WORLD TRADE ORGANIZATION

WT/DS543/R/Add.1

15 September 2020

(20-6162)

Original: English

UNITED STATES — TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS543/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 21 June 2019

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless a different due date is established by the Panel upon written request of a party showing good cause.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or China's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. China shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation. The Panel may grant reasonable extensions of time for the submission of an alternative translation upon a showing of good cause.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit in connection with the next submission thus would be numbered CHN-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

(1) Before any meeting, the Panel will send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

(2) The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

(1) The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.

(2) Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 3 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

(3) After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

(4) The Panel may subsequently pose questions to the parties.

(5) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

(6) Following the meeting:

a. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

b. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day before the meeting. In that case, China shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first. The Panel may also ask the parties to comment on each other's responses to written questions posed by the Panel following the second substantive meeting.

Third party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

(1) All parties and third parties may be present during the entirety of this session.

(2) The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

(3) Each third party should limit the duration of its statement to 10 minutes, and avoid repetition of the arguments already made in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least three days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

(4) After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

(5) The Panel may subsequently pose questions to any third party.

(6) Following the third-party session:

a. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

b. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

c. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

d. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its oral statements, and if possible, its responses to questions following the substantive meeting and its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to no more than 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages. If a third-party

submission and/or oral statement does not exceed 6 pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

(1) Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry.

(2) Each party and third party shall submit documents to the Panel in Microsoft Word format or in PDF format as an e-mail attachment, or if impractical, on a CD-ROM or a DVD, by 5.00 p.m. (Geneva time) on the due dates established by the Panel. Should there be any discrepancy between the Microsoft Word format and PDF format of the documents, the Word format shall constitute the final version of the party's submission. The electronic version of documents shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Email of a document shall constitute electronic service on the Panel, the other party, and the third parties.

(3) All emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties in the proceedings. If a CD-ROM/DVD is provided, it shall be filed with the DS Registry (office No. 2047) by 5:00 p.m. (Geneva time) on the due dates established by the Panel.

(4) By 5:00 p.m. (Geneva time) on the next working day following the electronic submission, each party and third party shall submit one (1) paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). If any documents are in a format that is impractical to submit as a paper copy, the party shall inform the Panel and the other party (and third parties if appropriate) accordingly.

(4) In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the electronic versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

(5) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. A party or third party may serve its documents on another party or third party by email or on a CD-ROM or DVD. Each party and third party shall confirm that copies have been served on the parties or third parties, as appropriate, at the time it provides each document to the Panel.

(6) Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

(7) As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Measures at Issue and Claims

1. The measures at issue in this dispute are the unilateral tariff measures taken by the United States against products imported from China:

- the 25 percent additional duty imposed on approximately $34 billion of imports (List 1) from China published by the Office of the United States Trade Representative (USTR) on 20 June 2018 and entered into effect on 6 July 2018;

- the 25 percent additional duty imposed on approximately $200 billion of imports (List 2) from China, initially applied at a rate of 10 percent which entered into effect on 24 September 2018 and subsequently increased to 25 percent on 10 May 2019.

2. China challenges these unilateral actions taken by the United States because they are in violation of Article II:1(a) and (b) and Article I:1 of the GATT 1994.

II. The United States' Measures at Issue are Inconsistent with its Obligations under Article II:1(a) and (b) of the GATT 1994

3. Article II:1(a) of the GATT 1994 obligates Members to extend to all other Members "treatment no less favourable" than that to which a Member bound itself in its Schedule of Concessions as annexed to the GATT 1994. The levying of ordinary customs duties (OCDs) or other duties or charges (ODCs) that are in excess of those set forth in a Member's Schedule is a violation of Article II:1(b) and results in "less favourable" treatment being extended to the imports on which that OCD or ODC is levied, violating Articles II:1(a) and (b) of the GATT 1994.

4. Although the GATT 1994 does not define "ordinary customs duties," an evaluation of the ordinary meaning of its component terms suggests that OCDs are duties that are "normal" and not "unusual," and that, as the Appellate Body found in *China — Auto Parts*, accrue to the importer of goods exported from one Member to another "at the moment and by virtue" of importation. Because the additional import duties imposed on List 1 and List 2 products are additional *ad valorem* rates of duty collected by U.S. Customs and Border Protection in the same manner as it collects OCDs, it is clear that the additional import duties are OCDs.

5. In this case, even if the Panel were to conclude that the additional import duties are not OCDs, the additional import duties would be "other duties or charges" that would need to be recorded in the United States' Schedule to the GATT 1994 (Schedule). As the Appellate Body stated in *India — Additional Import Duties*, Article II:1(b) also prescribes the imposition of "all other duties or charges of any kind imposed on or in connection with importation" that would result in duties in excess of "the amounts imposed on the date of entry into force of the GATT 1994 . . . as recorded and bound in the Schedules of Concessions annexed to the GATT 1994."[1]

6. As demonstrated by Exhibit CHN-17,[2] the United States' additional import duties are clearly "in excess of" the duties to which the United States bound itself in its Schedule, resulting in "less favourable" treatment than provided for in its Schedule, they violate Article II:1(a) and (b).

7. Throughout this proceeding, the United States did not offer any substantive rebuttal to China's showing that the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994.

[1] Appellate Body Report, *India – Additional Import Duties*, para. 151.

[2] Exhibit CHN-17 shows clearly the bound rate, MFN rate, and rate after additional tariffs imposed by the U.S. for List 1 and List 2 products.

III. The United States' Measures at Issue are Inconsistent with its Obligations under Article I:1 of the GATT 1994

8. Article I:1 of the GATT 1994 establishes most-favoured-nation treatment underlying the WTO Agreements, which obligates Members to extend any advantage, favour, privilege or immunity granted to a product of one Member to like products of all other Members. Thus, a Member imposing additional duties on products from a single other Member, and not also applying the same duties to like products from all other Members, violates Article I:1 of the GATT 1994.

9. The Appellate Body recognized in *Canada – Periodicals* that where the only distinction between two products is the country of origin of the products, they are presumed to be like products. Moreover, the Appellate Body has recognized that, in such circumstances, the traditional multi-criteria analysis for determining "likeness" is unnecessary. As a result, where two products are identical but-for their countries of origin, and only one is subject to additional duties by a third Member, then that third Member would be violating the most-favoured-nation treatment by conferring an advantage to only one of the two products, and, therefore, would be violating Article I:1 of the GATT 1994.

10. Each Chinese product subject to the additional import duties is a "like" product from other Members not subject to those additional duties within the meaning of Article I:1 of the GATT 1994. By not imposing these additional duties on any Member other than China, the United States has advantaged each like product of those Members. In such circumstances, because the additional import duties grant an advantage within the meaning of Article I:1 of the GATT 1994 to all other Members other than China, the denial of that same advantage immediately and unconditionally to China plainly violates Article I:1.

11. Throughout this proceeding, the United States did not offer any substantive rebuttal to China's showing that the measures at issue are inconsistent with Article I:1 of the GATT 1994.

IV. The United States has Failed to Demonstrate that a "Solution" has been Reached by the Parties within the Meaning of Article 12.7 of the DSU

12. In an attempt to avoid dealing with its violations of Article I:1 and Article II:1(a) and (b) of the GATT 1994, the United States instead unilaterally declares, without China's agreement, that the parties have resolved this dispute.

13. Article 12.7 of the DSU directs the Panel to submit its findings unless the parties have developed a solution that is "mutually satisfactory." China has repeatedly confirmed, however, that no "mutually satisfactory solution" to this dispute within the meaning of Article 12.7 has been reached. The language of Article 12.7 expressly contemplates *the parties* having reached a "solution" to, or having found a "settlement" of, the matter before the Panel, rather than one party making this determination unilaterally over the objections of another. The U.S. interpretation ignores the term "mutually satisfactory" in the first sentence of Article 12.7. Also, notably, neither Article 12.7 nor Article 11 of the DSU authorizes the Panel to determine that a solution has been reached without the consent of *both* parties. The "matter" before the Panel is defined by the claims set forth in China's Panel Request. Whether the parties develop a mutually satisfactory solution to the dispute is distinct from the "matter" before the Panel.

14. Furthermore, as China has explained, no "mutually agreed solution[]" has been notified by the parties to the Dispute Settlement Body pursuant to Article 3.6 of the DSU, which is the sole means by which a panel may ascertain whether a "solution" within the meaning of Article 12.7 has been found. The fact that the parties have not submitted any notification pursuant to Article 3.6 is further evidence that no "solution" to this dispute within the meaning of Article 12.7 has been reached.

15. China also does not agree that the Phase One Economic and Trade Agreement[3] (Phase One Agreement) resolves the present dispute. It has no legal relevance to the task before this Panel because the Phase One Agreement itself does not address the measures at issue, *i.e.* the additional

[3] Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, signed January 15, 2020, entered into force on February 14, 2020 (Exhibit US–33).

import duties in dispute, before this Panel. Moreover, the additional import duties subject to this dispute remain in effect and remain a violation of Articles I:1 and II:1(a) and (b) of the GATT 1994.

16. Therefore, China confirms that there is no mutually satisfactory solution to the dispute at issue agreed by the parties, and the present dispute remains unresolved. The Panel should reject the United States' flawed interpretation and proceed to issue the necessary findings to fully resolve this dispute.

V. The United States has Failed to Rebut China's Showing that the 25 Percent Tariff Measure for List 2 Products is within the Panel's Terms of Reference

17. The United States also argues that the 25 percent tariff measure for List 2 products is not within the terms of reference of the Panel because that measure was issued and took effect after the date the Panel was established. This contention is meritless.

18. China clearly stated in its Panel Request that the request "also concerns any modification, replacement or amendment to the measures identified above, and any closely connected, subsequent measures." Notably, the Notice issued by the USTR in which it increased the additional duties from 10 to 25 percent for List 2 products highlights that the nature of the 25 percent tariff measure was to "modify the September 2018 action."[4]

19. In addition, in its Panel Request, China specifically identified the increase of additional import duties from 10 to 25 percent *ad valorem*. The 25 percent tariff measure thus falls squarely within the Panel's terms of reference. China's Panel Request provided the United States with precisely the information it needed to respond to China's case, including its contention of the subsequent increase to 25 percent on the products previously subject to the 10 percent tariff.

20. In contrast, China would be denied due process if the Panel finds the 25 percent tariff measure to be outside of the Panel's terms of reference because it would require China "to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target.'" The Appellate Body observed in *Chile — Price Band System* that a modification to a measure that does not change its "essence" falls within a panel's terms of reference. In the present case, the "essence of the measure" did not change as the duties were imposed on the same tranche of tariffs targeting approximately $200 billion worth of goods. The only change to the measure at issue is the level of duties, and the United States itself labelled the increase in additional import duties as a *modification*.

21. Therefore, the Panel should conclude that the 25 percent tariff measure is within the Panel's terms of reference.

VI. The United States has Failed to Establish a Prima Facie Case that the Measures at Issue are Justified under Article XX(a) of the GATT 1994

22. Instead of attempting to directly rebut China's arguments, the United States makes a *post hoc* argument that its violations of Article II:1(a) and (b) and Article I:1 of the GATT 1994 are justified under Article XX(a) because they are "necessary to protect public morals." But it is clear that these tariff measures are purely for economic objectives and irrelevant to public morals. The United States has failed to establish a prima facie case for its justification under Article XX(a). Specifically, the United States has not shown: (1) that the measure is "designed" to protect public morals; (2) that the measure is "necessary" to protect such public morals; and (3) that the measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."

[4] Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20,459 (9 May 2019) (Exhibit CHN-4).

A. The United States has Failed to Demonstrate that the Measures at Issue are Provisionally Justified under Article XX(a) of the GATT 1994

1. The United States has Failed to Establish the Existence of a Valid Public Morals Objective

23. Public morals were never mentioned when the tariff measures were imposed — this is a mere *post hoc* declaration. To the contrary, it was often stated that the tariff measures were for economic objectives. For example, on 7 April 2018, the day after the USTR published the proposed tariff measures on $50 billion worth of goods, the President reiterated the true purpose of the United States: "*The United States hasn't had a Trade Surplus with China in 40 years*. . . . The U.S. is losing $500 Billion a year, and has been losing Billions of Dollars for decades. *Cannot continue*!"[5]

24. The United States reaffirmed the economic motivation behind the measures in determining the scale and items to be included and excluded. On 3 April 2018, the USTR stated that "the total value of imports subject to the tariff increase is commensurate with an economic analysis of the harm . . . to the economy." The key consideration in designing the product list subject to the tariff measures was not to protect "public morals" in the U.S., but to reduce the "likely impact on U.S. consumers, based on available trade data involving alternative country sources for each product."[6]

25. The United States seeks to persuade the Panel that it should not scrutinize whether the United States has put forward sufficient evidence of the existence of a "public morals" objective. Instead, the United States considers that the Panel should simply presume that the various criminal, civil, tort, and contract laws to which it cites "reflect[]" U.S. public morals. The United States has not demonstrated that each of those laws embody alleged "public morals" that are implicated by the practices at issue. The Panel should firmly reject this effort by the United States to circumvent its burden of proof. Moreover, the United States' alleged "public morals" objective is nothing but a *post hoc* attempt to justify a purely economic objective, as evidenced by the multiple contemporaneous statements of U.S. officials regarding the economic objectives of the measures at issue.[7]

26. The United States also seeks to persuade the Panel that a diverse range of entirely unproven "trade acts, policies, and practices" that it deems "unfair" are within the scope of Article XX(a). However, as noted in *US — Gasoline*, Article XX "enumerates the various categories of government acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests *outside the realm of trade liberalization.*" Notably, interpreting the term "public morals" in Article XX(a) to encompass "unfair trade" would allow Members to circumvent the disciplines that Members have negotiated and agreed with respect to this particular concern, and would undermine the disciplines set forth in these agreements and potentially render them superfluous. Thus, properly interpreted, the term "public morals" in Article XX(a) must be understood to *exclude* economic concerns, including, but not limited to, economic concerns that implicate the trade-related disciplines of the covered agreements. The Panel should therefore reject the U.S. defence under Article XX(a) without engaging in further examination of whether the U.S. measures are designed "to protect" public morals.

27. In its second written submission, the United States admits that its measures were designed to pressure China into making various economic policy changes that allegedly will allow for "free and unfettered competition as the rule of trade" in China.[8] The United States asserts that certain economic policies of China are contrary to U.S. economic policies and norms on unfair competition, as articulated in the Sherman Act and the Federal Trade Commission Act, which is consistent with the United States' contemporaneous statements regarding its economic objectives when the tariffs were imposed. The implications of this admission are that the U.S. measures at issue were designed to advance economic interests, not to protect public morals.

[5] Donald Trump (@realDonaldTrump), Twitter (7 April 2018, 2:03 PM), https://twitter.com/realDonaldTrump/status/982680387116781568 (emphasis added).

[6] Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products, Office of the United States Trade Representative (3 April 2018) (Exhibit CHN-9).

[7] China's oral statement at the First Substantive Meeting, paras. 23-29.

[8] United States' second written submission, para. 31.

28. The United States has failed to provide factual evidence to fulfill its burden of proof for the identification of a valid public morals objective. The U.S. alleged "public morals" objective is nothing but a *post hoc* attempt to justify a purely economic objective.

2. The United States has Failed to Establish that the Measures at Issue are Designed "to Protect" Public Morals

29. Even if the Panel were to conclude incorrectly that the United States has demonstrated the existence of a valid "public morals" objective, the U.S. measures are not designed "to protect" any such objective.

30. The United States argues that "[a] measure may be necessary to protect public morals *without being limited to a product that itself offends public morals*," *i.e.*, that a Member may target *any* products in order to protect the claimed "public morals" objective, regardless of whether those products bear any relationship to that objective. The U.S. interpretation of Article XX(a) as encompassing measures that are not limited to products that themselves offend public morals is incorrect as a matter of treaty interpretation, unsupported by the relevant jurisprudence concerning Article XX, and would set a dangerous precedent. The plain meaning of "to protect" in Article XX(a) requires that the claimed public morals measure be designed to "guard against," "shield," "defend," etc. the "public morals" of the Member from some danger or source of offence. A measure designed to restrict or deter the entry of specific products *regardless* of whether the products themselves offend public morals is not designed to shield the invoking Member's public morals from offence. The United States' argument is irreconcilable with the Appellate Body's observation in *US — Shrimp* that "each of the exceptions in paragraphs (a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994." If *any products* can be embargoed to advance the alleged "public morals" objective, as the United States suggests, it would impermissibly expand Article XX(a) to encompass measures that have no nexus with public morals, defeat the specific objective pursued by that exception.

31. The U.S. argument is also irreconcilable with the object and purpose of the GATT 1994, pursuant to which Members made binding commitments to provide access to their markets to other Members on specified terms. No Member would have entered into such commitments if it believed that another Member could restrict access to its market for any imported product, at any time, solely because it believed that in doing so, it could coerce a change in the exporting Member's domestic policies. In this regard, China agrees with the European Union's assessment that:

> The obligations on market access imposed by fundamental provisions of the GATT 1994, such as Article XI or Article III could be eviscerated if a Member was allowed to invoke Article XX(a) in order to restrict imports of any products of its choice in order to induce compliance with any public moral standard, regardless of the connection between them.[9]

32. The reason the United States has advanced this untenable interpretation of Article XX(a) is clear. It is evident on the face of the U.S. measures that they are not designed to target products that embody conduct offensive to "public morals" concerns within the meaning of Article XX(a), *i.e. non*-economic concerns. Even accepting, *arguendo*, that the term "public morals" could encompass economic concerns, including the alleged "unfair" trade acts, policies, and practices, it is similarly evident that the U.S. measures are not designed to target products on the grounds that they contain content or embody conduct offensive to such alleged concerns.

33. It is clear that the U.S. measures are underpinned by economic concerns, not moral concerns. This is also clear from the USTR's approach in evaluating exclusions, which are granted in circumstances in which the "imposition of additional duties on the particular product would cause severe economic harm" and the covered product can be sourced from a U.S. producer or third countries. Together, the criteria for selecting products and evaluating requests for exclusions establishes that the U.S. measures are designed to punish China for alleged harm to the U.S. economy while avoiding causing economic harm to the U.S. consumers. The United States has thus

[9] China second written submission, para. 41, quoting the European Union's response to Panel question No. 5, para. 29.

failed to establish that its measures target products embodying conduct offensive to "public morals" within the meaning of Article XX(a).

34. The United States' alternative argument, that there is a "clear nexus" between the products covered by the initial round of tariffs and the allegedly "unfair trade" acts, policies and practices that the measures are designed to combat, must be rejected as factually unsupported and legally deficient. First, the alleged "industrial policies and practices" do not constitute the morally offensive conduct within the meaning of Article XX(a), which is limited to non-economic concerns.[10] Second, even if the Panel were to conclude otherwise, the United States offers no evidence to demonstrate that the products selected by the USTR "benefit from" any such policies or practices, other than some general statements by the USTR. Third, even if the Panel were to find that the United States had demonstrated, as a matter of fact, that certain covered products embody the "unfair trade" conduct that could fall within the scope of Article XX(a), which China does not concede, that would be a function of the over-breadth of the U.S. measures. As tariffs were imposed on virtually all imported products from China, it is possible that certain products theoretically may have benefited from the alleged "industrial policies and practices." The overwhelming evidence demonstrates that it was the level of the tariffs and their economic effect, not the products selected, which drove the design of the measures.

35. Significantly, the United States does not claim any nexus between the products targeted in the subsequent measure — the 10 percent duties that subsequently were increased to 25 percent on an additional $200 billion worth of imports — and the asserted public morals. Because the measure is not directed at particular goods containing alleged morally offensive content, it is obviously not designed to protect any alleged "public morals" under Article XX(a).

3. The United States has Failed to Establish that the Measures at Issue are "Necessary" to Protect Public Morals

36. Regarding the "necessary" requirement, China first observes that the core U.S. argument for why its measures are "necessary" in fact has nothing to do with the necessity analysis conducted under Article XX(a). Under the U.S. interpretation of "necessary," a Member can ratchet up duties on any product to any level for any length of time that the Member deems appropriate, *regardless of whether the products contain or embody morally offensive content or conduct*. This interpretation of "necessary" would render the necessity analysis meaningless.

37. Properly conducted, the necessity analysis "involves a process of 'weighing and balancing' a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure." A measure may contribute to a public morals objective where there is "a *genuine* relationship of ends and means between the objective pursued and the measure at issue." The U.S. measures do not contribute to any "public morals" objective within the meaning of Article XX(a), and are instead applied on the basis of the United States' economic objectives. No "genuine relationship of ends and means" therefore exists between the U.S. measures and any valid "public morals" objective.

38. Even if the Panel were to conclude, incorrectly, that a measure adopted to address "unfair" trade could theoretically be "necessary" under Article XX(a), the U.S. measures would still not be "necessary" for that purpose as there would again be no evidence of contribution. The United States has merely asserted that it found certain products to "benefit from" policies that it alleges relate to "unfair" trade policies. There is no evidence that USTR determined that the covered products embody any particular act, policy, or practice, including those that the United States alleges to be "unfair." To the contrary, there is ample evidence that USTR selected products on other grounds, including purported estimated harm to the U.S. economy, likely impact on U.S. consumers, and its view that China had "made clear that it would not take any steps to address the U.S. concerns."[11]

39. In any event, whatever marginal degree of contribution the Panel might find in relation to any theoretically valid "public morals" objective is outweighed by the trade restrictiveness of the U.S. measures. The U.S. has imposed an additional 25 percent duties on products covering over 6,800 tariff subheadings worth an estimated $234 billion of Chinese imports. The increases in duties have reduced the ability of Chinese imports to compete in the U.S. market by increasing their price relative

[10] Exhibit CHN-10, China's second written submission, paras. 45-46.
[11] United States' response to Panel question No. 14, para. 61.

to domestically–produced products and imports from third countries not subject to the additional tariffs. The U.S. measures are therefore severely trade-restrictive.

40. The Appellate Body has recognized that there may be cases in which it is not necessary for a Member to propose alternative measures. In *US – Gambling*, the Appellate Body emphasized that before turning to the question of an alternative measure, the question was whether the United States had made a *prima facie* case that its measures were necessary.[12] Both *EC – Seal Products* and *US – Tuna II (Mexico)* observe in the context of the "necessity test" that there are circumstances in which "a weighing and balancing exercise would not require that a panel proceed to evaluate alternative measures."[13] In *US – Tuna II (Mexico)*, the Appellate Body stated in the context of Article 2.2 of the TBT (necessity test) that alternative measures may not be required when the challenged "measure is trade restrictive and makes no contribution to the achievement of the legitimate objective."[14]

41. China maintains that due to the unique facts of this dispute, there is no requirement for China to present or the Panel to examine alternative measures. As discussed repeatedly in this proceeding, the U.S. measures do not contribute to any "public morals objective" within the meaning of Article XX(a) because the United States imposed extremely restrictive measures on products chosen on the basis of the economic objectives unrelated to whether those products contain morally offensive content or embody morally offensive conduct. The total absence of contribution to the public moral objective, combined with the overwhelming trade-restrictiveness of the measure, which extends to almost all imports from China, makes consideration of alternative measures unnecessary.

B. The United States has Failed to Demonstrate that the Measures at Issue are Justified under the *Chapeau* of Article XX of the GATT 1994

42. In imposing the additional import duties only on Chinese products on grounds unrelated to whether those products contain morally offensive content or embody morally offensive conduct, the U.S. measures are inherently coercive, arbitrary, unjustifiable, and constitute a disguised restriction on trade.

1. The United States has Failed to Demonstrate that the Measures at Issue do not Constitute a "Means of Arbitrary or Unjustifiable Discrimination"

43. Pursuant to the *chapeau* of Article XX, a measure may not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Furthermore, a Member invoking Article XX(a) must demonstrate that a "rational connection" exists between its measures and an objective falling within the scope of Article XX(a). Such a demonstration ensures that the Member is acting in good faith rather than engaging in "the abusive exercise" of the limited exceptions set forth in Article XX.

44. The United States has not established that the additional import duties are limited to Chinese products demonstrated to embody *any* particular conduct, let alone *morally offensive* conduct within the meaning of Article XX(a), therefore, their imposition is fundamentally arbitrary and unjustifiable.

45. The lack of a rational connection between the U.S. measures and the purported public morals objective reflects the true, coercive intent of the U.S. measures. Despite the efforts of the Appellate Body in *US — Shrimp* to emphasize the limitations imposed by the *chapeau* on unilateral actions by a Member, the United States continues to assert that nothing in the text of Article XX prohibits Members from using its measures to "induc[e] policy changes."[15] China strongly disagrees.

46. In *US — Shrimp*, the Appellate Body objected to the U.S. measure on the grounds that it exerted a coercive effect on the policy decisions of foreign governments. As the Appellate Body observed in evaluating the U.S. measure at issue in the *US-Shrimp* dispute, "[p]erhaps the most conspicuous flaw in this measure's application relates to its *intended and actual coercive effect on*

[12] Appellate Body Report, *US – Gambling*, para. 310.
[13] Appellate Body Report, *EC – Seal Products*, fn. 1299 and para. 5.169; Appellate Body Report, US – Tuna II (Mexico), fn. 647.
[14] Appellate Body Report, *US – Tuna II (Mexico)*, fn. 647.
[15] United States' second written submission, paras. 64-65.

the specific policy decisions made by foreign governments, Members of the WTO."[16] The coercive intent here is more obvious than in *US — Shrimp*. The United States has expressly confirmed that the additional import duties are concerned with effectively "influencing China" to take "specific policy decisions."[17] Moreover, the lack of a relationship between the U.S. measures, purported public morals objective, and the covered products confirms the true, coercive intent of the U.S. measures.

47. According to the United States' own *post hoc* rationalization, it has applied its measures in order to coerce China into eliminating various alleged policies, not to prevent morally offensive products from entering the United States. The application of the United States' measures in this manner confirms that they are applied in a manner that results in unjustifiable discrimination. None of the arguments presented by the United States under the *chapeau* address these fundamental flaws.

2. The United States has Failed to Demonstrate that the Measures at Issue do not Constitute a "Disguised Restriction on International Trade"

48. Should the Panel proceed to examine whether the U.S. measures constitute a disguised restriction on international trade, China submits that the U.S. measures also violate the *chapeau* on this basis. The U.S. measures restrict international trade under the guise of a public morals measure. This is apparent from the fact that the measures do not restrict Chinese imports on the basis of their morally offensive content or morally offensive conduct. Furthermore, the United States has repeatedly admitted that it has implemented the additional import duties for reasons that have nothing to do with the protection public morals, but rather to restrict trade with China in order to obtain the elimination of China's alleged "unfair" trade policies. In this respect, the U.S. measures hardly qualify as "disguised" – the restrictions that have been imposed on essentially all Chinese products are blatantly motivated by economic objectives, which has been admitted publicly and repeatedly.

49. The United States argues that because it adopted its measures in a "deliberate" manner following efforts to address China's so-called "unfair trade acts, policies, and practices" through other means, those measures are not arbitrary. But the fact that the United States deliberately imposed restrictions on non-morally offensive products only confirms that the United States' measures are applied in a manner inconsistent with the *chapeau*. Making a deliberate choice to discriminate in an arbitrary manner does not render the resulting discrimination somehow not arbitrary.

50. The Panel should therefore reject the United States' argument that its measures do not result in arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

VII. Conclusion

51. The United States has taken unilateral actions against imports from China valued at $234 billion in violation of Article I.1 and Article II.1(a) and (b) of the GATT 1994. Throughout this proceeding, the United States did not offer any substantive rebuttal to China's showing that the measures at issue are inconsistent with the above rules. Rather, the United States unilaterally declared, without China's agreement, that the parties have resolved this dispute. As China has repeatedly confirmed, no "mutually satisfactory solution" to this dispute within the meaning of Article 12.7 of the DSU has been agreed and the present dispute remains unresolved. Article 12.7 of the DSU directs the Panel to issue the necessary findings to fully resolve this dispute. The United States has resorted to a transparently *post hoc* justification that its unilateral actions were justified under Article XX(a) of the GATT 1994. For the reasons discussed at length before this Panel, the United States' argument fails to meet the requirements of Article XX(a) and the *chapeau* of Article XX of the GATT 1994 in all respects. China therefore respectfully requests that the Panel find that the United States' measures at issue are inconsistent with its obligations under the GATT 1994.

[16] Appellate Body Report, *US – Shrimp*, para. 161.
[17] United States' second written submission, para. 66.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. The matters related to this dispute are currently subject to bilateral discussions between the Governments of China and the United States. The parties are holding these discussions at multiple levels, including between the leaders of the two disputing parties. It is those bilateral discussions, and not any possible findings to be adopted by the Dispute Settlement Body ("DSB"), that will resolve the important issues arising from China's unfair and harmful technology transfer policies, from the U.S. response to those policies, and from China's unilateral retaliation.

2. Under these circumstances, the outcome of a dispute settlement proceeding would be pointless, and, worse – a misuse by China of the dispute settlement system by trying to have the WTO side with China in support of its fundamentally unfair technology transfer policies. As noted, China has already taken the unilateral decision that the U.S. measures cannot be justified under WTO rules, and on that basis, already imposed tariff measures on most U.S. goods. Accordingly, addressing China's legal claims would not "secure a positive solution to [this] dispute," as China has already adopted the response that China unilaterally has determined is appropriate.

3. Fundamentally, both the United States and China have recognized that this matter is not a WTO issue: China has taken the unilateral decision to adopt aggressive industrial policy measures to steal or otherwise unfairly acquire the technology of its trading partners; the United States has adopted tariff measures to try to obtain the elimination of China's unfair and distortive technology-transfer policies; and China has chosen to respond – not by addressing the legitimate concerns of the United States – but by adopting its own tariff measures in an attempt to pressure the United States to abandon its concerns, and thus in an effort to maintain its unfair policies indefinitely.

4. By taking actions in their own sovereign interests, both parties have recognized that this matter does *not* involve the WTO and have settled the matter themselves. Accordingly, there in fact is no live dispute involving WTO rights and obligations. Therefore, in light of each party's action settling the matter, the report of the Panel should "be confined" to a brief description reporting that the parties have reached their own resolution, as provided for in Article 12.7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

5. Even aside from the fact that the parties have settled the matter through their actions, were the Panel to examine China's contentions, the Panel would find that the U.S. measures at issue would be justified under WTO rules.

6. The United States adopted the measures at issue in this dispute to combat China's longstanding policy and practice of using government interventions, coercion, and subterfuge to steal or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S. companies with the aim of advantaging Chinese companies and advancing China's industrial policy goals. Although China's conduct is not addressed by current WTO rules, it is unfair and contrary to basic moral standards. No WTO Member endorses forced technology transfer policies and practices such as those employed by China.

7. Finally, the United States notes that one of the U.S. measures that China is challenging in this dispute is not within the Panel's terms of reference because it was issued and took effect after China requested the establishment of a panel. Accordingly, for this additional reason, there is no legal basis for the Panel to examine or make any findings with respect to that measure.

II. FACTUAL BACKGROUND

8. In March 2018, the United States released a comprehensive report ("Section 301 Report") on China's policies relating to technology transfer, intellectual property, and other unfair trade acts. The Section 301 Report is over 200 pages in length, and is based on public testimony, public submissions, and other evidence. The United States encourages the Panel to read the Report (provided as Exhibit US-1) in its entirety. The Report supported the following conclusions.

9. First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies.

10. Second, China's regime of technology regulations forces foreign companies seeking to license technologies to Chinese entities to do so on non-market-based terms that favor Chinese recipients. These rules do not apply to technology transfers occurring between two domestic Chinese companies.

11. Third, China directs and unfairly facilitates the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies.

12. Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets.

13. In November 2018, the United States issued a 50-page supplemental report. The supplemental report explains that China has not fundamentally altered its unfair, unreasonable, and market-distorting practices that were the subject of the March 2018 report. Indeed, certain practices, such as cyber-enabled theft of intellectual property, appear to have grown worse.

A. China's Retaliatory Measures on U.S. Goods

14. Instead of taking steps to address the unfair acts and policies documented in the Section 301 Report, China has imposed retaliatory tariffs on approximately $110 billion in U.S. goods and reportedly taken other retaliatory actions against U.S. companies.

15. First, on June 16, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on $50 Billion of Imported Products Originating from the United States.

16. Second, on August 8, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on $16 Billion of Imported Products Originating from the United States.

17. Third, on September 19, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on Approximately $60 Billion of Products Originating from the United States.

18. Fourth, on August 23, 2019, China announced that would impose tariffs of 5 to 10 percent on U.S. goods with a trade value of $75 billion.

19. In sum, instead of addressing its unfair trade acts, policies, and practices, China has increased tariffs on U.S. goods with an annual trade value of approximately $110 billion and threatened additional retaliation to further protect the unreasonable acts, policies, and practices identified in the Section 301 Report. China has openly stated that its retaliation was adopted in response to the same increased tariffs that China purports to challenge in this WTO dispute.

III. MEASURES AT ISSUE

20. The measures that China raises in its request for panel establishment are additional duties that the United States implemented with respect to certain products from China on July 6, 2018,

and September 17, 2018. In addition, China's First Written Submission purports to raise claims with respect to a third measure. This third measure (i.e., "Measure 3") was not included in China's request for panel establishment, and is not within the Panel's terms of reference.

IV. CHINA'S ATTEMPT TO OBTAIN DSB FINDINGS WHILE SIMULTANEOUSLY RETALIATING AGAINST MOST U.S. EXPORTS IS A MISUSE OF THE DISPUTE SETTLEMENT SYSTEM, AND THE PANEL'S REPORT SHOULD NOTE ONLY THAT THE PARTIES HAVE REACHED THEIR OWN SOLUTION

21. Various provisions of the DSU describe the function, purpose, or aim of WTO dispute settlement. China's request for this panel to issue findings on the U.S. tariff measures is inconsistent with the principles reflected in these provisions.

22. There is no role for WTO dispute settlement where, as here, the parties to a dispute have reached their own solution. This principle is reflected in the DSU, including in Article 12.7, which provides in relevant part that "[w]here a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."

23. Article 3.2 of the DSU, second sentence, provides in part that "Members recognize that [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements." 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. And with respect to the U.S. tariff measures, China has already taken the countermeasures that it itself has chosen; in these circumstances.

24. Article 3.3 of the DSU provides that the "prompt settlement of disputes… is essential to the effective functioning of the WTO…" Given that China has already taken every retaliatory measure that China sees fit to adopt, China's pursuit of DSB findings does nothing in terms of leading to a "prompt settlement".

25. Article 3.4 of the DSU provides that "[r]recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." The United States has transparently explained that it has adopted the tariff measures to address unfair technology transfer policies of China that cannot be addressed under current WTO rules, and China has openly retaliated by placing tariffs on most U.S. exports, and has taken other retaliatory measures as well. In these circumstances, DSB findings on the U.S. tariff measures would not promote a satisfactory settlement of the matter. At most, DSB findings would provide China with a rhetorical point in support of its efforts to maintain its unfair trade acts, policies, and practices, and would thus inhibit, rather than promote, a satisfactory settlement.

26. Article 3.5 of the DSU states that solutions should not "impede the attainment of any objective" of the covered agreements. At most, China might see any DSB findings against the U.S. measures as encouragement to prolong this dispute by maintaining its aggressive and trade distorting policies for as long as possible. This result would be inconsistent with the fundamental objectives of the WTO Agreement and the GATT 1994, and thus – contrary to DSU 3.5 – would impede the attainment of the objectives of the covered agreements.

27. Article 3.7 of the DSU provides that, "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful" and that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Here, the facts and circumstances strongly indicate that China – in deciding to bring this dispute – did not fulfil its obligation to "exercise its judgement" that the procedures "would be fruitful" in terms of "securing a positive solution." To the contrary, China is well aware that this DSB proceeding will not contribute to the resolution of the issues arising from China's unfair trade acts, policies, and practices.

28. Article 3.2 of the DSU provides, in part, that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." The findings sought by China would not enhance the "security and predictability" of the multilateral

trading system but would rather undermine it by having the WTO side with China in support of its fundamentally unfair technology transfer policies.

29. Article 3.7 of the DSU provides that the suspension of concessions or other obligations is a "last resort," and "subject to the authorization by the DSB of such measures." China's first resort was to apply additional duties on goods of the United States "on a discriminatory basis vis-à-vis" the United States well before any request for panel establishment. Furthermore, China has adopted these tariff measures without any "authorization by the DSB of such measures."

30. Article 3.10 of the DSU provides, in part, that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." China's hypocritical invocation of WTO dispute settlement procedures can only be viewed as a cynical attempt to misuse the WTO system to try to obtain some rhetorical support for maintenance of its unfair, trade distorting measures not involving WTO disciplines. China is well aware that its request for a WTO panel to issue findings regarding the U.S. response to China's unfair policies will in no way advance a resolution of the dispute.

31. In sum: China already has taken self-help in the form of tariff measures, and other retaliatory measures, affecting most U.S. exports. At most, DSB findings on the U.S. tariff measures would provide China with a public relations point that China presumably would employ in an effort to maintain unfair and harmful technology transfer policies that are coercive to the viability of the multilateral trading system. China's pursuit of this dispute cannot be seen as anything other than an attempted misuse of the system.

32. Therefore, the Panel should follow the guidance provided in the last sentence of Article 12.7 of the DSU. It provides: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Given this situation, the Panel should decline China's request that the WTO dispute settlement system insert itself into the ongoing interactions and discussions between the United States and China regarding China's unfair technology transfer policies by issuing a panel report with findings on the allegedly WTO-inconsistent U.S. tariff measures. Instead, in 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."

V. EVEN ASIDE FROM THE RESOLUTION FOUND BY THE PARTIES, WERE THE PANEL TO EXAMINE CHINA'S CONTENTIONS, IT WOULD FIND THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

33. Were the Panel to examine China's contentions, it would find that the measures at issue are legally justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

34. As explained below, the challenged measures "protect public morals" within the meaning of Article XX(a) because (1) China's unfair trade acts, policies, and practices violate standards of right and wrong and; (2) the United States adopted the measures to address those unfair acts, policies, and practices.

35. The measures at issue in this dispute "protect public morals" with the meaning of Article XX(a) because the United States adopted the measures to "obtain the elimination" of conduct that violates U.S. standards of rights and wrong, namely China's unfair trade acts, policies, and practices. As noted, each WTO Member may seek to protect the public morals of its society.

36. China – as a matter of state policy and practice – uses coercion and subterfuge to *steal* or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S companies with the aim of advantaging Chinese companies and achieving China's industrial policy goals. China's policy and practice of state-sanctioned *theft* implicates "public morals" within the meaning of Article XX(a) because it violates prevailing U.S. "standards of right and wrong" as reflected in the state and federal laws of the United States, under which the act of "theft" is universally deemed a criminal offense.

37. In sum, the unfair trade acts, policies, and practices detailed in the Section 301 Report clearly violate prevailing U.S. standards of right and wrong and thus implicate U.S. "public morals" within the meaning of Article XX(a) of the GATT 1994. And, because the United States adopted the measures at issue to address (*i.e.*, "obtain the elimination of") such unfair trade acts, policies, and practices, the measures at issue "protect public morals" within the meaning of Article XX(a).

38. China employs the unfair trade acts, policies, and practices detailed in the Section 301 Report to advance its "industrial policy" goals and broader "economic objectives." Therefore, it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices while it is advantageous to China to do so, for example, until the economic costs of doing so begin to approach or outweigh the economic benefits.

39. To protect U.S. interests in moral (right or wrong) economic behaviour, it is necessary for the United States to adopt measures that are capable of changing China's economic cost-benefit analysis. The measures at issue in this dispute do just that by imposing significant tariff increases on Chinese products until China takes steps to eliminate the unfair trade acts, polices, and practices detailed in the Section 301 Report.

40. Moreover, the United States adopted the measures at issue after nearly a decade of trying to address China's unfair trade acts, policies, and practices. That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

41. For the foregoing reasons, the Panel should find that the measures are issue are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

42. The United States has not applied the measures at issue in a manner inconsistent with the chapeau of Article XX because no other government is engaging in forced technology transfer policies and practices of the type or to the extent that China is, causing tens of billions of dollars of annual harm to the United States.

43. Given the deliberate nature in which the United States proceeded *before* adopting the measures at issue in this dispute, there is no credible basis to conclude that the United States has applied the measures in a "capricious, unpredictable, [or] inconsistent" (i.e., "arbitrary") manner.

44. As noted, the United States adopted the measures at issue following nearly a *decade* of trying to address China's unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms, and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government. Then, the United States conducted a comprehensive eighth month investigation, resulting in the production of the 200-page report that exhaustively documented China's unfair trade acts, policies, and practices. Even after the report was released in March 22, 2018, the United States continued to constructively engage China concerning the unfair trade acts, policies, and practices included in the investigation. It was only after these engagements with China failed, that the United States ultimately decided to adopt the measures at issue on July 6, 2018, and August 23, 2018, respectively.

45. The measures at issue are not being applied in a manner that that constitutes a "disguised restriction on international trade" because the United States has taken no steps to conceal the reasons for adopting the measures at issue.

46. In sum, the Panel should find that the measures at issue are legally justified because they are (1) "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994; and(2) not being applied in manner inconsistent with the chapeau of Article XX of the GATT 1994.

VI. MEASURE 3 IS NOT WITHIN THE SCOPE OF THIS DISPUTE

47. The United States also explains in this Section that the Panel is legally precluded from examining and making findings on one of the measures at issue in this dispute – Measure 3. Because that measure was issued and took effect *after* the date this Panel was established, the measure falls outside the Panel's terms of reference as set by the DSB.

48. China advances several arguments to support the view that Measure 3 falls within the Panel's terms of reference, notwithstanding that Measures 3 was issued and took effect after the Panel was established. All of China's arguments are without merit.

49. China argues that Measure 3 is within the Panel's terms of reference because it modifies a measure identified in China's panel request, and because the panel request itself refers to "any modification" of the measures identified therein. Simply put, the DSU provides no support for the view that a measure not identified in a panel request can fall within a panel's terms of reference because it modifies a measure that is identified in a panel request.

50. Contrary to China's argument, the Appellate Body's report in *Chile – Price Band System* does not support – much less confirm – the view that that a measure issued after the date of panel establishment can fall within a panel's terms of reference.

51. The text of the DSU does not support China's suggestion that the inclusion of Measure 3 in the Panel's terms of reference is necessary "to secure a positive solution to the dispute."

52. For the forgoing reasons, to the extent the Panel makes findings on the alleged WTO-inconsistency of the U.S. tariff measures, the United States the Panel should find that Measure 3 falls outside its terms of reference.

VII. CONCLUSION

53. For the foregoing reasons, the United States respectfully requests that the Panel reject China's request for findings under Articles I and II of the GATT 1994 with respect to the allegedly WTO-inconsistent tariff measures. The United States instead requests that the Panel issue a report with a "brief description" of the pertinent facts of the dispute and "reporting that a solution has been reached" by the parties, as prescribed by Article 12.7 of the DSU. Were the Panel to examine China's contentions, the Panel should find that the U.S. measures are justified under Article XX(a) of the GATT 1994, and that Measure 3 falls outside the Panel's terms of reference.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

54. As explained in our first written submission, China has already taken retaliatory tariff actions in response to the U.S. measures at issue in this dispute. Therefore, it is clear that China has no serious intention or expectation of resolving the matter at issue through the WTO dispute settlement process. The Panel in this dispute should not tolerate China's cynical misuse of the dispute settlement process.

55. There is no legal basis for the Panel to issue any of the findings or recommendations requested by China because the Parties have already reached a "settlement of the matter" under Article 12.7 of the DSU.

56. Second, even if the Panel were to entertain China's legal claims, it would find the U.S. tariff measures at issue are legally justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

I. CHINA'S UNFAIR TRADE ACTS, POLICIES, AND PRACTICES

57. On March 2018, the United States released a comprehensive report ("Section 301 Report") on China's policies relating to technology transfer, intellectual property, and other unfair trade acts. The Report supported the following conclusions.

58. First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies. For example, China has uses such foreign ownership restrictions and related policies to compel foreign automakers to transfer technology and intellectual property to Chinese companies.

59. Second, China's regime of technology regulations forces foreign companies seeking to license technologies to Chinese entities to do so on non-market-based terms that favor Chinese recipients.

60. Third, China directs and unfairly facilitates the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies. For example, China's has used its outbound investment strategy to facilitate the acquisition of foreign integrated circuit (IC) and semiconductor technology by Chinese companies in support of China's industrial policy goals.

61. Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. China has used cyber-enabled theft and cyber intrusions to serve its industrial policy objectives.

62. As noted in the Update to the Section 301 Report, companies in Australia, Japan, the Europe Union, and South Korea have also been the subject of cyber-intrusions that appear traceable to the Chinese government.

II. CHINA'S RETALIATORY MEASURES ON U.S. GOODS

63. Instead of taking steps to address the unfair acts and policies documented in the Section 301 Report and its Update, China has imposed retaliatory tariffs on approximately $110 billion in U.S. goods and reportedly taken other retaliatory actions against U.S. companies.

64. First, on June 16, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on $50 Billion of Imported Products Originating from the United States.

65. Second, on August 8, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on $16 Billion of Imported Products Originating from the United States.

66. Third, on September 19, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on Approximately $60 Billion of Products Originating from the United States.

67. Fourth, on August 23, 2019, China announced that would impose tariffs of 5 to 10 percent on U.S. goods with a trade value of $75 billion.

68. In sum, instead of addressing its unfair trade acts, policies, and practices, China has increased tariffs on U.S. goods with an annual trade value of approximately $110 billion and taken or threatened additional retaliation to further protect the unreasonable acts, policies, and practices identified in the Section 301 Report.

69. China has openly stated that its unilateral retaliation was adopted in response to the same U.S. measures that China purports to challenge in this WTO dispute. China – of course – did not obtain DSB authorization before adopting these measures, as required under the DSU.

III. THE PANEL SHOULD NOT ISSUE FINDINGS ON CHINA'S LEGAL CLAIMS BECAUSE THE PARTIES HAVE REACHED "A SETTLEMENT OF THE MATTER" WITHIN THE MEANING OF ARTICLE 12.7 OF THE DSU

70. The Panel should not make findings or recommendations on China's legal claims. Through their actions, it is apparent that both Parties agree that these matters should be resolved outside of the WTO dispute settlement process.

71. As noted, China suspended WTO concessions to the United States for the explicit purpose of retaliating against the US measures at issue. China did so without first obtaining authorization from the DSB to impose such countermeasures, as required under the DSU.

72. Furthermore, China and the United States have entered into high-level negotiations to resolve U.S concerns with China's technology transfer policies and China's concerns with the U.S. response. Most recently, the United States reached Phase 1 of an agreement to resolve these matters.

73. In sum, both parties agree that the matter involving U.S. concerns with China's technology transfer policies, and with China's concerns with the U.S. response, are to be addressed outside of the WTO system. Applying the terms of Article 12.7 of the DSU, the parties are in mutual agreement that in terms of WTO rules and procedures, the solution is to take the matter outside of the WTO system. In these circumstances, Article 12.7 provides that "that report of the panel shall be confined brief description of the case and to reporting that a solution has been reached."

74. Accordingly, the report of the Panel in this dispute should be confined to reporting that the Parties have reached their own solution and should not include any examination of the China's legal claims.

75. From a systemic point of view, a decision by this Panel to accede to China's request for legal findings would undermine dispute settlement mechanism by signaling that WTO members can ignore DSU procedures – by pre-emptively suspending WTO concessions whenever they feel that their WTO rights have been infringed – and still obtain DSB findings after the fact.

IV. THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

76. The United States has shown that the measures at issue are legally justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. As explained in the U.S. first written submission , the measures at issue in this dispute "protect public morals" with the meaning of Article XX(a) because the United States adopted them to "obtain the elimination" of conduct that violates U.S. standards of rights and wrong, namely various unfair trade acts, policies, and practices engaged in by China.

77. China's policy and practice of state-sanctioned theft and coercive trade practices implicate "public morals" within the meaning of Article XX(a) because it violates prevailing U.S. "standards of right and wrong" as reflected in the state and federal laws of the United States, under which the act of "theft" is universally deemed a criminal offense.

78. The measures at issue aim to "protect" U.S. "public morals" in at least two ways.

79. First, the measures protect U.S. public morals by combatting conduct that is considered immoral under prevailing U.S. standards of right and wrong.

80. Second, the measures also protect U.S. morals by seeking to prevent China's conduct from undermining U.S. moral standards, such as norms against theft and coercion. If China is permitted to carry out its various unfair trade acts, policies, and practices without restraint, actors in the United States may come to believe that such conduct is "normal" and conclude that they have no choice but to *emulate* such conduct to compete in the market, or *succumb* to such conduct as pre-condition of accessing China's market.

81. As the United States has explained, the U.S. tariffs measures at issue play a "necessary" role toward the goal of eliminating China's unfair trade acts, policies, and practices by raising the cost of such practices and thereby reducing China's incentive to continue engaging in such conduct going forward.

82. The Chinese products subject to additional tariffs under the July 6, 2018 U.S. measure were selected precisely because those products benefit from the unfair trade policies documented in the Section 301 Report.

83. The measures at issue are clearly "necessary" when evaluated under the factor-based test that the Appellate Body has often applied to assess a measure's necessity for purposes of Article XX of the GATT 1994. Such factors include (1) the relative importance the objective pursued by the measure; (2) the contribution of the measure to that objective; and (3) the trade-restrictiveness of the measure.

84. First, the measures at issue pursue the vitally important objective of upholding U.S. norms against theft and coercion that are threatened by China's unfair trade acts, policies, and practices.

85. Second, the measures at issue make a substantial contribution to the objective or protecting U.S. public morals by raising the cost of such practices and reducing China's incentive to continue engaging in such conduct going forward. The U.S. measures also target Chinese goods that benefit from these policies.

86. The measure at issue further contribute to the objective of protecting public morals by signaling to U.S. citizens that China's trading conduct is so unacceptable and contrary to basic norms of fairness that the United States government was compelled to take action by lowering trade in the Chinese products that may benefit from China's unfair trade policies.

87. Third, the measures are not overly trade restrictive. The tariffs are at moderate levels, and are calibrated to obtain the elimination of the unfair technology transfer policies.

EXECUTIVE SUMMARY OF U.S. SECOND Written Submission

I. INTRODUCTION

88. As the United States has explained in its written and oral submissions, there is no legal basis for the Panel to issue the findings or recommendations requested by China because the Parties have reached a "settlement of the matter" within the meaning of Article 12.7 of the DSU. And, even if the Panel were to examine the measures at issue, it would conclude that they are "necessary to protect public morals" and therefore legally justified under Article XX(a) of the GATT 1994.

89. First, that a "settlement of the matter" has been reached is confirmed by objective facts on the record. China asserts that the Panel is "not permitted" to consider the objective evidence that a settlement has been reached. China's position finds no support in the DSU and is affirmatively contradicted by Article 11 of the DSU. Nor is there any support in the DSU for China's assertion that a "settlement" within the meaning of Article 12.7 must be memorialized in the form of a "mutually agreed solution."

90. Second, China does not even attempt to rebut the U.S. argument that the measures at issue are "necessary" within the meaning of Article XX(a). At any rate, the measures at issue in this dispute clearly satisfy the "designed to" and other "necessity" tests applied in previous panel and Appellate Body reports.

91. Third, China does nothing to substantiate its *new* assertion that the conclusions set out in the Section 301 Report are "factually baseless."

II. THE UNITED STATES HAS ESTABLISHED THAT THE PARTIES HAVE ARRIVED AT A "SETTLEMENT OF THE MATTER" WITHIN THE MEANING OF ARTICLE 12.7 OF THE DSU

92. As the United States has explained, the parties' agreement to settle this matter outside the WTO system is confirmed by objective facts on the record.

93. First, China has already applied tariff measures to imports from the United States in excess of its WTO commitments for the explicit purpose of retaliating against the measures for which it now seeks legal findings. China, of course, did so without first obtaining the authorization from the DSB pursuant to the DSU. China does not dispute the fact that it has already imposed retaliatory tariff measures in response to the U.S. measures at issue. Nor does China dispute that these retaliatory measures remain in effect.

94. Second, instead of challenging China's retaliatory actions at the WTO, the United States has entered into high-level negotiations with China with the aim of resolving U.S. concerns with Chinese conduct documented in the Section 301 Report and China's concerns with the U.S. response (*i.e.*, the U.S. measures at issue).

95. Third, China's decision to pursue this dispute has been a pointless waste of WTO resources, given that China has already unilaterally imposed the only remedy that the DSB could potentially authorize: the suspension of the WTO concessions.

96. In sum, the actions (and omissions) of both parties show that – as an objective matter – the parties have agreed to settle the matter at issue outside of the WTO system. In these circumstances, Article 12.7 of the DSU commands that "the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Accordingly, the Panel's report in this dispute must be limited in the manner prescribed in Article 12.7 of the DSU. China's arguments to the contrary are without merit.

97. China asserts that the Panel is not "permitted" to objectively assess whether there is a "settlement" between the parties within the meaning of Article 12.7 of the DSU. This assertion finds no support in the DSU.

98. First, the argument that the Panel is precluded from making such an objective assessment is contradicted by the clear terms of the DSU. Specifically, Article 11 of the DSU states that "a panel *should* make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."

99. Second, nothing in the text of Article 12.7 of the DSU itself suggests that panels are not permitted to objectively assess whether the parties to a dispute have settled the matter at issue. Article 12.7 simply refers to a circumstances where a "settlement of the matter among the parties to the dispute has been found."

100. Third, Article 7.1 of the DSU does not support China's view that a panel may not objectively assess whether a "settlement" exists within the meaning of Article 12.7 of the DSU. Indeed, Article 7.1 is concerned with a wholly different issue – namely, the scope of the "matter referred to the DSB." China's reliance on Article 7.1 is therefore misplaced.

101. China argues that the parties have not settled the matter within the meaning of Article 12.7 (last sentence) because the parties have not concluded a "mutually agreed solution" within the meaning of Article 3.6 of the DSU, or notified such a solution to the DSB. This argument is without merit.

102. While a "settlement among the parties" could be memorialized in the form of a "mutually agreed solution" and notified under Article 3.6, nothing in the text of Article 12.7 of the DSU mandates that such a notification is a precondition for the operation of Article 12.7. Accordingly, there is no legal support for China's suggestion that Article 12.7 of the DSU (last sentence) does not apply absent a "mutually agreed solution" and a notification thereof under Article 3.6 of the DSU.

103. For the foregoing reasons, the Panel should make an objective assessment of whether a "settlement has been found" within the meaning of Article 12.7 of the DSU.

III. THE UNITED STATES HAS ESTABLISHED THAT THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

104. China's view that the measures at issue cannot qualify for coverage under Article XX(a) because they (1) do not target morally offensive products per se and (2) are aimed at inducing China to adopt certain policy changes, finds no support in the text of Article XX(a) or the reports cited by China. In addition, China makes no attempt to substantiate its assertion that the allegations set out in the Section 301 Report are "factually baseless." To the contrary, the hundreds of sources on which the Section 301 Report's findings are based are highly credible.

105. As the United States has explained, the measures at issue in this dispute "protect public morals" within the meaning of Article XX(a) because the United States adopted the measures to "obtain the elimination" of conduct that violates U.S. standards of right and wrong, namely China's unfair trade acts, policies, and practices as documented in the Section 301 Report.

106. China's policies and practices in this regard can be summarized as state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets. China's conduct

implicates "public morals" within the meaning of Article XX(a) because it violates prevailing U.S. "standards of right and wrong" as reflected in the state and federal laws of the United States, under which the act of "theft" is universally deemed a criminal offense.

107. China's outbound investment policies result in conduct inconsistent with U.S. norms on unfair competition, as reflected in U.S. laws against anti-competitive behaviour, such as the Sherman Act and the Federal Trade Commission Act.

108. The United States does not simply view unfair competitive practices as merely a detriment to business and innovation. Ultimately, these practices are viewed as a threat to the "preservation of our democratic political and social institutions". Accordingly, certain violations of these laws, such as monopolization, are even criminalized.

109. In other words, the United States imposes constraints on behavior based on national concepts of right and wrong to ensure market-oriented outcomes. U.S. law specifically does not permit unreasonable anti-competitive behavior to determine winners and losers in the marketplace. The Chinese government, however, undermines U.S. public morals relating to fair competition through its outbound investment policies.

110. The U.S. market is based on fundamental concepts of fair competition and fair play, which are reflected in U.S. unfair competition and antitrust laws. China's government-backed investment strategies and market share goals undermine those notions of fair competition and fair play. As such, they are inconsistent with U.S. public morals within the meaning of Article XX(a). For the United States not to take action against China's unfair policies and practices would mean the United States is abandoning the "free and unfettered competition as the rule of trade" standard that underpins the U.S. economy and, ultimately, our "democratic political and social institutions".

111. The Chinese practices described in the Section 301 Report threaten to undermine U.S. moral standards and norms against theft, misappropriation, and unfair competitive practices. If China is permitted to carry out its various unfair trade acts, policies, and practices without restraint, U.S. citizens, businesses, and other entities may come to believe that such conduct is "normal" and conclude that they have no choice but to emulate such conduct to compete in the U.S. market, or succumb to such conduct as a pre-condition of accessing China's market.

112. Further, there is clear nexus between the product coverage of the U.S. measures at issue and the objective of protecting public morals by persuading China to abandon the unfair trade acts, policies, and practices documented in the Section 301 Report. The Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (i.e., Measure 1) were found to benefit from the trade policies documented in the Section 301 Report, including "Made in China 2025." This linkage is also evident with respect to U.S. tariff measures that took effect on September 24, 2018 (i.e., Measure 2). The United States adopted the additional duty measures that took effect on September 24, 2018, after China "made clear—both in public statements and in government-to-government communications—that it [would] not change its policies" and instead "responded …by increasing duties on U.S. exports to China."

113. The measures at issue are "necessary" because, absent such measures, China would have little incentive to abandon the unfair trade acts, policies, and practices detailed in the Section 301 Report. This reality is borne out by the economic objectives that China seeks to achieve by engaging in the conduct documented in the Section 301 Report and other aspects of China's behaviour over the last decade.

114. First, as explained, China engages in the conduct described in the Section 301 Report to advance its "industrial policy" goals and broader "economic objectives." Therefore, it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices while it is advantageous to China to do so – that is, until the economic costs of doing so begin to approach or outweigh the economic benefits.

115. Second, the necessity of the measures at issue is further confirmed by the United States' prior efforts – over more than a decade – to address China's unfair trade acts and policies through other means, without success. That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

116. Third, it was only *after* the United States adopted the measures at issue that China agreed to enter into negotiations with the United States to address the concerns documented in the Section 301 Report. While China has yet to address the entirety of U.S. concerns, such negotiations are reasonably viewed as predicate (*i.e.*, "necessary") step to the actions that China may eventually take to address U.S. concerns in earnest.

117. In view of the United States, the arguments above suffice to support a *prime facie* case that the measures at issue are justified under Article XX(a). The measures *also* satisfy the various tests that the Appellate Body and some panels have applied to assess the "necessity" of a measure for purposes of Article XX.

A. The measures at issue are "designed to" protect public morals for purposes of Article XX(a)

118. In some prior disputes, the Appellate Body and panels have examined whether a measure is *designed* to protect public morals before proceeding to an analysis of whether the measure is "necessary" to do so within the meaning of Article XX(a). To the extent that the Panel opts to analyse whether the U.S. measures are "designed to" protect public morals as part of its Article XX(a) analysis, it would find that the measures at issue in this dispute are clearly "designed to" protect public morals based on the reasoning used in prior reports.

119. In *Colombia –Textiles* the Appellate Body described the evaluation of whether a measure is designed protect public morals as "not…particularly demanding" and reasoned that a measure meets this threshold so long as the measure's "design reveals that [it] is not incapable" of protecting public morals. Further, the Appellate Body reasoned that a measure is demonstrably "incapable" of protecting public morals if there is "no relationship between the measure and protection of public morals."

120. There is no credible basis to conclude that the U.S. measures at issue in this dispute are "incapable" of protecting public morals given the clear "relationship" between those measures and the United States objective protecting public morals, *i.e.* by persuading China to abandon the unfair trade acts, policies, and practices detailed in the Section 301 Report.

121. First, as noted, the United States adopted the measures at issue with the explicit goal of *eliminating* the unfair trade acts, policies, and practices documented in the Section 301 Report.

122. Second, as explained, the tariff measures at issue are structured so as to target particular types of goods that benefit from the conduct detailed in the Section 301 Report

123. Third, the tariff measures raise the economic cost that China will incur so long as it maintains the unfair trade acts, policies, and practices documented in the Section 301 Report, and thus gives China an incentive to abandon the unfair trade acts, policies, and practices documented in the Section 301 Report.

124. For the reasons explained above, there is a clear relationship between the U.S. measures at issue and the objective of protecting public morals, and thus no basis to conclude the measures at issue are "incapable" of achieving this objective. Accordingly, the measures at issue meet the threshold test of being "designed to" protect public morals for purposes of Article XX(a).

B. The measures are issue are "necessary" when evaluated under the "holistic" test that the Appellate Body and other Panels have used to assess a measure's necessity for purposes of Article XX

125. Further, the measures at issue are clearly "necessary" when evaluated under the factor-based test certain past reports have applied to assess a measure's necessity for purposes of Article XX of the GATT 1994.

126. First, the measures at issue pursue the vitally important objective of upholding U.S. norms against theft and coercion that are threatened by China's unfair trade acts, policies, and practices. Such values are of tremendous importance to U.S. society and the functioning of the U.S. economy.

127. Second, the measures at issue make a substantial contribution to the objective of protecting U.S. public morals. As explained, the U.S. tariff measures at issue play a "necessary" role toward the goal of eliminating China's unfair trade acts, policies, and practices by raising the cost of such practices and reducing China's incentive to continue engaging in such conduct going forward.

128. Third, the measures are not overly trade restrictive. The measures at issue do not impose a ban on the import of any Chinese products. The tariffs are at moderate levels, and are calibrated to obtain the elimination of the conduct documented in the Section 301 Report.

129. Fourth, the United States has long since exhausted reasonably available alternatives to the measures at issue. As noted, the United States adopted the measures at issue *after* a decade of trying to address China's conduct though other means. That none of these prior efforts have proven durably effective further demonstrates the necessity of the measures at issue.

IV. CHINA HAS FAILED TO REBUT THE UNITED STATES' PRIMA FACIE SHOWING THAT THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A)

130. China argues that the measures at issue fall outside the scope of Article XX(a) because they (1) do not target morally offensive products *per se* and (2) are aimed at inducing China to adopt certain policy changes. China's arguments find no support in the text of Article XX(a) or the reports cited by China. China makes no attempt to substantiate its assertion that the findings in the Section 301 Report are "factually baseless.

131. As a legal matter, there is no foundation to China's assertion that a measure cannot fall within the scope of Article XX(a) unless the measure applies to products that embody "morally offensive content or conduct." And, at any rate, the U.S. measures at issue *do* target products that benefit from the morally problematic conduct detailed in the Section 301 Report.

132. First, by its terms, Article XX(a) refers to measures that are "necessary to protect public morals," *not* measures necessary to protect public morals from morally offensive products. Nothing in the text of Article XX(a) indicates that a measure justified under that provision "must" apply to any particular product, much less products that are themselves inherently morally offensive.

133. Further, the United States' argument that the measures are "necessary" is not contingent on the application of those measures to any particular class of morally offensive products. Rather, the measures are necessary because it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices while it is advantageous to China to do so.

134. Second, as a factual matter, the measures at issue do – in fact – apply to products that embody morally offensive conduct. As the United States has explained, the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, Measure 1) benefit from the trade policies documented in the Section 301 Report, including "Made in China 2025."

135. China's argument that Article XX(a) cannot justify measures that seek to encourage changes in another Member's policies is without merit.

136. First, nothing in the text of Article XX(a) supports the view that Article XX(a) excludes measures aimed at inducing policy changes in other WTO Members. B XX(a) provides that "nothing in the GATT 1994 shall be construed to prevent the application of *any* measure necessary to protect public morals." Therefore, so long as a Member can establish that a measure that aims to influence the policies or practices of another Member are "necessary to protect public morals," such a measure can be justified under Article XX(a).

137. Second, the argument advanced by China has been considered and rejected in past reports. As the *US – Shrimp (AB)* report observed, measures that seek to promote policy changes in another WTO Member *can* be justified under the subparagraphs of Article XX. Therefore, China's contention that the measures at issue are categorically unjustified under Article XX(a) because they are aimed at "influencing China" to take "specific policy decisions" does not comport with the understanding of Article XX reflected in past reports.

138. Third, China's attempt to analogize between the measures at issue in *US – Shrimp* and the measures at issue in this dispute fails. In *US – Shrimp*, the Appellate Body found that the measures at issue constituted "unjustifiable" and "arbitrary discrimination" within the meaning of the chapeau of Article XX because they compelled other WTO Members to adopt a "specific" and "comprehensive" regulatory regime as prescribed by the United States, *without* allowing for any "comparable" regulatory schemes that would also achieve the United States' legitimate resource conservation objectives.

139. In contrast, the measures at issue in this dispute are not aimed at encouraging China to adopt any particular regulatory regime, much less a regulatory regime or model prescribed by the United States. Rather, the United States adopted the measures at issue to obtain the elimination of specific policies and practices affecting the United States as documented in the Section 301 Report, including forced technology transfer and cyber-enabled theft of U.S. technologies. Nothing in the U.S. measures at issue (*contra* the measures at issue in *US – Shrimp*) prescribe any particular regulatory regime that China must implement to address U.S. concerns.

140. China's contention that the findings in the Section 301 Report are "factually baseless" is ridiculous on its face. As explained, the United States issued the Section 301 Report following a comprehensive eighth month investigation, resulting in the production of the 200-page document that exhaustively detailed China's unfair trade acts, policies, and practices. The evidence collected during the investigation includes public media reports, journal articles, over 70 written submissions, and witness testimony from representatives of U.S. companies, workers, trade and professional associations, think tanks, as well as law firms and representatives of trade and professional associations headquartered in China. That China may contest some or all of the Report's findings is not remarkable. But the suggestion that its findings are "factually baseless" is patently absurd.

V. CONCLUSION

141. The United States respectfully reiterates its request that the Panel reject China's request for findings respect to the allegedly WTO-inconsistent tariff measures. The United States instead requests that the Panel issue a report with a "brief description" of the pertinent facts of the dispute and "reporting that a solution has been reached" by the parties, as prescribed by Article 12.7 of the DSU. And, were the Panel to examine China's contentions, the Panel should find that the U.S. measures are justified under Article XX(a) of the GATT 1994.

EXECUTIVE SUMMARY OF THR U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

142. This dispute is best viewed as an attack by China on the legitimacy and relevance of the WTO itself in the current, real-world trading order. Fortunately the text of the WTO Agreement contains two alternative routes for the Panel to avoid this harm to the WTO. Were the Panel to take either of these approaches, the WTO system would be safeguarded, and the parties would remain in a posture of offsetting actions that are undoubtedly contributing to a deeper and more intensive dialogue of the conditions and actions needed for fair trading conditions.

143. The irrelevance of this dispute in terms of real world of economics and trade is further confirmed by developments in the last few weeks. On January 15, 2020, the United States and China signed an historic and enforceable Phase One economic and trade agreement. Covering all commitments, the agreement establishes a strong dispute resolution system that ensures prompt and effective implementation and enforcement. In connection with reaching this agreement, the United States agreed to modify its Section 301 tariff actions in a significant way. Those tariff reductions took effect on February 14, which as noted was the day of entry into force of the agreement.

144. This Phase One Agreement, as well as upcoming negotiations on a Phase Two Agreement, represents the real world status of the U.S.-China economic and trade relationship, including the role that additional duties imposed by either party play in that relationship. And what does the Phase One Agreement say about this dispute, or the U.S. additional duties that China challenges in this dispute? Nothing. And why is that? Because, as the United States has explained throughout

this dispute, both parties have decided to handle the additional duties imposed by the other side on a bilateral basis, adjusting them in accordance with the status of the bilateral negotiations.

145. Moreover, if as China requests, the Panel were to reject the valid U.S. Article XX(a) defense, the result would go beyond making the WTO appear irrelevant. Such findings would make the WTO appear counterproductive and even harmful to furthering a fair and sustainable system of world trade. It is essentially undisputed that China has adopted the unfair and harmful practices identified in the U.S. Section 301 report, and that these practices damage not just the United States, but every Member that relies on technology for its competitiveness. It is also undisputed that these practices cannot be addressed through challenges under existing WTO rules. And it is no answer to say that the WTO also has a negotiating function, and new rules could be developed. This answer is untenable – seeking new rules does nothing to address the harms felt today, and new rules must be adopted by consensus.

146. In addition to confirming that the parties have reached their own bilateral solution regarding each Party's additional duties, the Phase One Agreement also confirms the validity of the U.S. invocation of Article XX(a).

147. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The Phase One agreement covers some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement.

148. Second, the Agreement confirms the necessity of the U.S. tariff measures in addressing the unfair technology transfer issues identified in the Section 301 report. The tariff measures led to the negotiations, and it cannot reasonably be questioned that those tariff measures were the only available tool that would have enabled the parties to reach this successful outcome.

149. Third, the Phase One agreement confirms that forbidding forced technology transfer is a fundamental norm. The first sentence of the technology transfer chapter states that "The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern."

150. There is no legal basis for the Panel to issue the findings or recommendations requested by China because the Parties have reached a "settlement of the matter" within the meaning of Article 12.7 of the DSU. And, even if the Panel were to examine the measures at issue, it should conclude that they are "necessary to protect public morals" and therefore legally justified under Article XX(a) of the GATT 1994.

151. First, that a "settlement of the matter" has been reached is confirmed by objective facts on the record. China has failed to adduce any evidence to rebut these objective facts. Instead, China continues to assert that the Panel is not authorized to consider the objective evidence that a settlement has been reached. China's position, of course, finds no support in the DSU and is affirmatively contradicted by Article 11 of the DSU. Nor is there any support in the DSU for China's continued assertion that there cannot be "settlement" within the meaning of Article 12.7 unless and until the parties notify a "mutually agreed solution" to the Dispute Settlement Body.

152. Second, China does not make any serious attempt to rebut the U.S. argument that the measures at issue are "necessary" within the meaning of Article XX(a). Instead, China continues to argue that the measures at issue cannot be justified under Article XX(a) because they apply to products that are not themselves morally offensive. This view finds no support in the text of Article XX(a) or the prior reports cited by China. China's new argument that "economic concerns" are categorically outside the scope of Article XX(a) is without legal foundation and, as we shall explain, is contrary to commonsense.

II. CHINA HAS FAILED TO REBUT THAT THE PARTIES HAVE ARRIVED AT A "SETTLEMENT OF THE MATTER" WITHIN THE MEANING OF ARTICLE 12.7 OF THE DSU

153. The parties have settled the matter within the meaning of Article 12.7 of the DSU. Accordingly, as required by Article 12.7, the Panel should reject China's request for legal findings on the measures

at issue and confine its report to a brief statement of the facts and a notation that a settlement has been reached.

154. The parties' agreement to settle this matter outside the WTO system is confirmed by objective facts on the record, including:

> (1) China's decision to decision to unilaterally impose WTO-inconsistent measures on U.S. goods for the explicit purpose of retaliating against the measures for which it now seeks legal findings, and without first obtaining the authorization from the DSB pursuant to the DSU;
>
> (2) the U.S. decision to, nonetheless, refrain from challenging China's retaliatory actions at the WTO; and
>
> (3) the decision of both parties to enter into high-level negotiations with the aim of resolving U.S. concerns with Chinese conduct documented in the Section 301 Report and China's concerns with the U.S. response (*i.e.*, the U.S. measures at issue).
>
> (4) the Phase One Economic and Trade Agreement, which explicitly provides that each Party may apply additional duties in order to enforce the agreement, and that the other Party may not challenge those duties in the WTO.

155. In other words, the actions of both parties show that – as an objective matter – the parties have agreed to settle the matter at issue outside of the WTO system. In these circumstances, Article 12.7 of the DSU commands that "the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."

156. China continues to argue that the Panel must accept at face value China's assertion that the parties have not arrived at a settlement within the meaning of Article 12.7 of the DSU. However, Article 11 of the DSU, provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Accordingly, the Panel in this dispute should objectively assess whether the facts on the record support a finding that the parties have settled the matter within the meaning of Article 12.7 of the DSU. Certainly, nothing in the text of Article 11 supports the view that the Panel is not "permitted" to make such an objective assessment, as China argues.

157. Article 11 explicitly provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Accordingly, there be no serious question that the Panel in this dispute has the authority to assess whether Article 12.7 of the DSU applies to the matter before it.

158. Nothing in the DSU supports the view that panels are precluded from objectively assessing whether there is a settlement of the matter within the meaning of Article 12.7 of the DSU. Indeed, if anything, panels have an affirmative obligation to make such an objective assessment, and certainly in cases where one or both parties submits that a settlement has in fact been reached. Second, a practical matter, the question of whether the parties have reached a "settlement of the matter" is a fundamental aspect of the "matter" before a panel.

159. The text of the DSU does not support China's assertion that Article 3.7 of the DSU is the "sole means by which a panel can ascertain" whether the parties have arrived a settlement within the meaning of Article 12.7 of the DSU. Article 12.7 of the DSU (last sentence) becomes operative "[w]here a settlement among the parties to the dispute has been found." Nothing in the text of Article 12.7 of the DSU mandates that such a notification is a precondition for the operation of Article 12.7. The text of the DSU simply does not support China's contention that the absence of a notification under Article 3.7 would somehow preclude a finding that the parties have in fact reached a "settlement" within the meaning of Article 12.7 where objective facts on the record support such finding.

III. CHINA HAS STILL FAILED TO REBUT THE UNITED STATES' CASE THAT THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

160. China's assertion that some impermeable bright line exists between "economic" concerns, on the one hand, and "moral" concerns, on the other, finds no support in the text of Article XX. Nor, frankly does such a view comport with simple common sense.

161. First, nothing in the text of Article XX(a) itself suggests that "public morals" cannot (or must not) relate to issues of economic concern. China's attempt to place "economic" concerns outside the scope of Article XX(a) should be rejected as legally baseless.

162. Second, the context provided by other paragraphs of Article XX affirmatively rebuts the view that the phrase "public morals" could be read to exclude any concerns that are "economic" in nature. Specifically, unlike certain other paragraphs of Article XX, Article XX(a) does not include a proviso that could be understood to narrow the scope of the core operative text. The fact that Article XX(a) is unaccompanied by any such analogous limiting or conditional language further supports the view that "public morals" cannot be read to a priori exclude "economic concerns" as a definitive matter.

163. Third, other paragraphs of Article XX disprove China's assertion that there can be no overlap between "economic" concerns and "moral" concerns. For example, Article XX(d) covers measures "necessary to secure compliance with laws or regulations" *inter alia* "relating to the prevention of deceptive practices." No one could reasonably dispute that the prevention of deceptive practices is motivated both by moral and economic concerns. Another example is Article XX(e), which covers measures "relating to the products of prison labor." Members may adopt such measures for reasons of morality or to protect economic actors from unfair competition with goods produced with little or no cost of labor. Thus, there simply exists no bright line in Article XX between "moral" concerns and "economic" concerns.

164. Fourth, the idea that "economic" and "moral" concerns are definitely distinct goes against simple common sense. As the United States has argued, some types of conduct or behavior would appear to be immoral precisely because of the economic harms that result from such conduct. For example, when someone steals money from a bank, we would all agree the bank and its customers suffer a harm that is "economic" in nature. We would also agree that act that brought about this economic harm – namely the act of theft – is immoral, because it is contrary to standards of wrong. In this sense, the United States posits that most people would find it somewhat odd – if not nonsensical – to say that the act of stealing money from a bank does not implicate "moral" concerns because it imposes harms that are economic in nature.

165. For the foregoing reasons, China's arguments that the "the term 'public morals' in Article XX(a) must be understood to exclude economic concerns" is without any legal or practical foundation.

166. China continues to argue that a measure cannot be justified under Article XX(a) unless the measure applies to products that "embody [] morally offensive content or conduct." As the United States has explained, however, China's assertions on this score finds no support in the text of Article XX(a).

167. By its terms, Article XX(a) refers to measures that are "necessary to protect public morals," not measures necessary to protect public morals from morally offensive products. Nothing in the text of Article XX(a) indicates that a measure justified under that provision "must" apply to any particular product, much less products that are inherently morally offensive. Certainly, it may be the case that the product subject to a measure is also a product that offends public morals. But the text of Article XX(a) does not require any such a relationship. A measure may therefore be necessary to protect public morals without being applied only to products that are inherently morally offensive.

168. In its second written submission, China advances several new arguments to support its view that cover of Article XX(a) is limited to measures that apply to morally offensive products per se. None of China's new arguments find support in Article XX(a) or prior reports.

169. There is no merit to the argument that the inclusion of the word "protect" in Article XX(a) means that measures justified under that provision may only target products that are themselves

morally offensive. Article XX(a) refers to measures "necessary to protect public morals" – full stop – not measures necessary to protect public morals from morally offensive *products*. And, that Article XX(a) does not specify any particular threat (or source of offence) to "public morals" suggests that the drafters recognized that threats to "public morals" could emanate from a variety of sources or circumstances, not just morally offensive products per se. Accordingly, the argument that word "protect" implies protection against morally offensive products should be rejected as contrary to the clear text of Article XX(a) and thus meritless.

170. Contrary to what China suggests, nothing about the limited and conditional nature of Article XX(a) supports the legal conclusion that measures justified under Article XX(a) must target products that are inherently morally offensive. Indeed, apart from the criteria set out in the chapeau and lettered paragraphs of Article XX, there are no other limits or conditions that govern the general exceptions under Article XX. The only cross-cutting limit or condition that pertains to the exceptions under Article XX is the "requirement" that a measure is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade." Accordingly, if a measure meets the criteria specified in a paragraph at (a) through (j) of Article XX and satisfies the requirement of the chapeau of Article XX, the measure necessarily falls within the relevant conditions or limitations that govern the invocation of general exceptions under Article XX.

171. China's argument that interpreting Article XX(a) in light of the object and purpose of the GATT 1994 supports the view that measures justified under Article XX(a) must target morally offensive products relies on a fundamental misunderstanding of the customary rules of treaty interpretation. Customary rules of treaty interpretation preclude a panel from adopting an interpretation that is not supported by a plain reading of the text of an agreement. And, under no circumstances would it be correct to adopt an interpretation that is contrary to the clear text of an agreement based the subjective view that doing so would advance the "object and purpose" of the agreement. But this is precisely what China asks the panel to do – that is, to adopt a non-textual limitation on Article XX(a) simply because China believes it would somehow advance the object and purpose of the GATT 1994. As such, China's argument must be rejected.

172. Furthermore, China has not explained, nor can it explain, why its proposed limitation would comport with "object and purpose" of the treaty.

173. China asserts that "all" of the prior panel and Appellate Body reports that have addressed Article XX(a) have concerned measures that targeted products considered to be morally offensive. This is not correct, and would be irrelevant at any rate. First, contrary to China's characterization, in *Colombia – Textiles*, Colombia did not seek to justify its "compound tariff" measure under Article XX(a) by arguing that the textile, apparel, and footwear products at issue were themselves products that were morally problematic or offensive. And, in *Brazil – Taxation*, Brazil made no argument that the digital television equipment or other products at issue were inherently morally offensive. Second, even if it were the case that past disputes involving Article XX(a) had involved measures that targeted products that were morally offensive per se, this would not stand for the proposition that Article XX(a) is so limited in scope.

174. China argues that the United States took into account certain "economic concerns" in the course of adopting and implementing the measures at issue, and that this somehow undermines the "public morals" objective of the measures. This argument is without merit.

175. First, as the United States has explained, the argument that that "moral" and "economic" concerns are mutually exclusive finds no support in the text of Article XX(a) and does not comport with simple common sense.

176. Second, throughout the open and transparent process of selecting the products of China subject to additional duties, the United States has made clear that it would seek to avoid disproportionate economic harm to U.S. interests, while at the same time maintaining strong measures so as not to undermine the objective of obtaining the elimination of conduct documented in the Section 301 Report. That the United States would take steps mitigate the economic harms associated with adopting the measures at issue is not at all inconsistent with pursuing a "public morals" objective.

177. China argues that a finding that the measures at issue are justified under Article XX(a) would "set a dangerous precedent" and signal that Members can adopt GATT-consistent measures "whenever" they consider that the policies of another Member are "immoral" or "unfair." This is nothing more than a "slippery slope" argument – which is usually one of the weakest types of arguments. And is particularly weak here, given the unique facts and circumstances.

178. First, an invocation of Article XX(a) that is as demonstrably specious and convenient as China suggests is unlikely to satisfy the requirements of the chapeau of Article XX, which provides that a measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Therefore, the language of the chapeau serves as backstop that prevents the sort of dangerous precedents to which China alludes.

179. Second, a finding that the measures at issue are justified under Article XX(a) is not practically or legally capable of setting the dangerous precedent that China warns of, because any such finding would be squarely grounded in the unique facts of this dispute.

180. In this regard, the United States would like to, once again, remind the Panel of the historical background against which the United States adopted the measures at issue in this dispute. As noted, the United States adopted the measures at issue following nearly a decade of trying to address China's unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms, and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government. Accordingly, the notion that a finding for the United States would open the door to Member successfully invoking Article XX(a) "whenever" they want and to justify "whatever" GATT-inconsistent measures they want, is utterly unfounded.

EXECUTIVE SUMMARY OF THE UNITED STATES' RESPONSES TO QUESTIONS FROM THE PANEL

21. Please explain the relationship between the Section 301 Report and the additional duties imposed on List 1 Products and List 2 Products.

Response:

181. There is a clear and direct relationship between the "List 1 Products" and the unfair technology transfer policies, and practices described in the Section 301 Report. In particular, the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, List 1) were found to benefit from the unfair policies, and practices documented in the Section 301 Report. This is clearly shown by the record evidence in this dispute, including the U.S. legal instruments (*i.e.*, Federal Register Notices) through which the United States implemented the measures at issue and the Section 301 Report itself.

182. The Section 301 Report found that China adopted the aforementioned unfair trade acts, policies, and practices to advance China's industrial policy objectives, in particular the goals and objectives reflected in *Made in China 2025*, "China's ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development.

183. Accordingly, the legal instruments through which the United States adopted and implemented the measures at issue place significant emphasis on *Made in China 2025* and the Chinese industries that benefit from that initiative. For example, in the April 6, 2018 Federal Register Notice (Exhibit CHN – 10) that summarized the findings of the Section 301 Report and proposed certain actions in response, USTR stated the following with respect to the products to be targeted by the measures at issue:

> The list of products [*i.e.*, List 1] covered by the proposed action was developed using the following methodology: Trade analysts from several U.S. Government agencies identified products that benefit from Chinese industrial policies, including Made in China 2025. The list was refined by removing specific products identified by analysts as likely to cause disruptions to the U.S. economy, and tariff lines that are subject to legal or administrative constraints. The

> remaining products were ranked according to the likely impact on U.S. consumers, based on available trade data involving alternative country sources for each product. The proposed list was then compiled by selecting products from the ranked list with lowest consumer impact.

184. The United States adopted the measures at issue pertaining to "List 1" products following a notice and comment period on the tariff action proposed in the April 6 Notice. As stated in the June 20, 2018 Notice (Exhibit CHN – 2) through which the "List 1" measures were implemented:

> USTR and the Section 301 Committee have carefully reviewed the public comments and the testimony from the three-day public hearing. In addition, and consistent with the Presidential directive, USTR and the interagency Section 301 Committee have carefully reviewed the extent to which the tariff subheadings in the April 6, 2018 notice include products containing industrially significant technology, including technologies and products related to the "Made in China 2025" program. Based on this review process, the Trade Representative has determined to narrow the proposed list in the April 6, 2018 notice to 818 tariff subheadings, with an approximate annual trade value of $34 billion.

185. In short, the record evidence demonstrates that (1) China adopted the unfair trade acts, policies, and practices documented in the Section 301 Report to support the industrial policy goals reflected in *Made in China 2025*; (2) the "List 1" products benefit from the *Made in China 2025* initiative; and (3) the United States adopted the "List 1" measures because the so-listed products were found to benefit from *Made in China 2025*.

EXECUTIVE SUMMARY OF THE UNITED STATES' COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

To China

18. In your view, what is the legal value / relevance of the Economic and Trade Agreement between the United States and China (Phase One Economic and Trade Agreement) for the present dispute?

U.S. Comment on China's Response to Panel Question 18:

186. China's response completely fails to rebut that the Phase One Agreement confirms that the Parties have settled, within the meaning of Article 12.7 of the DSU, any WTO issues regarding additional duties; and that the U.S. measures at issues are justified under Article XX(a) of the GATT 1994.

187. In sum, the actual conduct of the parties demonstrates as an objective matter that the parties have reached their own mechanisms for addressing each party's additional duties, outside of any WTO framework. This is explicitly reinforced in the Phase One Agreement, where, in prescribed circumstances, either party may impose additional duties on goods of the other Party. In these circumstances, any WTO findings would do nothing to promote core objectives of the DSU, such as achieving a "satisfactory settlement of the matter" or a "positive solution to the dispute."

188. China has no answer to these fundamental realities. Instead, China presents the cursory statement that:

> The Phase One Agreement reached through bilateral negotiations is not legally relevant to the Panel's resolution of this current dispute, which involves a fundamental question of whether the unilateral imposition of discriminatory duties on imports from China by the United States is a violation of the United States' obligations under the WTO.

189. This statement does nothing to support China's position. It conflates two separate issues: the real-world dispute between the parties, and a legal issue regarding the application of the WTO Agreement to certain measures. What Article 12.7 of the DSU states is that where the parties have settled their real-world dispute, then the Panel *must not* issue a report containing legal findings on the legal issues that the DSB referred to the Panel. China in pointing out that the Panel's terms of reference include a legal issue does nothing to rebut that the parties, as an objective matter, have settled outside of the WTO system any WTO issues regarding their respective additional duties.

190. China's argument here is simply that the parties have not reached agreement on the merits of China's legal claims. As explained, however, agreement on the merits of legal claims is not required for a mutually agreed solution. Accordingly, China has failed to rebut the importance of the Phase One Agreement in confirming the existence of an agreement between the parties regarding their respective additional duties. China also fails to rebut that the Phase One Agreement confirms that the U.S. measures at issue are justified under Article XX(a) of the GATT 1994. At the second substantive meeting, the United States explained that conclusion of the Phase One Agreement further validates the United States' invocation of Article XX(a) in the following ways.

191. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The Phase One Agreement covers some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement. Second, the Phase One Agreement confirms the necessity of the U.S. tariff measures in addressing the unfair technology transfer issues identified in the Section 301 Report. The tariff measures led to the negotiations, and were the only available tool that would have enabled the parties to reach this successful outcome. Third, the Phase One Agreement confirms that forbidding forced technology transfer is a fundamental norm. The first sentence of the technology transfer chapter states that "The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern."

192. China's response to Question 18 is cursory in the extreme, presenting a single conclusory sentence containing two arguments: "… yet there has been no evidence to support this [i] *post hoc* rationalization and [ii] no demonstrated relationship between the measures imposed, the imported products, and the 'public morals' alleged to be protected." Neither of these arguments have validity. On the second argument the United States has explained at length (and without any rebuttal by China) both that Article XX(a) requires no particular relationship, and that the record shows a direct tie between China's immoral policies and the products subject to additional duties, especially with respect to Measure

193. As a factual matter, the United States adopted the measures at issue following a months-long, public investigation. The United States provided public notice of the issues under investigation, and conducted a full notice and comment procedure, including a public hearing at which many Chinese witnesses testified. The fact-finding phase of the investigation concluded with the issuance of an extensive, well-documented report, precisely explaining the U.S. concerns with China's technology transfer policies. And the notice imposing the measures clearly states that the tariff measures were adopted to obtain the elimination of the unfair policies identified in the report. Thus, the justification for the U.S. measures was anything but "*post hoc*".

194. To the extent that China is presenting a legal argument that the United States in this dispute is not entitled to explain how its measures fall within the scope of an Article XX exception, China is wrong. As China itself acknowledges, the party asserting an Article XX justification has the burden of establishing that defense. The way any party meets its burden is through the presentation of factual and legal argumentation, as the United States has done in this dispute. Contrary to China's implication, there is simply no rule or concept that such argumentation is somehow "*post hoc*" and inadmissible. If this were the case, no Member could meet a burden of establishing a justification under any Article XX exception.

195. The United States notes that the record in prior disputes shows that the Member asserting an Article XX defense presents evidence and arguments in support of its justification, and this has not been (and could not be) rejected as "*post hoc*."

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia presents its views on certain systemic issues raised by these proceedings. Australia does not take a view on the particular facts at issue. First, we provide some general observations on the importance of multilateral trade rules; second, we consider the requirements for a panel's report; third, we examine the legal interpretation of Article XX(a) of the GATT 1994; and finally, we provide views on measures within a panel's terms of reference.

II. THE IMPORTANCE OF MULTILATERAL TRADE RULES

2. Australia would like to begin with some general comments on the importance of multilateral trade rules, especially for a country like Australia where one in five Australian jobs depends on trade.

3. Australia supports an open global economy underpinned by enforceable rules. The rules embodied in the multilateral trading system established under the WTO are of fundamental importance. These rules serve to limit unilateral or retaliatory trade actions that damage trade and global growth. Respect for multilateral trading rules ensures stability in the trading environment, supports global prosperity, and provides an even playing field for all WTO Members.

4. Australia recognises the US has had longstanding concerns with certain of China's policies regarding forced technology transfer and the protection of IP rights more broadly. Australia urges the US and China to find a resolution to this dispute that is WTO-consistent and reinforces our open and inclusive global trading system.

III. THE REQUIREMENTS FOR A PANEL'S REPORT

5. Turning now to some of the systemic legal issues in these proceedings. The US argues that the report of the Panel should be "confined to a brief description of the case and to reporting that a solution has been reached" in accordance with the last sentence of Article 12.7 of the DSU.[1]

6. In this provision, the use of the verb "shall" imposes a requirement on a panel to curtail the content of its report, but this requirement only arises "where a settlement of the matter among the parties to the dispute has been found". This makes sense in the context of the WTO dispute settlement system, whose object and purpose is the *prompt settlement of disputes*.[2] Panel reports should be limited where the parties have already reached a resolution.

7. In Australia's view, notification of a mutually agreed solution in accordance with Article 3.6 of the DSU is clear evidence that "settlement of the matter among the parties to the dispute has been found". This view is supported by the past practice of panels.[3]

8. Australia submits that, for the purpose of the last sentence of Article 12.7, at a minimum, use of the phrase "among the parties" requires there to be evidence of a *shared* view by *both* the

[1] The last sentence of Article 12.7 of the DSU provides: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."

[2] Article 3.3 of the DSU provides: "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

[3] Cases where panels have issued a 'brief report' following the notification of a mutually agreed solution include Panel Reports, *EC – Scallops*; *EC – Butter*; *US – DRAMS* (Article 21.5 – Korea); and *Japan – Quotas on Laver*.

complainant and respondent that the dispute has been settled. In practice, Australia further submits that this *shared* view may be expressed individually (by each party) or jointly.

IV. Justification of measures under Article XX(a) of the GATT 1994

9. The US argues that the measures challenged by China are legally justified under Article XX(a) of the GATT 1994, which permits measures "necessary to protect public morals".[4]

10. Article XX provides a list of general exceptions to breaches of GATT obligations. To rely on these, a Member must first establish a sufficient connection to one of the subject-specific exceptions. The Member must also comply with the 'chapeau' of Article XX by establishing that the measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and does not create a disguised restriction on international trade.[5]

11. Australia agrees with the US that a Member seeking to justify a measure under Article XX(a) must show:

> [t]hat the measure (1) protects public morals; (2) is "necessary" to achieve that objective; and (3) is not being applied in a manner that constitutes an "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" within the meaning of the chapeau of Article XX.[6]

12. Australia recognises the importance of the exceptions in Article XX to enable Members the policy flexibility to regulate on issues of importance to them. Australia further recognises that, in the case of measures to protect public morals, a Member has the right to determine the level of protection it considers appropriate.[7] The content of what constitutes public morals may therefore differ between Members, but it is not without some limitations. Australia submits that exceptions to address legitimate public morals concerns are fundamental and their integrity should be upheld. In our view, the legal tests for justification of an exception under Article XX(a) are sufficiently robust to ensure only measures that are necessary are permitted.

V. MEASURES WITHIN A PANEL'S TERMS OF REFERENCE

13. The US argues that one of the measures identified by China is not within the scope of this dispute because it is not in the panel request, and it was introduced after the Panel was established.[8]

14. The scope of the jurisdiction of a panel is determined by its terms of reference, based on the complainant's panel request. That panel request must include "the specific measures at issue" in accordance with Article 6.2 of the DSU.

15. As a consequence, this means measures must be listed in the panel request. This is important as a matter of due process, to allow the respondent notice to adequately defend its case. However, it is equally important to avoid an overly formalistic approach. The WTO dispute settlement system is set up to deal with the 'matter' at hand and provide a resolution between the parties. Litigation is lengthy and resource-intensive. During the litigation process, laws and regulations may expire, or be renewed, or enacted in a different form. This is why the Appellate Body has recognised that panels may consider laws or regulations that are not identified in the panel request if, for example, they amend a measure that is identified in the panel request and the amendment does not change the "essence" of the identified measure.[9]

---

[4] US First Written Submission, paras. 63-91.

[5] Panel report, *US – Gasoline*, para. 6.20; reasoning followed by the Appellate Body Report in *Brazil – Tyres*, para. 210.

[6] US First Written Submission, para. 65 (footnotes omitted).

[7] Appellate Body Report *EC – Seal Products*, para. 5.199.

[8] US First Written Submission, paras. 92-112.

[9] Appellate Body Report, *EC- Selected Customs Matters*, para. 184.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. Introduction

1. Brazil. provides the following executive summary of its participation during the panel proceedings in this dispute.

II. Article 12.7 of the Dispute Settlement Understanding

2. During these proceedings, in addition to claiming that the measures challenged by China are justified under Article XX(a) of the GATT (the public morals exception), the United States has argued that the Panel should limit itself to noting that the disputing parties have reached their own solution[1], in accordance with Article 12.7, third (and last) sentence.

3. On this subject, Brazil noted that Article 3.6 of the Understanding on rules and procedures governing the settlement of disputes (DSU) mandates the parties to notify the Dispute Settlement Body (DSB) of any mutually agreed solution to matters formally raised under the consultations and dispute settlement provisions of the covered agreement. In the absence of such notification, the first, not the last, sentence of Article 12.7 of the DSU applies. In such a scenario, the Panel has a duty to produce a written report setting out "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes"[2].

III. The proper interpretation of Article XX(a) of the GATT.

4. Brazil did not comment on whether the United States measures are justified under Article XX of the GATT and, instead, presented its views regarding the proper interpretation and application of this article.

5. Brazil agreed with the United States when it affirmed that:

> *"A Member seeking to establish that a measure is justified under Article XX(a) of the GATT 1994 must demonstrate that the measure (1) protects public morals; (2) is "necessary" to achieve that objective; and (3) is not being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" within the meaning of the chapeau of Article XX."*[3]

6. Brazil further noted that the Appellate Body and several panels have made it clear that a GATT Article XX claim involves a two-tier test. In *US – Gasoline*, the Appellate Body clarified:

> *"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."*[6]

7. In Brazil's view, an analysis of a claim under Article XX of the GATT should begin at the subparagraph level and, in the case of an Article XX(a) claim, involve, first, an examination of whether a measure is "necessary to protect public morals". This, in turn, can also be achieved by a two-step process, through which a panel first examines whether a measure is designed to protect public morals, and then follows that up with an examination of whether that measure found to be

[1] United States FWS, paras. 35, 36, 59-62.
[2] DSU, Article 12.7, first sentence.
[3] United States, FWS, para. 65, footnotes omitted.

designed to protect public morals also clears the higher threshold of being necessary to that objective.

8. In its first written submission, and in response to questions by the Panel, Brazil clarified its views regarding the legal standard for the examination of each of these steps. Regarding the first one, Brazil's position, in line with prior guidance by the Appellate Body in *Colombia – Textiles*[4], is that the mere fact that a measure expressly refers to a public morals objective is not sufficient to satisfy the "design step" of the analysis. Rather, it is the existence of a relationship between the measure and the protection of public morals that must be assessed, through an investigation of the measure's design, including its content, structure and expected operation. The Panel's task, in Brazil's view, is to determine, through such an investigation of the measure's design, including its content, structure and expected operation, whether the measure "is not incapable" of protecting public morals.

9. Brazil also explained, in response to a question by the Panel, that, for Brazil, determining whether a relationship exists does not require necessarily a determination that such a relationship meets any minimum degree or threshold. Brazil does not read that requirement in the Appellate Body report in Colombia – Textiles, nor in the text of Article XX(a).

10. In relation to the second step of an analysis of subparagraph (a) of Article XX, Brazil noted that when it comes to the "necessity test", not only Article XX(a), but also Articles XX(b) and XX(d) of the GATT contain the expression "necessary". Past Appellate Body Reports have interpreted that expression consistently in all of these provisions. This resulted in the development of a "necessity test", which, in Brazil's view, represents the legal standard that must be cleared for a successful recourse to Article XX(a) of the GATT.

11. The "necessity test" under Article XX of the GATT entails an analysis of three factors: (i) the importance of the interests or values at stake; (ii) the extent of the contribution made by the measures to the objectives they seek to protect; and (iii) the level of trade restrictiveness they generate. The interplay of these factors will enable a panel to assess whether a measure is necessary. Any preliminary conclusions resulting from this exercise must then be compared with possible alternative measures in order to gauge whether the same results could be achieved with less trade restrictive measures, which would mean that the original measure was not, in fact, necessary.

12. Only after assessing whether a measure is "necessary" to "protect public morals" in accordance with the "necessity test" described above, would a panel move on to the next tier of the analysis. At this second tier, the Panel's task is to assess whether the measure, provisionally justified under subparagraph "a" of Article XX of the GATT, also complies with the conditions of the chapeau. This, in turn, involves an examination of whether the measure is being applied in a manner that constitutes "arbitrary or unjustifiable discrimination"; or a "disguised restriction on international trade".

[4] Appellate Body Report, *Colombia – Textiles*, paras. 5.67-5.70.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. 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.

2. 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 Unites States does.

3. 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.

4. 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

5. The European Union considers that the Panel is required under the DSU to rule on the claims brought by China in this dispute.

6. 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".

7. 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.

8. 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".

9. 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 prejudge 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

10. 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.

11. The measures at issue appear to 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 appear to 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.

12. 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 ado not appear to be 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.

13. 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.

14. 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.

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

15. In accordance with well-established 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.

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

17. First, contrary to the US allegations, 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 legal instrument, the measure remains essentially the same and, therefore, within the panel's terms of reference.

18. 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". 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'". 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.

19. 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. 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. 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.

20. 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. 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. 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".

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. GENERAL REMARKS

1. Japan notes that this dispute arose in a broader international economic context. Japan is of the view that no country should require or pressure technology transfer from foreign companies to domestic companies, including, for example, through the use of joint venture requirements, foreign equity limitations, administrative review and licensing processes, or other means.[1] Neither should any government support unauthorized intrusion into, or theft from, computer networks of foreign companies to access sensitive commercial information and trade secrets for commercial gain. Such policies and practices create unfair competitive conditions for workers and businesses, hinder the development and use of innovative technologies, and undermine the proper functioning of international trade.[2] While there may be policies and practices that are not subject to the current WTO rules, the multilateral trading system is not meant to encourage or to support the adoption or maintenance of such unfair policies and practice.

II. ARTICLE XX(A) OF THE GATT 1994

2. Japan turns now to the interpretation of Article XX(a) of the GATT 1994, the analysis of which, according to the jurisprudence of past panels and the Appellate Body, involves four issues: First, does the value being protected qualify as a "public moral"? Second, is the measure at issue "designed to protect public morals"? Third, is the measure at issue "necessary" to protect public morals? And fourth, is the measure applied consistently with the chapeau of Article XX? The defending party has the burden of proof to present and explain evidence with respect to all four issues. Japan wishes to present its views regarding aspects of this analysis.

A. "Public morals"

3. Past panel and Appellate Body reports interpreting Article XX(a) have properly declined to impose a global WTO standard of public morals and have left it to each Member to define its own "public morals" for itself. To quote past reports: "public morals" for the purpose of Article XX(a) "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values"; "it is up to each Member to determine what level of protection is appropriate in a given situation"; and Members "should be given some scope to define and apply for themselves" such concepts "according to their own systems and scales of values".[3] The Appellate Body in *EC – Seal Products* agreed that Members have the right to determine the level of protection that they consider appropriate, and added that "Members may set different levels of protection even when responding to similar interests of moral concern."[4]

4. The United States has argued that the tariff measures at issue protect "public morals", because the Chinese government engages in acts, policies and practices that the United States refers to as "morally wrong".[5] The United States describes that these acts, policies and practices engaged in within China and on the Internet violate "prevailing US standards of right and wrong".[6] The United States refers to its domestic criminal law as evidence of its own norms of "morally wrong

[1] "Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union", agreed on 31 May 2018, text available at https://www.meti.go.jp/press/2018/05/20180531009/20180531009-2.pdf; and "Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union", agreed on 25 September 2018, text available at https://www.meti.go.jp/press/2018/09/20180925004/20180925004-2.pdf.

[2] "Joint Statement on Technology Transfer Policies and Practices", attached to 31 May 2018 Joint Statement, id.

[3] Panel Report, *China – Publications and Audiovisual Products*, para. 7.759 (quoting Panel Report, *US – Gambling*, para. 6.461) and para. 7.819.

[4] Appellate Body Report, *EC — Seal Products*, para. 5.200.

[5] US FWS, para. 76.

[6] US FWS, para. 74.

behaviour".[7] Japan agrees that a Member's domestic criminal law provides relevant evidence for evaluating what might constitute a "public moral" in that Member.

B. "Designed to protect public morals"

5. When a panel analyzes a measure's "design" in relation to Article XX(a), it must examine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals: that is, whether a relationship exists between the measure and public morals, such that the measure is "not incapable of protecting public morals". In Japan's view, for a measure to be provisionally justified under Article XX(a) of the GATT 1994, it must be designed to meet the policy objective that it pursues.[8]

6. To ascertain whether such a relationship exists, "a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation."[9] The evidence and evaluation regarding this relationship is what matters, not whether the measure refers by name to one of the usual "public moral" concerns[10] nor the subjective intention of the government of the Member taking the measure.

C. Chapeau

7. If the Panel determines that the US tariff surcharges at issue are "necessary to protect public morals", then it should also carefully evaluate whether the application of these surcharges satisfies the requirements of the *chapeau* of Article XX: that is, whether these surcharges are applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Not every difference in treatment constitutes such "arbitrary or unjustifiable discrimination".

8. Japan notes the discussion in *US – Shrimp* listing three elements relevant to analyzing compliance with the *chapeau.*[11] The Appellate Body has also found that when a panel analyzes whether discrimination is arbitrary or unjustifiable, it "should focus on the cause of the discrimination, or the rationale put forward to explain its existence"[12]; this analysis "'should be made in the light of the objective of the measure', and … discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'".[13] Thus, "'[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[14]

[7] Id., para. 74-76.

[8] See Appellate Body Report, *Colombia — Textiles*, para. 5.68, and Appellate Body Reports, *EC — Seal Products*, para. 5.169: in both cases the Appellate Body found that to justify a measure under Article XX(a) the measure must be designed to protect public morals, as well as necessary to protect public morals.

[9] Appellate Body Report, *Colombia – Textiles*, para. 5.69.

[10] Id.

[11] Appellate Body Report, *US – Shrimp*, para. 150.

[12] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US/Mexico II)*, para. 6.271 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226).

[13] Id. (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

[14] Id. (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.306).

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

I INTRODUCTION

1. New Zealand's participation in the current dispute reflects its systemic interest in the issues raised. New Zealand has a significant interest in the preservation of the multilateral rules-based global trading system, and in maintaining the important role played by the WTO.

II THE MULTILATERAL RULES BASED TRADING SYSTEM

2. The multilateral rules-based trading system regulates and fosters international trade. The WTO covered agreements sit at the heart of this system. They ensure that all Members, regardless of their size or trading capacity, are subject to the same baseline rights and obligations and, accordingly, have equal opportunity to participate in the global market.

3. By prescribing what Members can and cannot do, the multilateral rules-based trading system provides the predictability necessary to ensure efficient and stable trade. A predictable and stable trade environment encourages trade expansion by reducing the degree of risk that traders must assume. This fosters growth and, in turn, enhanced economic welfare.

4. This system is currently under threat by unilateral trade action, taken by multiple Members, in order to influence other Members' trade practices.

III UNILATERAL ACTION

5. Unilateral action, taken outside of the covered agreements and directed at disrupting the trade of another Member, is antithetical to a stable and predictable trading system. It undermines the rights and obligations that form the foundation of the system, and the fundamental principle that these rights and obligations apply to all Members, equally.

6. The multilateral rules-based trading system is built on the principal of trade liberalisation. This is facilitated through the mutual acceptance of limitations on what Members can do. The benefits conferred by the covered agreements can only be effectively enjoyed if all Members comply with them. If one Member expressly steps away from these commitments, this will undermine the stability and certainty on which the system rests, and could reduce the incentive for other Members to comply. Depending on the scale, nature and duration, unilateral action of this kind can threaten the system as a whole.

IV CONCLUSION

7. New Zealand is committed to the preservation and maintenance of the multilateral rules-based trading system. The system is not perfect. These imperfections cannot, however, be used to justify actions that will distort trade and destabilise the system as a whole. If the system is undermined, all Members will suffer. Its preservation and strengthening should be an imperative for all Members.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

I. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT

A. Introduction

1. Singapore is concerned with the importance of maintaining a rules-based multilateral trading system – one that sees a disciplined application of the covered agreements, underpinned by a robust dispute settlement system to lend predictability and security to the multilateral system.

2. Singapore is participating in these proceedings because it has a systemic interest in the interpretation of the language relating to the "public morals" exception found in the covered agreements, including the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

3. In this regard, Singapore's comments are strictly limited to providing itsviews on the proper interpretation of Article XX(a) of the GATT 1994. Accordingly, Singapore does not seek to comment on the substantive merits of the case. In summary, our key points are as follows:

a. To begin with, in determining whether the objective of a measure in question is a "public morals" objective, Members must be afforded a certain degree of domestic policy space to determine their public morals objectives, having regard to their specific cultural, religious and other social contexts.

b. However, this discretion is not unlimited. First, there must be a relationship between the measure and the protection of public morals, in the sense that the measure must not be incapable of protecting public morals. Second, it must meet the necessity test, which involves weighing and balancing between a series of factors, including: the importance of the objective; the contribution of the measure to that objective; and the trade-restrictiveness of the measure.

c. Finally, the measure must meet the chapeau requirements of Article XX, in that it must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

B. GATT Article XX – Two-tier analysis

4. In line with the consistent jurisprudence of the Appellate Body ("AB") and several panels,[1] and as most recently re-affirmed by the AB in *Indonesia – Import Licensing Regimes*,[2] an assessment of whether a measure is justified under Article XX of the GATT 1994 involves a two-tier sequential analysis of:

a. first, whether the measure at issue is provisionally justified under one of the paragraphs of Article XX; and

b. second, whether it also meets the requirements of the chapeau of Article XX.

5. With respect to the first tier, provisional justification requires that a challenged measure "address the particular interest specified in that paragraph", and that "there be a sufficient nexus between the measure and the interest protected."[3] In particular, where Article XX(a) is concerned, the AB in *Colombia – Textiles* has essentially boiled this down to mean that the measure must, firstly, be "designed" to protect public morals, and secondly, be "necessary" to protect such public morals.[4]

[1] Appellate Body Report, *Colombia – Textiles*, para. 5.67 (citing a list of other cases).
[2] Appellate Body Report, *Indonesia – Import Licensing Regimes,* para. 6.7.
[3] Appellate Body Report, *Colombia – Textiles*, para. 5.67; Appellate Body Report, *EC – Seal Products*, para. 5.169 (quoting Appellate Body Report, *US – Gambling*, para. 292)
[4] Supra, fn.1.

C. Scope of "Public Morals"

6. Before assessing whether a measure is "designed" or "necessary" to protect public morals, we need to first cross the threshold of what constitutes "public morals" to begin with. In this regard, previous WTO panels[5] have taken a relatively broad approach in defining the concept of "public morals". This term "public morals" has been interpreted as denoting "standards of right and wrong conduct maintained by or on behalf of a community or nation". Panels have also noted that its content "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values." In particular, the panels in *Colombia – Textiles* and *EC – Seal Products* noted that Members should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to "various values prevailing in their societies at a given time".[6]

7. Singapore generally agrees with this analysis. In Singapore's view, this element recognises the reality that Members must be afforded a certain degree of domestic policy space to define their own public morals objectives, having regard to their specific cultural, religious and other social contexts.

8. At the same time, this discretion is not without its limits, insofar as the measure must, as earlier mentioned, firstly, be "designed" to protect the stated public morals objective, and secondly, satisfy the "necessity" analysis.

D. Design of measure

9. As emphasised by the AB in *Colombia – Textiles*, the analysis of the "design" of a measure requires an examination as to whether there is a relationship between the measure and the protection of public morals. This is in the sense that the measure must not be incapable of protecting public morals.[7] Such a determination requires examination of the "evidence regarding the design of the measure at issue, including its content, structure, and expected operation."[8]

10. In this regard, we note that the determination should not focus on mere labels. The AB has clarified that an express reference to "public morals" is not *per se* definitive that the measure was indeed designed for that purpose. On the other hand, neither is the absence of such an explicit reference fatal if the evidence pertaining to the content, structure and other aspects of a measure, nonetheless objectively demonstrates that it was in fact designed to protect public morals.

E. Necessity of measure

11. Turning next to the "necessity" analysis, this was summarised by the AB in *EC – Seal Products* as involving a process of "weighing and balancing" a series of factors, including: the importance of the objective; the contribution of the measure to that objective; and the trade-restrictiveness of the measure.[9]

12. This is a highly fact-specific assessment that a panel will need to undertake on a holistic basis, which can comprise both qualitative and quantitative analyses. We note, amongst other things, the AB's indication that:

> a. the more vital the values that are reflected in the measure's objectives, the easier it would be to accept the measure as "necessary";
>
> b. the greater the contribution a measure makes to the objective pursued, the more likely it is to be characterised as "necessary"; and
>
> c. a measure with a relatively slight impact … might be more easily considered as "necessary" than a measure with intense or broader restrictive effects,

[5] Panel Report, *US – Gambling*, paras. 6.465 and 6.461; Panel Report, *China – Publications and Audiovisual Products*, para 7.759; Panel Report, *EC – Seal Products*, paras. 7.380 and 7.409.

[6] Panel Report, *Colombia – Textiles*, paras. 7.301 (citing Panel Report, *EC – Seal Products*, paras. 7.380-7.381 and 7.409).

[7] Appellate Body Report, *Colombia – Textiles*, para. 5.68.

[8] Appellate Body Report, *Colombia – Textiles*, para. 5.69.

[9] Appellate Body Report, *EC – Seal Products*, para. 5.169

and furthermore, that a panel must then compare the challenged measure against possible alternative measures which could achieve the same level of protection while being less trade restrictive[10].

F. Chapeau requirements

13. Finally, in the event that a measure is found to be provisionally justified under paragraph (a) of Article XX, it thereafter still needs to comply with the conditions of the chapeau of Article XX. This, in turn, involves an examination of whether the measure is being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

14. However, Singapore does not consider it necessary to add any further views as regards the chapeau of Article XX, in light of the already considerable body of jurisprudence and guidance available on this element, and which was helpfully articulated by the distinguished delegation of Japan in its third party oral statement.

II. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

A. Response to Question 1 (para. 12 of Japan's statement)

15. Singapore's oral statement, paras. 9-10, noted that:

> "9. As emphasised by the AB in *Colombia – Textiles*, the analysis of the "design" of a measure requires an examination as to whether there is a relationship between the measure and the protection of public morals. This is in the sense that the measure must not be incapable of protecting public morals. Such a determination requires examination of the "evidence regarding the design of the measure at issue, including its content, structure, and expected operation."
>
> 10. In this regard, we note that the determination should not focus on mere labels. The AB has clarified that an express reference to "public morals" is not *per se* definitive that the measure was indeed designed for that purpose. On the other hand, neither is the absence of such an explicit reference fatal if the evidence pertaining to the content, structure and other aspects of a measure, nonetheless objectively demonstrates that it was in fact designed to protect public morals."

16. In Singapore's view, the determination of whether a measure is "designed" to protect a stated public morals objective should focus on "evidence regarding the design of the measure at issue, including its content, structure, and expected operation", rather than mere labels. As clarified by the AB in *Colombia – Textiles*, the existence or absence of an express reference to the public morals objective in question should not be treated as determinative.

17. In light of the AB's statement that the Panel "must *examine evidence*…", and arrive at a conclusion following "an *assessment* of the design", Singapore understands this to be an objective determination to be undertaken by the Panel based on the evidence and facts before it, while recognising the observation that the "design" step is not a particularly demanding step of the Article XX(a) analysis. This is also a separate question from, and does not erode, the broad discretion and latitude given to Members to define and apply for themselves the concept of "public morals" in their respective territories.

B. Response to Question 2 (para. 10 of Singapore's statement)

18. Singapore's response to Question 1 above applies to this Question also.

[10] Appellate Body Report, Colombia – Textiles, paras 5.71-5.75.

C. Response to Question 3 (para. 13 of EU's statement)

19. Singapore understands para. 13 of the EU's oral statement, when read with para. 44 of the EU's written submission, to be making the point that there needs to be a reasonably direct nexus between a measure at issue and the public morals objective being invoked, in order to demonstrate the existence of a relationship between the objective and the measure. Singapore notes the EU's comment that there has to be a "genuine" relationship, in order to cross the threshold for the "design" step, but also recognises the AB's observation that the examination of a measure's "design" is not a particularly demanding step of the Article XX(a) analysis.[11]

20. In Singapore's view, the suggestion that "[i]f the US measures were to target specifically those imports … whose production has benefitted from the practices which the US is objecting to, such measures could be evaluated differently", could also lend itself to the "necessity" analysis, particularly as one of its key elements is to assess the level of trade-restrictiveness of a measure. This would thus likely impact on the evaluation of its provisional justification under Article XX(a) of the GATT.

21. In addition, we note that the chapeau of Article XX also requires an analysis of whether a measure constitutes a "disguised restriction on international trade". In this regard, the degree and genuineness of relationship that a measure has with the stated objective which it seeks to pursue, could be a relevant factor in determining if a measure is "disguised".

D. Response to Question 4 (para. 2 of Chinese Taipei's statement)

22. As noted in paras. 6-8 of Singapore's statement, Singapore agrees that Members should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to "various values prevailing in their societies at a given time".[12] At the same time, this discretion is not without its limits, insofar as the measure must, firstly, be "designed" to protect the stated public morals objective, and secondly, satisfy the "necessity" analysis.

E. Response to Question 5 (justifiability, or otherwise, of a measure's coercive effect on another Member's policies)

23. Drawing from the guidance of the AB in *US – Shrimp*, Singapore recognises that a measure which requires an exporting country to adopt or comply with certain policies prescribed by the importing country, does not necessarily render it *a priori* incapable of justification under Article XX.[13] Instead, certain factors should be taken into account to determine whether the effect of an applied measure constitutes an "unjustifiable discrimination" within the meaning of the chapeau of Article XX.

24. The first is to consider whether the measure, when applied, is in effect an "economic embargo" which requires the exporting Member(s) to adopt not merely a comparable, but rather essentially the same, policy as that applied within the importing Member.[14] In this regard, the AB further considered that it would be unacceptable to establish a "rigid and unbending" standard regulating market access to the importing Member, in which any other specific policies or measures adopted by exporting Member(s) to achieve a similar objective are not taken into account.[15]

25. A second factor is to consider that, in international trade relations, it would be unacceptable for one Member to use an economic embargo to require other Members to adopt essentially the same regulatory programme to achieve a certain policy goal within the importing Member, without taking into consideration "different conditions which may occur in the territories of those other Members".[16] In this regard, the AB elaborated that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of a measure

[11] Appellate Body Report, *Colombia – Textiles*, para. 5.70.
[12] Panel Report, *Colombia – Textiles*, paras. 7.301 (citing Panel Report, *EC – Seal Products*, paras. 7.380-7.381 and 7.409).
[13] Appellate Body Report, *US – Shrimp*, para. 121.
[14] Appellate Body Report, *US – Shrimp*, para. 161 read with para. 163.
[15] Appellate Body Report, *US – Shrimp*, para. 163.
[16] Appellate Body Report, *US – Shrimp*, para. 164.

at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries.[17]

26. A third factor is whether the importing Member had adequately engaged and negotiated with the exporting Member(s) in an effort to pursue its underlying policy objective, before applying the measure in question.[18]

[17] Appellate Body Report, *US – Shrimp*, para. 165.
[18] Appellate Body Report, *US – Shrimp*, para. 166.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI*

Mr. Chairman, Members of the Panel,

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu thanks the Panel for the opportunity to make a statement in this dispute. In our statement, we would like to address two points: first, the interpretation of Article XX(a) of the GATT 1994, and second, the importance of the issues raised in this dispute to our economy, trade and competitiveness, and the far-reaching impact they will have on the world economy and the multilateral trading system as a whole.

2. Firstly, regarding the interpretation of Article XX(a) of the GATT 1994, in our view, the impact on trade from practices violating public morals are not limited to any particular industry or sector, but rather affects society as a whole. Accordingly, the Panel should be careful not to use an overly restrictive interpretive approach when reviewing a Member's invocation of Article XX(a).

3. Secondly, intellectual property protection is crucial to safeguarding and advancing international trade. Members and their businesses rely on adequate and sound intellectual property protections to ensure their competitiveness in the global marketplace, and it is these protections that encourage further innovation as well as the spread of knowledge.

4. This dispute involves the practices of certain Members, which include foreign ownership restrictions, forced technology transfers, theft of trade secrets, among others. These practices may cause harm to Members, their businesses, and the credibility and normal-functioning of the WTO. For this reason, we share the same concerns as the United States, and believe it is important for these issues to be taken into account by the Panel.

5. This concludes our statement today. We thank the panel again for this opportunity.

* Chinese Taipei requested that its oral statement serves as its executive summary.