In the World Trade Organization
Panel Proceedings

UNITED STATES–TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

Third Party Submission
by the European Union

Geneva, 10 September 2019

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LIST OF ABBREVIATIONS

Abbreviation	Full Name
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 exercises its right to participate in these proceedings as a third party because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, in particular the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and the *Understanding on Rules and Procedures governing the Settlement of Disputes* (DSU).

2. The European Union notes that the United States does not contest that the tariff measures at issue are incompatible with Articles I:1 and II:1 of the GATT 1994. Accordingly, in this submission the European Union will not provide comments on that question. Instead, the European Union will address the following three issues: 1) whether the Panel should decline to make findings on the claims submitted by China, as requested by the United States; 2) whether the measures at issue are justified under Article XX(a) of the GATT 1994; 3) and what is the relevant legal standard for deciding whether "Measure 3" is within the Panel's terms of reference.

3. The United States has explained that the tariff measures in dispute have been adopted in response to certain "China's unfair trade acts, policies, and practices" [1] addressed by the US authorities in a Section 301 investigation.

4. The European Union shares the US concerns with regard to those Chinese measures. The European Union has requested consultations with China with regard to some of those measures because it considers that they are incompatible with various provisions of the TRIPS Agreement, the GATT 1994 and China's Protocol of Accession[2]. The European Union continues to discuss this matter with China within that WTO framework with a view to achieving a satisfactory solution. More generally, the European Union shares the concerns expressed by the United States regarding the protection of intellectual property rights and discriminatory conditions applying to foreign licensors of intellectual property in China. These are well-known issues and long-standing concerns that the European Union has raised over the years both in political dialogues with China and at the multilateral level, such as in TRIPS Council transitional reviews. The European Union shares both the concerns expressed by the United States and the description of the problem regarding China's

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1 US first written submission, paras. 17-24.

2 *See* WT/DS549/1 and WT/DS549/Rev. 1.

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.

5. Foreign investors know that the transfer of technology is an unavoidable requirement they will have to satisfy if they wish to enter the Chinese market. Most of them have no choice but to accept these conditions if they want to survive on the global scale. Foregoing the Chinese market is simply not an option as this would mean undermining their short-term growth and profitability to the advantage of competitors. Typically, foreign companies are pressured into transferring their technology through informal and non-written practices that are steered by an internal eco-system developed through top-down education, strategic planning and industrial policy. Companies are afraid to complain openly about this situation. They face a tangible and concrete risk of retaliation to their businesses, and this is a risk they cannot afford to take.

6. The legitimate concerns expressed by the United States with regard to the Chinese measures identified in its submission should be addressed by resorting to action under the WTO Agreement, including dispute settlement under the DSU. In so far as some of those Chinese measures fell 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.

7. The United States exercised its "sovereign rights"[3] in becoming a WTO Member. WTO membership implies rights, but also obligations vis-à-vis all other Members. A WTO Member cannot waive unilaterally its own WTO obligations whenever it considers that another Member is acting "unfairly"[4] and that the WTO Agreement does not provide adequate remedies. The European Union, like many other Members, considers that such unilateral responses to perceived unfair acts of another Member are themselves both unfair and illicit under the WTO Agreement. The DSU was specifically designed, with the consent and support of the United States, to prevent those unilateral responses. Condoning those unilateral responses on the legal

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[3] US first written submission, para. 2.

[4] US first written submission, para. 1

grounds invoked by the United States in this dispute would upend the DSU and the multilateral trading system.

8. The European Union reaffirms 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. Unilateralism, and in particular unilateral measures not complying with the commonly agreed rules of the WTO Agreement, stand in the way of a stable and predictable environment. Whenever measures of other WTO Members are deemed to breach WTO rules, the only permitted way to address such a perceived breach is recourse to the WTO dispute settlement mechanism, which, where appropriate, may authorise remedies such as tariff increases. Where, in contrast, measures by other WTO Members are not deemed to breach WTO obligations, a WTO Member is entitled to take action in response, but must still do so in conformity with the WTO Agreement and any other relevant obligations under international law.

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

9. The United States asserts that China's decision to pursue this dispute represents "a profound misuse and abuse of the WTO dispute settlement system".[5]

10. More precisely, according to the United States, China's request for DSB findings" would be inconsistent "with nine separate principles of WTO dispute settlement"[6].

11. The United States further alleges that the parties have "recognized that this matter does not involve the WTO"[7] and have "settled the matter through their actions"[8].

12. For the above reasons, the United States has requested the Panel to refrain from making any findings on the claims brought by China. Instead, in

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5 US first written submission, para. 4.

6 US first written submission, paras. 37-58.

7 US first written submission, para.9.

8 US first written submission, para. 11

accordance with the last sentence of Article 12.7 of the DSU, the Panel should issue a report that is confined to "a brief description of the case and to reporting that a solution has been reached."[9]

13. For the reasons set out below, the European Union considers that the request made by the United States is without merit and, therefore, that the Panel is required under the DSU to rule on the claims brought by China in this dispute.

2.1. THE UNITED STATES IMPERMISSIBLY LINKS COMPLAINTS AND COUNTER-COMPLAINTS IN REGARD TO DISTINCT MATTERS

14. At the outset, the European Union would recall that the "matter" in this dispute consists exclusively of the specific measures and the legal basis of the complaints identified by China in its panel request.[10]

15. The Chinese measures which the United States describes as "China's unfair trade acts, policies, and practices"[11] and "China's retaliatory measures on US goods"[12] are not part of the "matter" before the Panel.

16. Yet, the US request that the Panel refrains from making findings is based, to a very large extent, on the allegation that the Panel's findings requested by China would fail to address US concerns with regard to those Chinese measures[13]. While the European Union shares the US concerns, the Chinese measures are not part of the "matter" of this dispute and, therefore, cannot be relied upon in order to challenge the Panel's jurisdiction.

17. By making such request, the United States disregards that, as clarified by the last sentence of Article 3.10 of the DSU, "complaints and counter-complaints in regard to distinct matters should not be linked".

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9 US first written submission, paras. 59-62.

10 *See e.g*. Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 76.

11 US first written submission, paras. 17-24.

12 US first written submission, paras. 25-30.

13 *See e.g*. US first written submission, para. 39 (the Panel's findings would not serve to "preserve the rights and obligations of Members", as required by Article 3.2 of the DSU, because "[as the unfair trade acts, policies, and practices of China are not covered by existing 'rights and obligations … under the covered agreements' there are no such 'rights and obligations' to be preserved through the dispute settlement process."); para. 40 (contrary to Article 3.3 of the DSU, the Panel's findings would "do nothing in terms of leading to a 'prompt settlement' of the matters covered by and arising from the US section 301 investigation."); and para. 45 (contrary to Article 4.4 of the DSU, the Panel's findings would not "achiev[e] a satisfactory settlement of the matter" because in "a broader sense" the "matter" would encompass the "full situation", including China's "unfair trade acts, policies, and practices" and "China's retaliatory measures on US goods").

2.2. THERE IS NO EVIDENCE THAT THE PARTIES HAVE SETTLED THE MATTER WITHIN THE MEANING OF ARTICLE 12.7 OF THE DSU

18. Article 12.7 of the DSU applies where the parties to a dispute have reached a mutually agreed solution. In accordance with Article 3.6 of the DSU, mutually agreed solutions must be notified to the DSB and the relevant Councils and Committees.

19. In the present case, however, no mutually agreed solution has been notified (either jointly by the Parties or by one of them). Nor has the United States provided any other evidence of the alleged settlement. Instead, the United States contends that the settlement is to be inferred from unilateral "actions" of each party. Yet, the fact that China has brought this dispute clearly indicates that China does not share the US interpretation of the legal consequences of China's own actions.

20. Furthermore, in accordance with Article 3.5 of the DSU, mutually agreed solutions must be consistent with the covered agreements.

21. According to the United States, the settlement reached by the parties would rest upon the "recognition" by both Parties that "the matter does not involve the WTO"[14]. That view, however, is manifestly untenable. The mere fact that the measures in dispute have been taken in response to Chinese measures which, according to the United States, "cannot be addressed under current WTO rules"[15] does not have the implication that the "matter" before the Panel "does not involve the WTO".

22. China's claims address US tariff measures and are based on provisions of the GATT 1994. Therefore, it is plain that the "matter" before the Panel does "involve the WTO".

23. The United States does not contest that the measures in dispute are incompatible, in principle, with Articles I:1 and II:1 of the GATT 1994, as alleged by China. Furthermore, as discussed below, the European Union considers that the measures at issue do not appear to be justified under Article XX(a) of the GATT 1994. Therefore, the implicit settlement alleged by the United States would be inconsistent with the GATT 1994 in that it would

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14 *See e.g.* US first written submission, paras. 10 and 38.

15 US first written submission, para. 44.

allow the United States to maintain tariff measures which are incompatible with the provisions of the GATT 1994 invoked by China in this dispute.

24. Since it is obvious that the Parties have not settled the matter in dispute, let alone reached a settlement that complies with the requirements of Articles 3.5 and 3.6 of the DSU, the last sentence of Article 12.7 of the DSU is manifestly inapplicable. Therefore, the Panel is required to make findings with regard to the claims raised by China, in accordance with its terms of reference, Article 11 of the DSU and the first sentence of Article 12.7 of the DSU.

2.3. THE UNITED STATES HAS NOT ESTABLISHED THAT CHINA HAS FAILED TO ACT IN GOOD FAITH IN BRINGING THIS DISPUTE

25. Members enjoy considerable discretion in deciding whether to bring a case. The Appellate Body has observed that the DSU stipulates only two explicit limits to the right of Members to bring an action:

> We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgment as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU[16].

26. In turn, the Appellate Body has interpreted the first sentence of Article 3.7 of the DSU as

> reflect(ing) a basic principle that members should have recourse to WTO dispute settlement in good faith, and not frivously set in motion the procedures contemplated in the DSU[17].

27. Thus, ultimately, 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.

28. The Appellate Body has considered that, in particular, a Member is prevented from initiating a dispute by virtue of Article 3.10 of the DSU where, as a part of a mutually agreed solution, it has "clearly stated" that it would not take legal action with respect to a certain measure[18]. In the absence of such "clear

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16 Appellate Body Report, *EC – Export subsidies on Sugar*, para. 312.

17 Appellate Body Report, *Peru – Agricultural Products*, para. 5.18.

18 Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / EC – Banana III (Article 21.5 – US)*, para. 228.

statement", a Member cannot be regarded as failing to act in good faith if it challenges that measure.

29. The United States has not established that, in bringing this dispute, China has failed to act in good faith.

30. First, as discussed above, there is no evidence that the United States and China have reached a mutually agreed solution, let alone a mutually agreed solution that complies with the requirements of Article 3.5 and Article 3.6 of the DSU. Two wrongs do not make a right and two violations of the WTO Agreement do not amount to a mutually agreed solution.

31. Second, even if China had agreed to settle the matter, there is no evidence that China ever made a "clear statement" to the effect that it would not challenge the measures in dispute.

32. Third, neither Article 3.10 of the DSU nor any other provision of the DSU provides for a "clean hands" defence. To the contrary, as recalled above, 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". Therefore, even if what the United States calls "China's retaliatory measures on US goods" were inconsistent with the GATT 1994 and with Article 23 of the DSU (a question which is beyond the Panel's terms of reference), that would not prevent China from bringing this dispute.

33. Lastly, whether the panel's findings in a given dispute would be consistent with the principles of WTO dispute settlement invoked by the United States must be assessed in relation to the specific "matter" of that dispute. Yet, as noted above, the arguments advanced by the United States on the basis of Articles 3.2, 3.3, 3.4, 3.5 and 3.7 of the DSU[19] relate, to a very large extent, to the US own concerns with regard to the Chinese measures which the United States describes as "China's unfair trade acts, policies, and practices" and "China's retaliatory measures on US Goods". To repeat, however, those measures are not part of the "matter" before the Panel. Therefore, the fact that the Panel's findings will fail to address the US concerns with regard to those Chinese measures is only to be expected under the DSU rules and wholly irrelevant for the purpose of assessing whether the Panel's findings in this dispute would be consistent with the DSU principles invoked by the United States.

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19 US first written submission, paras. 35-54.

2.4. THE FINDINGS REQUESTED BY CHINA WOULD NOT SUPPORT OR ENCOURAGE CHINA'S OWN MEASURES

34. By ruling on the claims brought by China in this dispute, the Panel would do nothing to "support"[20] or "encourage"[21] the Chinese measures identified by the United States.

35. 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 those measures, either before another WTO panel or in any other WTO consistent manner which the United States deems appropriate.

36. Moreover, the Panel's findings with regard to the US measures in dispute will not prejudge in any manner either the compatibility 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

37. The United States alleges, in the alternative, that the measures in dispute are justified under Article XX(a) of the GATT 1994.[22]

38. For the reasons set out below, the European Union considers that the measures in dispute do not appear to be provisionally justified under paragraph (a) of Article XX of the GATT 1994.

3.1. THE MEASURES DO NOT APPEAR TO BE DESIGNED TO PROTECT PUBLIC MORALS

39. The Appellate Body has clarified that an Article XX(a) analysis proceeds in two steps. First, the measure must be "designed" to protect public morals. Second, the measure must be "necessary" to protect such public morals. With respect to the "design" of the measure, there must be a relationship between an otherwise GATT-inconsistent measure and the protection of public morals, *i.e.* the measure must "not be incapable" of protecting public morals[23].

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20 *See e.g.* US first written submission, paras. 8, 51, 53, 58

21 *See e.g.* US first written submission, paras 39, 46, 47.

22 US first written submission, paras. 63-91.

23 *See e.g.* Appellate Body Report, *Colombia – Textiles*, paras. 5.67-5.70.

40. The European Union does not take position on whether the standards of conduct invoked by the United States[24] may, in the abstract, qualify as "public morals" within the meaning of Article XX(a) of the GATT 1994.

41. Nevertheless, on the basis of the argument 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.

42. In the first place, the measures at issue, including the lengthy Section 301 Reports on which they are based, do not appear to use the terms "public morals" even once. Instead, they invoke the "harm to the US economy" or the "burden on U.S commerce" caused by the Chinese measures to which they purport to respond. Similarly, according to the US submission, by adopting the measures at issue "the United States is pursuing its sovereign right to protect its fundamental economic competitiveness"[25]. All this may suggest that the measures at issue were not designed to protect "public morals" within the scope of Article XX(a) of the GATT 1994, but instead to protect purely economic interests. The subsequent characterization of those measures as being designed to protect public morals would be but an all-too-obvious *ex-post* rationalization of an otherwise uncontested breach of basic WTO obligations.

43. Moreover, 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 the previous cases cited by the United States[26]. 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. The measures at issue in those cases thus addressed directly the relevant public moral concerns of the responding Member by excluding from its territory the morally offensive goods or services.

44. In contrast, the measures at issue in this case provide for tariff increases on a very large category of products, regardless, apparently, of whether the imports of the products concerned pose, by themselves, any threat to the

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24 US first written submission, paras. 74-75.

25 US first written submission, para. 2.

26 US first written submission, para. 68.

public morals invoked by the United States. Instead, the measures at issue rely on the expectation that, as a result, the Chinese authorities will be induced to discontinue what the United States regards as morally offensive practices. For that reason, the relationship between the measures at issue and the objective invoked by the United States is too indirect to consider that the measures at issue are "capable" of addressing the threats identified by the United States and hence "designed" to protect public morals.

45. In addition, the European Union is concerned that the use of Article XX(a) of the GATT 1994 in order to justify measures such as those at issue would defeat the specific objective pursued by that exception and undermine the overall object and purpose of the GATT 1994 and the WTO agreement as a whole.

46. Article XX(a) of the GATT 1994 reflects the recognition that, as observed by the Appellate Body and previous panels, public moral standards may vary considerably from one Member to another[27]. 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 measures at issue, however, seem not to seek to restrict specifically imports into the US territory of Chinese goods that offend the US public morals. Instead, the United States seems to restrict imports from China with a view to coercing China into changing certain Chinese domestic policies, which presumably reflect China's own public morals. The US measures at issue are thus not designed to protect the US public morals, within the meaning of Article XX(a), but instead to induce a change in China's own public morals, contrary to the underlying objective of Article XX(a). Far from being justified under Article XX(a), the measures at issue would frustrate the objective pursued by that provision.[28]

47. Moreover, given the broad deference accorded to each Member in view of defining its own public moral standards[29], 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

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27 *See e.g.* Appellate Body Report, *EC – Seal Products*, para. 5.199.

28 It would be different if the US measures targeted specifically imports of Chinese products whose production in China has benefitted from the practices which the US is objecting to.

29 *See e.g.* Appellate Body Report, *EC – Seal Products*, para. 5.199.

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.

48. In particular, if the US measures were deemed justified under Article XX(a), nothing 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.

3.2. THE MEASURES DO NOT APPEAR TO BE NECESSARY TO PROTECT PUBLIC MORALS

49. The European Union further considers that, in any event, the measures at issue do not appear to be "necessary" to protect the public morals invoked by the United States from the alleged threats posed by China's measures.

50. The US analysis of the necessity of the measures at issue is very succinct[30] and fails to address all the relevant factors.

51. As the Appellate Body has explained, the "necessity" of a measure must be assessed through a "process of weighing and balancing of a series of factors"[31]. According to the Appellate Body, the relevant factors include, in particular, the following:[32]

- the relative importance of the objective pursued by the measure;
- the contribution of the measure to that objective; and
- the restrictive effect of the measure on international commerce.

52. Following the above analysis, the challenged measure should, in most cases, be compared with reasonably available alternative measures that are less trade restrictive, while making an equivalent contribution to achieving the desired level of protection of the relevant objective.[33]

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30 *See* US first written submission, paras. 78-81.

31 *See e.g.* Appellate Body Report, *EC – Seal Products*, para. 5.169.

32 *See e.g.* Appellate Body Report, *EC – Seal products*, para. 5.169.

33 *See e.g.* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; and Appellate Body Report, *EC – Seal Products*, paras. 5.169 and 5.261.

53. The European Union does not contest the relative importance of the objective invoked by the United States.

54. On the other hand, for the reasons explained above, the contribution of the measures at issue to the stated objective is too indirect.

55. At the same time, the measure at issue are far more trade restrictive than the measures found provisionally justified under Article XX(a) of the GATT 1994 in previous cases, because they apply indiscriminately to all imports of a very large category of products, regardless of whether they have been identified as morally tainted. In addition, the Panel will have to scrutinize whether the United States could have resorted to reasonably available alternative measures that would be both at least equally effective but less trade restrictive than the measures at issue.

4. THE PANEL SHOULD ASCERTAIN WHETHER THE SO-CALLED "MEASURE 3" MODIFIES THE ESSENCE OF THE MEASURES IDENTIFIED IN THE PANEL REQUEST

56. The United States contends that what it calls "Measure 3"[34] is not within the Panel's terms of reference because it was not identified in China's panel request and did not exist when the Panel was established[35].

57. The Appellate Body has clarified that, as a general rule, measures enacted after the establishment of a panel fall outside the panel's terms of reference:

> 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.[36]

58. However, according to the Appellate Body, this general rule is qualified by the following exception:

> a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the

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34 US first written submission, para. 33.

35 US first written submission, paras. 94-112.

36 Appellate Body Report, *EC – Chicken Cuts*, para. 156. Quoted in Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

> amendment does not change the essence of the identified measure[37].

59. The Appellate Body made this interpretation in *Chile – Price Band*[38] and confirmed it in *EC – Chicken Cuts*[39] and *EC – Selected Customs Matters*[40]. This interpretation has been followed by several panels[41].

60. The European Union understands that the so-called "Measure 3" amends "Measure 2" by raising the applicable duty rate on imports of products covered by Measure 2 ("List 2" products) from 10 % to 25 %[42].

61. Therefore, in accordance with the above case-law of the Appellate Body, the question of whether Measure 3 falls within the Panel's terms of reference must be decided by ascertaining whether Measure 3 "changes the essence" of Measure 2, an issue on which the European Union does not express any views.

62. The United States, nevertheless, has asked the Panel to disregard the above-mentioned Appellate Body's interpretation on the grounds that it would not be "persuasive"[43]. The United States, apparently, takes the view that a legal instrument adopted after the date of establishment of a panel may under no circumstances be covered by a panel's terms of reference.

63. The European Union submits that the United States has not advanced any "persuasive", let alone "cogent"[44] reasons in support of its request that the Panel departs from a previous, well-established, Appellate Body's interpretation.

64. First, the European Union considers that, contrary to the US allegations[45], the wording of Article 6.2 of the DSU is by no means dispositive. It refers to "specific measures", rather than to specific "legal instruments". Where an amending legal instrument does not "change the essence" of the amended

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37 Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

38 Appellate Body Report, *Chile – Price Band*, para. 126 ff.

39 Appellate Body Report, *EC – Chicken Cuts*, paras. 150-162.

40 Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

41 *See e.g. Panel Report, Colombia – Ports of Entry*, paras. 7.53-7.54; and Panel Report, *EC – Fasteners (China)*, para. 7.34.

42 US first written submission, para. 33. China's first written submission, para. 24.

43 US first written submission, para. 106.

44 *Cf.* Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 158-161.

45 US first written submission, para. 106.

legal instrument, the measure remains essentially the same[46] and, therefore, within the panel's terms of reference.

65. Second, the Appellate Body's interpretation is consistent with the object and purpose of the DSU, as expressed in Article 3.7 of the DSU, which is to "secure a positive solution to the dispute"[47]. At the same time, that interpretation takes duly into account the demands of due process. As noted by the Appellate Body, "a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'"[48]. The Appellate Body's interpretation prevents this result by holding that any amendment which "changes the essence" of a measure falls outside the panel's terms of reference.

66. In contrast, the United States' own formalistic interpretation would open the door to abusive practices that would undermine the object and purpose of the DSU. Indeed, according to that interpretation, the defendant could evade the review of a measure simply by replacing from time to time the legal instrument that provides for that measure with another legal instrument with the same or a slightly modified content, which does not change the essence of the measure.[49] The United States argues that the complainant may exercise all pertinent rights with regard to an amended measure, for example by challenging it in compliance proceedings.[50] However, this is not persuasive, since it would require the launching of compliance proceedings, which would create delays and prolong unnecessarily the existence of the WTO-inconsistent measure.

67. Lastly, the European Union disagrees with the US reading of the Appellate Body report in *Chile – Price Band System*. The United States contends that the amendment in *Chile – Price Band System* only formed "interpretative context" for the legislation identified in Argentina's panel request, while the amendment itself was not within the panel's terms of reference. The United States seems to take this position on the basis of a single sentence in the report where the Appellate Body states that "[w]e understand the Amendment as having

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46 Appellate Body Report, *Chile – Price Band System*, para. 139.

47 Appellate Body Report, *Chile – Price Band System*, para. 140.

48 Appellate Body Report, *Chile – Price Band System*, para. 144.

49 *Cf.* Panel Report, *EC – Fasteners (China)*, para. 7.524.

50 US first submission, para. 111.

clarified the legislation that established Chile's price band system."[51] However, the amendment was not a clarification in the sense of mere "interpretative context", as maintained by the United States. The amendment established a price cap for the price band system at issue where there had been no cap before, *i.e.* it amended the original measure in substance.[52] The amendment therefore "clarified" the legislation, as would *e.g.* a change in product scope, eligible applicants or effective date. However, such amendments cannot be properly qualified as mere "interpretative context". They form part of the measure itself. The Appellate Body in *Chile – Price Band System* also made very clear that the measure before it included both the original legislation and the amendment and hence that the amendment was not mere interpretative context for the original measure. It found:

> [W]e conclude that the measure before us in this appeal includes Law 19.772 [i.e. the amendment in question], because that law amends Chile's price band system without changing its essence.[53]

68. It is therefore incorrect for the United States to assert that only the original measure in Argentina's panel request was found to be within the panel's terms of reference and the amendment only constituted interpretative context or that the Appellate Body's statements only constituted *obiter dicta*.[54]

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[51] Appellate Body Report, *Chile – Price Band System*, para. 137.

[52] Appellate Body Report, *Chile – Price Band System*, para. 126.

[53] Appellate Body Report, *Chile – Price Band System*, para. 139.

[54] US first written submission, para. 108.