a national "essential security interest."[30]

In the *Russia–Ukraine* case, the panel first confirmed that Article XXI(b)(iii) should not be interpreted as relying on the absolute self-judgment of a nation and that the invocation of this provision is within the panel's jurisdiction.[31] Second, to precisely define the proper conditions for invoking Article XXI(b)(iii), the panel further interpreted the term "international relations" in this subsection as referring to "world politics" or "global political interaction, primarily among sovereign states,"[32] and it interpreted "emergency in international relations" as meaning "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[33] It also found that the phrase "taken in time of" in subparagraph (iii) of Article XXI(b) requires the disputed action to have been taken during the course of such war events or other emergency.[34] With these meticulous interpretations, the panel corroborated the conventional interpretation of the term "essential security" in the exception as being limited to military interests and territorial integrity rather than encompassing economic, ideological and technological supremacy in international economic governance, as certain countries had alleged.[35]

While the WTO panel in the *Russia–Ukraine* case found that the emergency in the disputing parties "is very close to the hard core of war and armed conflict,"[36] the WTO panel in the *Saudi Arabia* case [37] adopted a relatively loose standard to connect the "essential security interest" in the TRIPS security exception[38] with the defence of the population and territory from external threats and the maintenance of law and public order internally.[39] The circle of "essential security interest" is then expanded to cover not only the military interests or territorial integrity, but also the sovereign interest of an independent state to prevent its population from "war, instability, and general unrest"[40] within the territory.

With respect to the "necessity" of a disputed action based on the associated "essential security interest," the panel in the *Russia–Ukraine* case applied a subjective standard by leaving it up to individual WTO members to define these terms for themselves, provided that they obey the good faith obligation.[41] The fact

that the specific interests that render a state particularly vulnerable to external or internal threats depend on the particular circumstances of the state in question, as well as the words "which it considers" contained in Article XXI(b), justifies the subjective standard established in the *Russia–Ukraine* case to review the "necessity" of disputed actions and the associated "essential security interest." While the ruling in the *Saudi Arabia* case impose a "good faith" condition to assess the necessity of the measures in question, which requires a direct link between the measures in question and essential security interests that should be protected under the "emergency in international relations."[42]

B. Common Understanding between the EU and China

In both the *Russia–Ukraine* case and the *Saudi Arabia* case, the panels confirmed that the national security exception clause is not an absolute "self-judging" clause, but panels have the jurisdiction to review a WTO member's invocation of the clause. As noted in the *Saudi Arabia* case, the standards adopted by panels when reviewing the "essential security interest" of a defending state, the necessity of their measures taken by the defending state, and the direct link between these measures and the essential security interests at stake "depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances."[43] This means that the proper invocation of the national security exception requires a case-by-case analysis that combines an accurate interpretation of the national security clause with the specific facts of each case.

Article 3.2 of the DSU provides that the provisions of WTO agreements shall be interpreted "in accordance with the customary rules of interpretation of public international law." The WTO Appellate Body does not specify these customary rules, but the general rules for treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT) which are widely used to ascertain the intended meaning of the WTO agreement provisions. Accordingly, when invoking the WTO's national security exception, factors to be taken into account include the ordinary meanings of the provisions, as informed by the contexts in which they appear and in light of the objects and purposes of the agreements in which they are contained; the subsequent practices of the WTO member states in drafting, applying, or interpreting these provisions; and the relevant rules of international law.

Whereas the US insists on the "self-judging" nature of "essential national security," which encompasses not only military or quasi-military emergencies or treaties but also non-military factors such as economic superiority or dominance in technology, the EU takes the opposite position. In its opening oral statement in *United States – Certain Measures on Steel and Aluminium Products*,[44] the EU emphasised that the adjectival clause "it considers" qualified only the necessity test. The chapeau of Article XXI(b) of GATT 1994 contains objective questions to be determined by the panel, such as what the 'security' interests are, whether such interests are 'essential,' and whether a measure is adopted 'for' the protection of such interests.[45] The EU's statement reveals its position regarding the WTO security exception: it does not deny the importance of protecting sovereign states' essential security interests, but upholds the jurisdiction and authority of the WTO in resolving international trade disputes.

The EU's attitude towards the objective interpretation of the national security exception is consistent with its own law. The EU law admits the importance of the national security of its member states. Article 4(2) of the Treaty on European Union provides that the treaty "shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security." National security remains the sole responsibility of each Member State. This means that it is up to member states to define their own essential security interests. The Treaty on the Functioning of the European Union (TFEU) contains a "public security" exception similar to the national security exception in the WTO law: it justifies measures taken by member states that may impair the freedom of the EU's internal market,[46] as well as those who have no direct link to the freedom of EU's internal market, as long as they comply with other EU laws.[47] Established case law further indicates that the concept of "public security" under the TFEU includes both the internal security and the external security of a member state,[48] and that a member state has the autonomy and wide discretion to take measures "as it considers necessary" for the protection of its essential security interests.[49]

In this respect, China's position is similar to that of the EU. In recent cases in which the national security exception was invoked, China expressed its opinion on the interpretation and application of this clause as a means of resolving trade disputes. In *Russia–Ukraine,*[50] China submitted arguments as a third party. First,

it admitted that the panel had the discretion to address Article XXI of GATT 1994 and to examine relevant measures. Second, it emphasised the sensitivity of the article in balancing the sovereignty and security interests of member states with trade liberalisation, which requires the careful assessment of the panel. Third, China indicated that the invocation of Article XXI should fulfil the good faith obligation.[51] Based on the subsequent practice of both the EU and China in interpreting and applying the national security exception clause, it can be concluded that the two parties hold similar positions regarding unilateralism and acknowledge the role of the WTO law in the protection of multilateral trading systems. Both the EU and China are opposed to taking unilateral sanctions without the authorisation of the WTO. They support the jurisdiction of WTO panels in the examination of objective elements of the national security exceptions and their application. This shared position between the EU and China regarding the interpretation and application of the national security exceptions within the WTO frameworks offers a promising foundation for the resolution of the on-going WTO dispute between the two parties. Also, it is especially useful in addressing key questions, such as whether the EU-China dispute involves national security issues, and the extent to which China can take measures to safeguard its essential security interest.

C. National Security Issues in the EU–China Dispute

It has been established that the national security exception in the WTO law plays a vital role in balancing trade liberalisation with sovereign states' essential national security concerns. Although precedent has no formal authority in international law, the parameters adopted to review the invocation of the security exception in the two aforementioned cases are useful in assessing the current EU–China dispute. Based on established standards, to determine whether the EU's allegation may be upheld, the following issues must be addressed:

(a) whether the One-China principle and its abidance fall within the nation's "essential security interests.";
(b) whether there is an "emergency in international relations" in the sense of Article XXI(b)(iii); and
(c) whether –if any– the measures that China has taken are "necessary" for the protection of its "essential security interests."

1. The Taiwan Issue: China's Essential Security Interest

The controversy surrounding the political status of Taiwan (the Taiwan issue/question) has always been a source of great concern for China. The Chinese government issued three official statements to declare its position and attitude towards the Taiwan issue. [52]

In August 1993, China issued a white paper titled, "The Taiwan Question and Reunification of China," which systematically expounded on Taiwan as an inalienable part of China, the origin of the Taiwan issue, the Chinese government's basic principles and its policies regarding the resolution of the Taiwan question. In this white paper, China invoked the Charter of the United Nations and "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States"[53] to emphasise the international law principle not to intervene in matters within the domestic jurisdiction of any state.

The 1993 white paper further presented the following claims, which constitute the foundation of China's position on the Taiwan issue. The first claim was that Taiwan is an inseparable part of China. The international community has recognised this fact both the Cairo Declaration and the Potsdam Proclamation which stipulated that Taiwan belonged to China's sovereign jurisdiction.[54] Second, the Taiwan issue has not been resolved, [55] China will continue to attempt to safeguard its national unity and territorial integrity.[56] Third, all of the countries in the world that have established diplomatic relations with China have reached formal agreements or understandings with the Chinese government on the Taiwan issue in accordance with international law and the One-China principle, promising not to establish any official diplomatic relations with Taiwan.[57] Fourth, Taiwan has no right to participate in the UN or similar intergovernmental international organisations or in their affiliated institutions and agencies. When China's national organisations participate in non-governmental international organisations in the name of China, the corresponding organisations in Taiwan may participate in the name of "Taipei, China" or "Taiwan, China."[58] Fifth, China's reunification is in the fundamental interests of the Chinese nation. China's reunification is conducive not only to China's own stability and development, but also to the strengthening the friendly and co-operative relations between China and other countries, as well as peace and development in the Asia-Pacific region and even globally.[59]

In 2000, the Chinese government issued a second white paper titled' "the One-China Principle and the Taiwan Issue." Reiterating the position declared in the 1993

white paper, the 2000 white paper raised two more issues, presenting China's firm stand of adhering to the One-China principle. The first was Taiwan's membership in the WTO.[60] China insisted that Taiwan be only eligible to join the WTO as "a separate Taiwan-Penghu-Jinmen-Mazu tariff zone" after the PRC's entry into GATT.[61] Second, the Chinese government recognised that a serious crisis still existed in the Taiwan Straits. Although the Chinese government remained firm in adhering to peaceful reunification and its principle of "one country, two systems," it reserved the right to adopt any available measures, including the use of force, to safeguard China's sovereignty and territorial integrity and to fulfil the great cause of reunification.[62]

The third white paper titled, "The Taiwan Question and China's Reunification in the New Era" was released after the US House Speaker Nancy Pelosi provocatively visited Taiwan on August 2, 2022.[63] Besides reiterating the historical, political and legal basis of the One-China principle, the third white paper emphases the firm rejection of China against external forces obstructing China's complete reunification. China will continue to promote peaceful cross-Strait relations and integrated development "in the new ear," but reserve the option of "taking any necessary measures" including the use of force to guard against external interference and separatist activities.[64]

With these legal documents, the Chinese government made it very clear to the international community that the One-China principle is the absolute foundation of any diplomatic relations with China and that the Taiwan issue concerns China's essential security interest, which is important not only to China's sovereignty and territorial integrity but also to peace and political and military stability in the Asia-Pacific region and around the world.

It has been argued that the "essential security interest" clause of the national security exception indicates that a member state's general security interest does not suffice and the definition of "essential security interest" must meet a higher standard than that of "non-essential security interest." The National Security Law (NSL) of the People's Republic of China, which is the basic law for regulating national security issues, came into effect on July 1, 2015.[65] The NSL regulates a holistic national security system, covering political, economic, cultural, and social security. Article 3 of the NSL provides that political security is the basis of national security. In terms of China's political security, Taiwan has long been considered the most

critical and sensitive issue.[66] In the PRC Constitution, peaceful reunification with Taiwan is described as vital to the country's interests and an "inviolable task for safeguarding national sovereignty, unity and territorial integrity."[67]

2. Diplomatic Crisis: "Emergency in International Relations"

The panel's interpretation of the term "emergency in international relations" in GATT's Article XXI(b)(iii) in the *Russia–Ukraine* case can be used as a reference in the current case. Applying a semantic interpretation, the panel interpreted "international relations" as being political in nature and therefore including "world politics," or "global political interaction, primarily among sovereign states."[68] Moreover, by using constructive interpretation, the panel insisted that "emergency in international relations" belongs to the same category as other objective facts addressed in Article XXI(b)(i) and (ii) of GATT 1994,[69] referring to "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[70] Therefore, politically compelling circumstances are not "emergencies in international relations" within the meaning of subsection (iii) unless they pertain to "defence or military interests" or to maintaining "law and public order."[71]

After fixing the parameters of the term "emergency in international relations," the panel examined the emergency between Russia and Ukraine. As the emergency had been recognised by the UN General Assembly as involving armed conflict, the panel found that the emergency fell within the category of "emergency in international relations" under Article XXI(b)(iii).[72] According to the cautious position of the panel, it was safe to treat the emergency between Russia and Ukraine as an "emergency in international relations" under Article XXI(b)(iii), as it was very close to war or armed conflict.

Relative to this case, the panel's decision in the *Saudi Arabia* case is more relevant to the China–Lithuania crisis. In the *Saudi Arabia* case, both Qatar and certain third parties (including the EU, Japan and Canada) viewed the severance of diplomatic and consular relations as not necessarily dispositive proof of the existence of "emergency in in international relations"; rather, it is a "mere political or economic" dispute.[73] The panel held that the severance of diplomatic or consular relations had been characterised as "a unilateral and discretionary act usually decided upon only as a last resort when a severe crisis occurs in the relations between" a

sending state and a receiving state. [74] The panel carefully examined the character of the severance of diplomatic relations in international law and noted that it is one type of measure that the UN Security Council may decide to use to enforce its decisions under Article 41 of the UN Charter. By referring to the commentary on Article 63 (severance of diplomatic and consular relations) of the VCLT, the panel found that severance of diplomatic relations is an exceptional act that is used "in case of security issues or serious crises in diplomatic relations" and which "was usually accompanied by rising tension in public opinion and by hostility."[75]

According to the parameters established in the aforementioned two cases, the diplomatic crisis between Lithuania and China may also fall within the category of the "emergency in international relations." First, the event that led to the diplomatic crisis was Lithuania's permitting the establishment of the Taiwan Representative Office in its territory. This was a "political emergency" in nature, involving no economic interest. Lithuania had and continues to have little competitive relation with China in terms of economy, technology or any other field. China therefore has no motivation to take any trade restriction measures against Lithuania to secure its own economic competitiveness. Any decrease in the bilateral trade volume between China and Lithuania is an inevitable consequence of the diplomatic downgrading, and it therefore is unfair to blame China unilaterally for such a decrease.[76]

Second, the diplomatic emergency is close in nature to war. Although there is currently no physical war between China and Lithuania, the present diplomatic crisis was directly caused by Lithuania's breach of the One-China commitment. Given China's repeated declarations that it reserves certain rights, including the right to use force, to resolve the Taiwan issue and prevent other nations' interference with China's sovereignty and internal affairs, the rising tension across the Taiwan Strait and the continuous deterioration of political relations between China and Lithuania may ultimately lead to the severance of the diplomatic relations and the termination of all economic connections between the two countries.[77]

3. Necessary Actions to Take against Lithuania?

In its request for consultations, the EU alleged that China has adopted a series of restrictive trade measures against Lithuania after the diplomatic crisis arose, which affected the importation and the exportation of goods from and to the EU and affected trade in service between the EU and China. The EU therefore alleged that

China breached its obligations under GATT 1994, the TFA, the SPS Agreement and the GATS. [78]

There is no evidence as of today yet that China has given any official response to the EU's request for consultations. Instead, on a number of public occasions, China has denied taking any of the measures against Lithuania alleged by the EU. China has reiterated its consistent position of respecting and obeying the WTO rules. It has also suggested that any enterprise encountering technical problems when exporting to China report it to Chinese governmental authorities through normal channels.[79] So far, all of the measures that China has taken against Lithuania are political in nature. The burden of proof falls on the EU's side to prove that not only the measures in question have actually happened, but also the alleged actions "is attributable to the State under international law," which "constitutes a breach of an international obligation of the state."[80]

Meanwhile, Chapter 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts lists 7 scenarios where an action taken is imputable to a state.[81] As of today, however, it seems that the EU has no evidence to prove whether either the alleged measures have actually happened, or they are attributable to China. That is the reason for some commentaries to use vague words like "unofficial economic sanction" and "indirect pressure through supply chain"[82] to describe the suspicious actions that they believe China has taken against Lithuania.

Nevertheless, China is entitled to take any action necessary to protect its essential security, including putting an end to all economic and trade relations with Lithuania in case of the severance of diplomatic or consular relations of the two countries. Cutting its political and economic relationships with Lithuania in response to Lithuania's breach of the One-China commitment would be necessary to ensure the integrity of China's sovereignty and to protect China's national security from the danger of division. It is explicitly stated in the third white paper on Taiwan issue that China views external interference as a prominent obstacle to China's reunification. Any diplomatic interaction with Taiwan that against the One-China principle will be treated by China as a gross interference in China's domestic affairs. Therefore, cutting off both the political and economic relations with Lithuania is one of the necessary actions to diminish the external interference, and is a plausible measure to end or prevent any form of interactions with Lithuania. In that case, any panel's ruling on measures such as a two-way embargo may be inconsequential,

or a "meaningless step" in resolving this dispute because of the severance of economic relations between the parties, as was the case in the GATT dispute like *US-Nicaraguan Trade*.[83]

V. Coercion Measures outside the WTO System?

Aside from seeking remedies via the WTO, the EU is preparing other ways to resolve its current dispute with China. In December 2021, the European Commission proposed an instrument for the protection of the Union's member states from economic coercion by third party countries (Anti-coercion Instrument: ACI).[84] This instrument is intended to "act as a deterrent" to "preserve the EU and its member states" legitimate right to make policy choices and decisions and prevent serious interference in the sovereignty of the EU or its member states.[85] The term "economic coercion" here is defined broadly; it refers to "a situation where a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a Member State." Although the proposal does not explicitly target China, there is wide-ranging discussion of the potential of the new ACI to deter China's "unofficial economic coercion" in the form of "indirect pressure through supply chains" against Lithuania and other EU members.[86]

The term 'coercion' has no unified definition under international law but appears in international treaties and legal documents. Article 52 of the VCLT provides that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[87] The Government of the Syrian Arab Republic interprets the phrase "threat or use of force" used in this article as extending "to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests."[88] Similar terms are also adopted in the Charter of the Organization of American States,[89] the Draft Code of Offences against the Peace and Security of Mankind,[90] and the UN Friendly Relations Declaration.[91]

Seeking to change the sovereign will of another state through force or the threat of force to gain unjustifiable advantages is unacceptable under international law.

However, due to the various difficulties involved in assessing the scope and impact of economic coercion tactics, international adjudicating bodies have been reluctant to offer distinct definitions of or thresholds for economic coercion in their past judgments. In *the Nicaragua* case,[92] the International Court of Justice did not uphold Nicaragua's claim that the US's trade embargo on and cessation of economic aid to Nicaragua constituted economic coercion. The Court recognised only that the trade embargo contravened the purpose or objective of the Treaty of Friendship, Commerce and Navigation between the two countries. Similarly, the WTO adjudicating bodies in *US-Nicaraguan Trade* refused to respond to Nicaragua's allegation of economic coercion.[93]

Concerns of infringement by means of economic coercion cannot be addressed or redressed through the WTO dispute settlement system or the EU-drafted anti-coercion instrument to dissuade third countries from engaging in, or continuing to engage in, economic coercion. Using its anti-coercion instrument, the EU can implement a broad range of measures against third party countries and natural or legal persons.[94] This instrument also encourages international cooperation and collective action against a third-party country that the EU members have determined as having taken economic coercion measures against one or more member states.[95] A detailed analysis of the nature and legitimacy of the EU's actions in proposing an anti-coercion instrument is beyond the scope of this article. Rather, this article examines whether it is permissible under international law for the EU to take unilateral measures against China, regardless of if either such measures are taken in the name of anti-coercion, or such measures falls outside the WTO system of resolution regarding the current dispute between China and Lithuania.

Article 23 of the DSU forbids any member state from unilaterally determining that "a violation (of WTO agreements) has occurred" and from "suspending concession or other obligations under the covered agreements." Such measures may only be taken with DSB authorization. Article 23 may be interpreted using "any relevant rules of international law applicable in the relations between the parties" according to Article 31.3(c) of the VCLT. Anti-coercion measures shall be interpreted as "self-help," which is permissible by international customary law and shall be taken as an exception to the DSU stipulations. However, Article 23 includes an exhaustive list that requires all WTO members who seek any "redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an

impediment to the attainment of any objective of the covered agreements" to abide by the rules and procedures of the DSU. It could also be argued that any measures that the EU proposes may fall outside the scope of Article 23, providing that these measures are taken not to redress a violation but to make up the loss suffered as a result of China's economic coercion. However, the issue of whether economic coercion exists, or whether these so-called anti-coercion measures constitute "self-help," also belongs to the jurisdiction of the DSB.

The DSU makes it clear that any dispute or unilateral measure concerning the WTO obligations shall be placed under the multilateral supervision of the WTO. Therefore, the EU's allegation that China has failed to comply with its WTO duties shall be and can only be handled by the WTO adjudicating bodies. The EU's anti-coercion instrument also imposes the requirement of compatibility with international law as a precondition for taking anti-coercion measures.[96] Aside from lacking the basis of international law for taking such countermeasures outside the WTO system, the EU's anti-coercion instrument cannot itself justify taking measures against China during the diplomatic crisis between China and Lithuania. The term 'coercion' in the instrument is defined as "measures such as trade or investment restrictions in order to obtain from another country an action or inaction which that country is not internationally obliged to perform."[97] As discussed above, redressing the violation of Lithuania's commitment to the One-China principle is an international obligation. However, this analysis may not stop the EU from taking action against China as it is empowered to do so by its proposed anti-coercion instrument, which would give it a great deal of discretion in deciding which actions are coercive.[98] The EU is concurrently playing the role of legislator, victim, and adjudicator in its own cases. Should the EU take any measures against China, China would probably respond firmly, as per its newly promulgated "Anti-Foreign-Sanctions Law." If so, the tense trade relations between the EU and China would be further exacerbated.

VI. Conclusion

The WTO's security exception clause is designed to balance the interests of free trade with those of nations seeking to protect their essential security. This clause also plays a crucial role in defining the evolving standards for the *bona fide* invocation

of the security exception. The proper use of the security exception clause is of particular importance in disputes with mixed political, diplomatic, and military elements. In this respect, both the EU and China object to the broad interpretation of "essential security interest" as an excuse for protectionism and insist on using the inherent jurisdictions of the WTO adjudicating bodies in the examination of trade issues with national security concerns. In other words, the EU and China both support the multilateral trade system and global economic order established by the WTO and agree that trade-related disputes must be resolved within the multilateral trading system. This is a good starting point for the resolution of the current EU–China dispute.

Applying the parameters established by the WTO rules and case law, the EU's allegation that China has violated its WTO obligations is not substantiated. The dispute arising from the China–Lithuania diplomatic crisis was caused by Lithuania's breach of its commitment to upholding the One-China principle. There is no doubt that Chinese–Lithuanian bilateral trade suffered as a result of Lithuania's broken promise, which undermined China's essential security interests. However, this damage arose not from any economic sanction or trade restrictive measure taken against Lithuania by China, but because Chinese enterprises no longer regarded Lithuania as a trusted partner, which affected trade between the two countries.

Considering the current diplomatic crisis between China and Lithuania and the possible severance of diplomatic and consular relations between the two countries, any measures perceived by China as necessary to safeguard its territorial integrity, such as an embargo and trade restrictions, may fall within the WTO's national security exception. No potential finding or ruling of the DSB against China would address the underlying causes of the comprehensive rupture in diplomatic and consular relations between the two parties.

Beyond the WTO dispute settlement system, the EU's newly adopted anti-coercion instrument offers the possibility of taking unilateral sanctions against China. Although the legitimacy of unilateral economic sanctions is a grey area in international law, the self-determination features of 'coercion' in the new anti-coercion instrument may lead to deteriorating the trade relations between the EU and China. No such measure, even if it is permissible under the WTO national security exception, can be the reason for triggering anti-coercion actions, whether it is in the name of a countermeasure, a reprisal, or anything else. It is undeniable that

the WTO dispute settlement system is now facing challenges. However, the WTO remains the main power in the maintenance of a rule-based international economic order. Taking unilateral measures of coercion without the authorisation of the WTO will not strengthen multilateralism, as the EU asserts. Rather, it may create more hurdles in the already difficult global economic environment.

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