

**As delivered**

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Panel Proceedings**

***UNITED STATES–TARIFF MEASURES ON  
CERTAIN GOODS FROM CHINA***

**(DS543)**

**Oral Statement  
by the European Union**

**Geneva, 30 October 2019**

**TABLE OF CONTENTS**

**1. INTRODUCTION ..... 3**

**2. THE PANEL IS REQUIRED UNDER THE DSU TO RULE ON THE CLAIMS  
SUBMITTED BY CHINA..... 4**

**3. THE MEASURES DO NOT APPEAR TO BE JUSTIFIED UNDER ARTICLE  
XX(A) OF THE GATT 1994 ..... 5**

**LIST OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Full Name</b>
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade of 1994
GATS	General Agreement on Trade in Services
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
US	United States
WTO	World Trade Organization

**1. INTRODUCTION**

1. The European Union thanks the Panel for the opportunity to submit its views orally in this dispute.
2. In our statement, we will address two issues: 1) whether the Panel should decline to make findings on the claims submitted by China, as requested by the United States; and 2) whether the measures at issue are justified under Article XX(a) of the GATT 1994.
3. The United States has explained that the tariff measures in dispute have been adopted in response to certain of China's unfair trade acts, policies, and practices addressed by the US authorities in a Section 301 investigation.
4. The European Union shares both the concerns expressed by the United States and the description of the problem regarding China's technology transfer policies. Foreign ownership restrictions, opaque administrative procedures, vague and unclear rules that leave discretionary leeway to the administration, discriminatory laws and practices, lack of transparency and consistency, are all elements that create the conditions for the Chinese government and State-influenced actors to pressure foreign companies to transfer their technology to Chinese entities. Moreover, cyber-theft and cyber-hacking are activities which the European Union condemns as much as the United States does.
5. However, the legitimate concerns expressed by the United States should be addressed by resorting to action under the WTO Agreement, including dispute settlement under the DSU whenever possible. In so far as some of those Chinese measures fall outside the scope of the covered agreements, they should be addressed by resorting to other available actions that are not inconsistent with the WTO Agreement.
6. The European Union reaffirms once again its strong attachment to the multilateral rules-based trade system embodied by the WTO Agreement. All the WTO Members are bound by, and must abide by, those rules in the interest of security and predictability for international trade and of economic development and growth and common prosperity. A WTO Member cannot waive unilaterally its own WTO obligations whenever it considers that another Member is acting "unfairly" and that the WTO Agreement does not provide adequate remedies. Such unilateral responses to perceived unfair acts of another Member are themselves both unfair and illicit under the WTO Agreement.

**2. THE PANEL IS REQUIRED UNDER THE DSU TO RULE ON THE CLAIMS SUBMITTED BY CHINA**

7. For the reasons set out in our written submission, the European Union considers that the Panel is required under the DSU to rule on the claims brought by China in this dispute.
8. First, China's claims concern tariff measures adopted by the United States and are based on provisions of the GATT 1994. Therefore, it is plain that the "matter" before the Panel does "involve the WTO".
9. Second, the last sentence of Article 12.7 of the DSU applies where the parties to a dispute have reached a mutually agreed solution and relieves the panel from the duty to make substantive findings. There is no evidence that, in the present case, the Parties have reached such a mutually agreed solution, let alone a mutually agreed solution that complies with the requirements of Articles 3.5 and 3.6 of the DSU. Therefore, the last sentence of Article 12.7 of the DSU is manifestly inapplicable.
10. Third, Members enjoy considerable discretion in deciding whether to bring a case. A Member is precluded from exercising its right to initiate a dispute only in very exceptional circumstances where, by doing so, it would fail to act in good faith. The United States has not established that, in bringing this dispute, China has failed to act in good faith. In particular, neither Article 3.10 of the DSU nor any other provision of the DSU provides for a "clean hands" defence. To the contrary, the last sentence of Article 3.10 of the DSU clarifies that "it is understood that complaints and counter-complaints in regard to distinct matters should not be linked".
11. Lastly, by ruling on the claims brought by China in this dispute, the Panel would not be "supporting" or "encouraging" the Chinese measures identified by the United States. Those measures are not part of the "matter" before the Panel. Whatever findings are made by the Panel with regard to the "matter" of this dispute, the United States will remain free to challenge the Chinese measures it takes issue with, either before another WTO panel or in any other WTO consistent manner which the United States deems appropriate. Moreover, the Panel's findings with regard to the US measures in dispute will not prejudice in any manner either the consistency of the Chinese measures identified by the United States with the WTO Agreement, or with any other applicable international legal instruments, or their "fairness".

**3. THE MEASURES DO NOT APPEAR TO BE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994**

12. The European Union does not take a position on whether the standards of conduct invoked by the United States may, in the abstract, qualify as “public morals” within the meaning of Article XX(a) of the GATT 1994. Nevertheless, on the basis of the arguments and evidence submitted so far by the United States, the European Union considers that the measures at issue do not seem to be “designed” to protect those public moral standards.
13. The measures at issue operate very differently from the measures that have been found provisionally justified under Article XX(a) of the GATT 1994 (or under Article XIV of the GATS) in previous cases. Those measures involved, in essence, a prohibition on the importation or marketing of goods, or on the supply of services which, because of their content, or of the way in which they had been obtained or produced, were regarded as morally offensive by the responding Member. In contrast, the measures at issue in this case provide for tariff increases on a very broad category of products, regardless, if the European Union understands the facts correctly, of whether the imports of the products concerned pose, by themselves, any threat to the public morals invoked by the United States. If the US measures were to target specifically those imports of Chinese products whose production in China has benefitted from the practices which the US is objecting to, such measures could be evaluated differently.
14. Article XX(a) seeks to preserve the autonomy of each Member to uphold its own public moral standards within its own territory by restricting, if necessary, trade in goods from other Members where the presence of those goods in its territory would offend those public moral standards. The US measures at issue are not designed to protect the US public morals in the manner described. Instead, they seem to primarily seek to induce a change in China's policies and practices.
15. Moreover, given the broad deference accorded to each Member in view of defining its own public moral standards, if measures such as those at issue could be justified under Article XX(a), it would become all-too-easy for a Member to restrict imports of any product from any other Member merely by invoking that the latter Member acts in a manner that the first Member considers to be “unfair”, according to its own public moral standards,

regardless of whether there is any relationship between the perceived unfair actions and the goods affected by the import restrictions.

16. In particular, if the US measures were deemed justified under Article XX(a), what would prevent China from considering, in turn, that those US measures are "unfair" and incompatible with China's public morals, which would justify under Article XX(a) China's own retaliatory tariff measures? Thus, the US interpretation of Article XX(a), if accepted, could trigger an endless spiral of measures, countermeasures, counter-countermeasures, etc., all of them justified under Article XX(a), which would threaten to unravel the benefits accrued to Members under the GATT 1994 and the value of a rules-based multilateral trading system.

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This concludes our oral statement. The European Union looks forward to answering any questions that the Panel may have.