

UNITED STATES — TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

**RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS
FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

November 20, 2019

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
<i>Brazil – Retreaded Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Colombia – Textiles (AB)</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add. 1, adopted 22 June 2016
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
<i>Dominican Republic – Import and Sale of Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and

	Corr.3 and 4
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>US – Shrimp (Article 21.5 – Malaysia) (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001
<i>US – Shrimp (Thailand) / US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
<i>US – Softwood Lumber V (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Wool Shirts and Blouses (Panel)</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R

TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
US – 26	Statement by the United States on the Precedential Value of Panel or Appellate Body Reports Under the WTO Agreement and DSU, Meeting of the DSB (December 18, 2018)
US – 27	Statement from the Press Secretary Regarding the President's Working Dinner with China (December 1, 2018)
US – 28	Remarks by Vice President Pence at the Frederic V. Malek Memorial Lecture (October 24, 2019)
US – 29	German Chamber of Commerce, <i>Business Confidence Survey 2019-20</i>
US – 30	18 U.S. Code CHAPTER 41 (EXTORTION AND THREATS)

MEASURES AT ISSUE

1. Referring to the content of China's panel request, please indicate what are the measures China challenges in this dispute?

1. The following two measures are identified in China's panel request and are within the panel's terms of reference:

- An additional 25% duty ad valorem on approximately \$34 billion worth of imports, with effective date June 20, 2018 (“**Measure 1**”)¹; and
- An additional 10% duty ad valorem on approximately \$200 billion worth of imports from China, with effective date September 24, 2018 (“**Measure 2**”).²

2. Measure 1 (found at Exhibit CHN-2) was published in the official U.S. government journal, the Federal Register, on June 20, 2018, at 83 Fed. Reg. 28710.³ Measure 2 (found at Exhibit CHN-3) was published in the Federal Register on September 21, 2018 at 84 Fed. Reg. 20459.⁴

3. In its first written submission, China also sought to challenge a third measure, enacted well after the time of panel establishment.⁵ In particular, China seeks to challenge a different rate of duty (25 percent) applied to the products of China that are subject to Measure 2. This duty on certain products (Duty Measure 3) was adopted in May 2019 and published in the Federal Register on May 9, 2019 at 84 Fed. Reg. 20459. Duty Measure 3 is found at Exhibit CHN-4.

4. As China acknowledges in its first written submission, Duty Measure 3 was not “in place” (i.e., did not exist) on the date the Panel in this dispute was established and was not among the “specific measures” identified in China's panel request.⁶ Specifically, the DSB established this Panel on January 18, 2019, whereas Duty Measure 3 was issued nearly five

¹ See China's Panel Request (WT/DS543/7) (circulated December 7, 2018) p. 2.

² See China's Panel Request (WT/DS543/7) (circulated December 7, 2018) p. 2.

³ Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28710 (June 20, 2018). (Exhibit CHN-2).

⁴ Notice of Modification of Section 301 Action: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47974 (September, 21, 2018) (Exhibit CHN-3).

⁵ See China's First Written Submission, para. 26.

⁶ See China's First Written Submission, para. 26.

months later, on May 9, 2019. Accordingly, as the United States has explained,⁷ Duty Measure 3 falls outside the Panel's terms of reference as established by the DSB pursuant to Articles 7.1 and 6.2 of the DSU.

2. *Please elaborate on whether the clause in China's panel request referring to "any modification, replacement, or amendment to the measures identified above, and any closely connected, subsequent measures" covers the increase of the additional duty on List 2 products to 25%. Please explain the rationale for your response.*

5. Notwithstanding whatever China wished to accomplish by including the above-referenced clause in its panel request, the inclusion of such language does not have the legal effect of sweeping Duty Measure 3 into the Panel's terms of reference.

6. As the United States has explained, under Article 7.1 and Article 6.2 of the DSU a panel's terms of reference is limited to (1) a measure specified in a Member's panel request (2) "in existence" on the date of panel establishment. Nothing in the text of DSU suggests that the inclusion of any particular phraseology in a panel request can expand a panel's terms of reference beyond the scope demarcated by Articles 6.2 and 7.1 of the DSU. Nor has China identified any other text in the DSU that supports such a view.

7. As the United States has explained, Duty Measure 3 (i.e., "the increase of the additional duty on List 2 products to 25%") did not exist at the time the panel was established. Accordingly, Measures 3 is not within the Panel's terms of reference under Articles 7.1 and 6.2 of the DSU.

8. The United States further notes that the phrase "any modification, replacement, or amendment to the measures identified above, and any closely connected, subsequent measures" – although not able to serve as a net for capturing future measures of possible interest to China – does have utility. In particular, the language could capture measures that came into existence before the date of panel establishment, but that were perhaps unknown to China when it filed its panel request on December 8, 2018.

9. It could not, however, be the case that the phrase "any modification, replacement, or amendment to the measure identified above" would bring into the scope of the dispute any post-panel establishment changes. Consider a case in which a Member maintains a duty that appears consistent with its WTO commitments. A complaining party could challenge that measure and include the phrase "any modification, replacement, or amendment to the measure identified above". At the time the DSB establishes the panel and sets its terms of reference, the measure in existence would not breach any WTO obligation. If at some point in the future the measure were modified, replaced, or amended, however, the complaining party might seek to establish a breach based on the new measure, even though no breach existed when the panel's terms of reference

⁷ See U.S. First Written Submission, paras. 91-112.

were set. Conversely, if a breach had existed at the time of panel establishment, a responding party might seek to “cure” the breach by modifying, replacing, or amending the challenged measure in the course of the dispute. This would convert “the matter” set out in the panel request that the DSB charges a panel to examine into a moving target that either the complaining party or responding party could seek to adjust, contrary to the terms of the DSU.

3. Please develop further the argument presented in the United States' response to Panel's advanced question four on the first day of the Panel's meeting with the parties, and we paraphrase, that for a measure to fall within a panel's mandate, it must exist at the time of or be contemplated in the request for the establishment of a panel. Could you please refer to any past disputes that dealt with a similar problem?

10. In the view of the United States, a proper interpretation of the DSU requires the result that for a measure to be within a panel's terms of reference, the measures must be (1) identified in the request for panel establishment and (2) in existence on the date of panel establishment. As explained, this understanding flows from the text of Articles 7.1 and 6.2 of the DSU, which govern a panel's terms of reference.

11. The question also includes the phrase “or be contemplated in the request for the establishment of a panel.” The meaning of this phrase is uncertain, and to the extent it would differ from the U.S. view expressed above, the United States would not agree with it.

12. Under Article 7.1 of the DSU, when the DSB establishes a panel, the panel's terms of reference (unless otherwise agreed) are “[t]o examine . . . the matter referred to the DSB” by the complainant in a specific document, namely, the request for establishment of a panel. Under Article 6.2, the request for the establishment of a panel must identify “the specific measures at issue” and “a brief summary of the legal basis for the complaint.” It is these elements in the panel establishment document that are the “matter” referred to the DSB. Consequently, under the plain meaning of the DSU, the measures within a panel's terms of reference are those “specific measures” identified in the panel request; no other measures are properly within the panel's terms of reference.

13. A complaint with respect to a measure that does not exist at the time of panel establishment cannot be “referred to the DSB.” It is for this reason, as the Appellate Body recognized in *EC – Chicken Cuts*, “[t]he term ‘specific measures at issue’ in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference,” and thus the measures on which the panel makes findings, “must be measures that are in existence at the time of the establishment of the panel.”⁸ Similarly, in *EC – Selected Customs Matters*, the panel and the Appellate Body both reasoned that, under the DSU, a panel is to determine whether the

⁸ *EC – Chicken Cuts (AB)*, para. 156.

measure at issue is consistent with the relevant obligations “at the time of establishment of the Panel.”⁹

14. The United States notes that China cites two Appellate Body reports to support its position that Duty Measure 3 is within the Panel’s terms of reference, even though Measure 3 did not exist on the date of panel establishment: *Chile – Price Band System*¹⁰ and *EC – Selected Customs Matters*.¹¹ China’s reliance on these reports is misplaced.

15. First, the DSU does not assign precedential value to Appellate Body or panel reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of prior reports. Under the DSU (Articles 1, 3, 7, 11, and 19), a WTO adjudicator is to make findings so as to assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with WTO rules. The rules set out in the covered agreements are to be understood through application of customary rules of interpretation of public international law to the text of the WTO agreements (Art. 3.2).

16. Neither the DSU nor those rules assign any weight to previous dispute settlement interpretations. In fact, the DSU expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations. Article 3.9 of the DSU states that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”¹²

17. In short, prior Appellate Body reports are not binding on panels considering other disputes. Accordingly, as the United States has explained at length in a recent DSB statement,¹³ the Panel in this dispute is not bound by any of the legal interpretations adopted in the panel or Appellate Body reports cited by China, or any other panel or Appellate Body reports.¹⁴

⁹ See, e.g., *EC – IT Products*, para. 7.167 (“[W]e note that any repeal would have taken place after the panel was established and its terms of reference were set. Therefore, the Panel considers that it may make recommendations with respect to these measures.”); *US – Wool Shirts and Blouses (Panel)*, para. 6.2 (“In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate . . . notwithstanding the withdrawal of the US restraint.”); see also *Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.

¹⁰ See, China’s First Written Submission, para. 27

¹¹ See, China’s Opening Statement at the First Meeting of the Parties, para. 15.

¹² DSU, Article 3.9.

¹³ Statement by the United States on the Precedential Value of Panel or Appellate Body Reports Under the WTO Agreement and DSU, Meeting of the DSB on December 18, 2018. (Exhibit US – 26)

¹⁴ See *US – Softwood Lumber V (AB)*, para. 111 (citing *Japan – Alcoholic Beverages II (AB)* and *US – Shrimp (Article 21.5 – Malaysia (AB))*). As the Appellate Body noted in its *US – Softwood Lumber V* report, adopted

18. This does not mean that a prior panel or Appellate Body interpretation is without any value. To the extent a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning would likely add to the persuasiveness of the panel's own analysis, whether or not the panel agrees with the prior reasoning. By the same token, if the legal reasoning contained in a prior Appellate Body report is not persuasive or does not comport with the text of a relevant covered agreement, a panel would have no basis for applying such reasoning in its adjudication of the matter before it.¹⁵

19. In this regard, to the extent that *Chile – Price Band System*, *EC – Selected Customs Matters*, or any other prior panel or Appellate Body report could be read to imply that measures enacted after the date of panel establishment are within a panel's terms of reference, those reports are erroneous as a matter of law and are not persuasive. They therefore would not support – much less confirm – a legal conclusion that Duty Measure 3 is within the Panel's terms of reference despite the fact that it did not exist at the time of panel establishment.

20. Second, neither *Chile – Price Band System* nor *EC – Selected Customs Matters* in fact supports China's view that measures enacted or amended after the date of panel establishment can fall within a panel's terms of reference, e.g., because they do not change "the essence" of measures identified in a panel request.¹⁶

21. As the United States has explained, the Appellate Body's report in *Chile – Price Band System*, at most, suggests that a measure enacted after the date of panel establishment can serve as interpretive guidance for measures identified in a panel request, not that a panel is authorized to render findings on such a measure. Indeed, the Appellate Body observed that the "amendment" at issue in *Chile – Price Band System* – which was enacted after the date of panel establishment – merely "clarified" the content of a measure identified in Argentina's panel request (i.e., the "legislation that established Chile's price band system").¹⁷ Specifically, as the Appellate Body noted

[t]he Amendment does not change the price band system into a measure different from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No. 19.772 simply amends Article 12 of Law No. 18.525 by adding a final paragraph to that provision. In its amended form, Law No. 18.525 incorporates the additional paragraph, making explicit that there is a cap on the amount of the total tariff that can be applied

report "as not binding, except with respect to resolving the particular disputes between the parties to that dispute." *US – Softwood Lumber V (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*).

¹⁵ See DSU Art. 11 ("Accordingly, 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 . . .").

¹⁶ See, China First Written Submission, note. 45; China's Opening Statement, para. 15.

¹⁷ *Chile – Price Band System (AB)*, para. 137.

under the system at the tariff rate of 31.5 per cent *ad valorem*, which has been bound in Chile's Schedule since the entry into force of the WTO Agreement.¹⁸

22. In other words, the “amendment” at issue in *Chile – Price Band System*, did not materially change the measure as it existed prior to the amendment. Rather, the amendment merely clarified (i.e., “mad[e] explicit”¹⁹) that Chile’s bound rate remained the same as it was before the amendment was enacted. It was against this factual backdrop that the panel concluded that the DSU did not preclude the panel from considering the original measure “as amended,” even though the amendment was enacted after the date of panel establishment.

23. China’s reliance on the Appellate Body report in *EC – Selected Customs Matters* is similarly misplaced. In its opening statement at the first substantive meeting, China cites the following sentence from that report:

[I]n *Chile – Price Band System*, the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure.²⁰

24. As explained above, however, *Chile – Price Band System* does not support the view that a panel’s terms of reference can extend to amendments enacted after the date of panel establishment. Rather, *Chile – Price Band System* at most suggests that panels are authorized to examine measures enacted after the date of panel establishment to the extent those measures provide context or guidance to understand the content of measures identified in a panel request. This, however, does not mean that such amendments are within the panel’s terms of reference such that a panel is authorized to make findings or recommendations on those measures. By the same token, *EC – Selected Customs Matters* cannot be read to support the view that a panel is authorized to render legal findings and recommendations on amendments enacted after the date of panel establishment so long as “the amendments do not change the essence of measures identified in the panel request.”

25. Moreover, in *EC – Selected Customs Matters*, the Appellate Body affirmatively recognized that while a panel may be authorized to examine legal instruments enacted after the date of panel establishment (e.g., for the purpose of evidentiary guidance), such instruments do not thereby fall within the panel’s terms of reference. Specifically, the Appellate Body stated that

While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel. A

¹⁸ *Chile – Price Band System* (AB), para. 137. (emphasis added)

¹⁹ *Chile – Price Band System* (AB), para. 137. (emphasis added)

²⁰ *US – Renewable Energy* (Panel), para. 7.10, citing *EC – Selected Customs Matters* (AB), para. 184.

panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.²¹

26. Both the panel and the Appellate Body reports in *EC – Selected Customs Matters* correctly understood that when the DSB establishes a panel and sets its terms of reference to examine the matter set out in the complaining party's panel request, it is the legal situation as of that date that a panel is charged to make findings on. A panel is generally free to consult evidence, including measures, enacted *after* the date of panel establishment to the extent such evidence is pertinent in assessing the WTO-consistency of measures identified in the panel request and that exist as of panel establishment – the date the DSB established the panel's terms of reference. The ability of a panel to assess post-panel establishment evidence, however, does not support the view that measures or amendments enacted after the date of panel establishment can be included within a panel's terms of reference. Making findings on post-panel establishment measures would be contrary to the panel's terms of reference and the DSU.

4. *Please provide contemporaneous information (documents or official statements) showing the rationale for the increase of the additional duty from 10% to 25% on List 2 products as initially contemplated in September 2018 and as ultimately adopted in May 2019.*

27. As explained in the notice announcing 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.”²²

28. In December 2018, the United States decided that the duties would not increase on January 1, 2019 from 10 percent to 25 percent. This measure was published in the Federal Register on December 19, 2018, at 83 FR 65198. The notice is at Exhibit CHN-13. The notice explained:

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301

²¹ *EC – Selected Customs Matters (AB)*, para. 188.

²² See, *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47974 (September 21, 2018) (Exhibit CHN – 3) (“China’s response, however, has shown that the current action no longer is appropriate. China has made clear— both in public statements and in government-to-government communications—that it will not change its policies in response to the current Section 301 action. Indeed, China denies that it has any problems with respect to its policies involving technology transfer and intellectual property. The United States has raised U.S. concerns repeatedly with China, including in Ministerial level discussions, but China has been unwilling to offer meaningful modifications to its unfair practices. Furthermore, China openly has responded to the current action by choosing to cause further harm to the U.S. economy, by increasing duties on U.S. exports to China.”)

investigation. See <https://www.whitehouse.gov/briefingsstatements/statement-press-secretaryregarding-presidents-working-dinnerchina/> (the ‘December 1 Statement’)^[23]. The December 1 Statement notes that the President “agreed that on January 1, 2019, he will leave the tariffs on \$200 billion worth of product at the 10% rate, and not raise it to 25% at this time . . . Both parties agree that they will endeavor to have this transaction completed within the next 90 days. If at the end of this period of time, the parties are unable to reach an agreement, the 10% tariffs will be raised to 25%.” The end of the 90-day period mentioned in the December 1 Statement is March 1, 2019.²⁴

29. In March 2019, the USTR announced that the rate of duty would remain at 10 percent “until further notice”. This measure was published in the Federal Register on March 5, 2019, at 84 FR 7966. The notice is at Exhibit CHN-14:

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301 investigation. See <https://www.whitehouse.gov/briefingsstatements/statement-press-secretaryregarding-presidents-working-dinner-china/>. Since the meeting on December 1, the United States and China have engaged in additional rounds of negotiation on these issues. In light of progress in discussions with China, on February 24, 2019, the President directed the Trade Representative to postpone the increase in tariffs scheduled for March 2, 2019.

...

To effectuate the Trade Representative's decision, Annex B of the September 21 notice (83 FR 47974) and the Annex to the December 19 notice (83 FR 65198), hereby are rescinded. In accordance with Annex A of the September 21 notice, the rate of duty under the September 2018 action will remain at 10 percent until further notice.²⁵

30. Developments in May 2019 resulted in the United States adopting a new measure, namely, Duty Measure 3. Duty Measure 3 definitively set a duty level of 25 percent on products

²³ Statement from the Press Secretary Regarding the President’s Working Dinner with China (December 1, 2018). (Exhibit US-27)

²⁴ See *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 65198 (December 19, 2018), Section B. (Exhibit CHN-13)

²⁵ See *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, Section B, 83 Fed. Reg. 7966 (March 5, 2019). (Exhibit CHN-14)

covered by Measure 2. Duty Measure 3 was published in the Federal Register on May 9, 2019, at 84 FR 20459. The notice is at Exhibit CHN-4. As explained in the notice:

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301 investigation. See <https://www.whitehouse.gov/briefingsstatements/statement-press-secretaryregarding-presidents-working-dinnerchina/>. Since the meeting on December 1, the United States and China have engaged in additional rounds of negotiation on these issues, including meetings in March, April, and May of 2019. *In the most recent negotiations, China has chosen to retreat from specific commitments agreed to in earlier rounds. In light of the lack of progress in discussions with China, the President has directed the Trade Representative to increase the rate of additional duty to 25 percent.*²⁶

31. It is this May 2019 measure that China impermissibly seeks to include in a dispute established pursuant to a panel request months earlier, in December 2018. As the record makes clear, this measure was different than Measure 2 – it imposed a different rate of duty, and had its own, particular rationale.

GENERAL ISSUES

6. ***Do the parties agree that the United States has imposed and has been collecting:***
- a. ***additional 25% ad valorem duties on products from China classified in the subheadings of the Harmonized Tariff Schedule of the United States (HTSUS) set out in Annex A to Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation; and / or***
 - b. ***additional 10%, increased subsequently to 25%, ad valorem duties on products of China classified in the subheadings of the HTSUS set out in Annex A to Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation?***

²⁶ See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Section B, 83 Fed. Reg. 20459 (May 9, 2019). (Exhibit CHN-4) (emphasis added)

32. The following is a response to Questions 6(a) and (b): The United States has imposed and has been collecting the duties referenced above.

7. *In paragraph 46 of its first written submission, the United States asserts that maintaining China's practices and policies, subject to the Section 301 Report, would be "inconsistent with the fundamental objectives of the WTO Agreement and the GATT 1994". How does this assertion relate to the United States' position that "this dispute is fundamentally not about WTO rights and obligations", as summarized in paragraph 2 of the United States' first written submission?*

33. These statements are entirely consistent, and reinforce each other. To recall, this question refers to the following section of the U.S. First Written Submission:

5. China's pursuit of this dispute, and findings by this Panel, will not achieve a "solution" or lead to a "reciprocal and mutually advantageous arrangement[]"

[paragraph 46] Article 3.5 of the DSU states that solutions should not "impede the attainment of any objective" of the covered agreements. As explained above, DSB findings would not serve to resolve any dispute between the parties; rather, those matters are being discussed on a bilateral basis at the highest levels, and China has already taken the unilateral decision to try to maintain its unfair technology transfer policies by retaliating with its own tariff measures against most U.S. exports. 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.*

[paragraph 47] The Preamble to the GATT 1994 – which remains unchanged from the GATT 1947 – states that it seeks to reach "reciprocal and mutually advantageous arrangements." This goal is repeated in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization. A trading system where one Member may maintain policies to steal or otherwise unfairly acquire the technologies of its trading partners in no sense can be considered a "mutually advantageous arrangement[]." Rather it is an arrangement that benefits only one party – namely, the party that has made the unilateral decision to adopt unfair

policies in order to obtain a competitive edge over all other participants in the system. Accordingly, to the extent that a DSB finding in favour of China would encourage China to maintain its unfair technology transfer policies, that “solution” would impede the attainment of the objectives of the GATT 1994, and of the WTO Agreement as a whole.

[paragraph 48] Furthermore, the preamble to the Marrakesh Agreement expresses the objective of “develop[ing] an integrated, more viable and durable multilateral trading system.” A trading system where one Member may steal or unfairly acquire the technology of its trading partners – without any consequence – is neither viable, nor durable. Moreover, if the WTO is seen as approving or supporting such aggressive and unfair industrial policies, the Members of the system will increasingly question its fundamental legitimacy. Accordingly, a “solution” that in any way supports China’s goal of maintaining its current technology transfer policies would “impede the attainment” of a “viable and durable multilateral trading system.”²⁷

34. The point in this section of the U.S. submission is that China’s pursuit of findings in this dispute, if successful, may encourage China to maintain measures that are harmful to the overall goals of Members in establishing the multilateral trading system. These goals are expressed in the preamble to the WTO Agreement, and are not set out in specific WTO rights and obligations. Accordingly, in evaluating whether China is entitled to the findings it seeks, the Panel must take into account that the overall dispute between the parties – involving China’s unfair and immoral policies, the U.S. response, and China’s counter-response – is not fundamentally about WTO rights and obligations. And to the contrary, accepting China’s request for findings could lead to a result which is incompatible with the objectives of Members in establishing the WTO system.

35. The United States would further note that certain third parties have agreed that the unfair and immoral acts, policies, and practices detailed in the Section 301 Report undermine the multilateral trading system.²⁸

²⁷ U.S. First Written Submission, pp. 11-12 (footnotes omitted, emphasis added).

²⁸ See Oral Statement of Japan at the First Meeting of the Parties, para. 5:

No government should support unauthorized intrusion into, or theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets and use that information 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. 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.;*

8. ***In the title of the heading 3.1.1 of the United States' first written submission, the United States contends that the parties have "reached their own solution to the dispute". Could the United States please explain whether the reference to "solution" used in this context means a resolution of the dispute, or a process to resolve the dispute?***

36. The United States confirms that the first meaning expressed above is correct: namely, the parties have resolved or settled this WTO dispute within the meaning of Article 12.7 of the DSU (last sentence). That is, the record supports that as an objective matter, China and the United States have agreed that the overall matter – involving China's unfair and immoral technology transfer policies, the U.S. response, and China's counter-response – is not a matter that can or should be addressed under the WTO dispute settlement system.

37. Looking beyond the contours of the WTO system, and the DSU in particular, perhaps (as the question indicates) one might label the ongoing bilateral negotiations and bilateral tariff actions as some sort of "process." This labelling, however, would in no way indicate that the parties do not have a solution in terms of the DSU and WTO rights and obligations, within the meaning of Article 12.7 of the DSU. Indeed, a mutually agreed solution reflected in a single written document executed by the parties might well include processes for bilateral engagement. The inclusion of such processes in a written mutually agreed solution would in no way indicate that a mutually agreed solution had not been reached within the meaning of Article 12.7.

38. In sum, the parties have resolved or settled the dispute, as far as the dispute settlement process is concerned, and for purposes of Article 12.7 of the DSU (last sentence).

ARTICLE XX OF THE GATT 1994

10. ***Please comment on the argument that Article XX(a) requires a degree of a relationship between the products concerned by a measure claimed to be justified under that provision and a public morals objective pursued by the measure. (see European Union's third-party submission, paras. 43-44). Is this something that a panel should consider when examining the design of the measures or their necessity?***
11. ***Could you please comment on the approach taken by prior WTO adjudicators to assessing the "design" of a measure claimed to be provisionally justified under***

Oral Statement of Chinese Taipei at the First Meeting of the Parties, para. 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.

Article XX(a), especially the Appellate Body report in Colombia – Textiles (see, in particular, paragraphs 5.68-5.69 and 5.87- 5.89)?

39. The United States will provide a combined response to Questions 10 and 11.

40. As an initial matter, the phrase “designed to” does not appear in the text of Article XX(a) of the GATT 1994. While the phrase has appeared in prior dispute settlement reports, the United States emphasizes that the DSU does not assign precedential value to Appellate Body or panel reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of prior reports (*see* U.S. Response to Panel Question 3). Rather, a panel must apply the text of a covered agreement as understood through application of customary rules of interpretation. Accordingly, there is no requirement in the DSU to show that a measure is “designed to” protect public morals to establish a defense under Article XX(a).

41. An assertion that there must be a degree (undefined) of relationship between the products concerned by a public morals measure and the public moral objective is vague and not grounded in the text of Article XX(a). This provision reads that nothing in the GATT 1994 shall be construed to prevent the application of any measure necessary to protect public morals. It may be 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 such a relationship. A measure may be necessary to protect public morals without being limited to a product that itself offends public morals.

42. Further, to the extent that the reasoning of certain reports in relation to the “design” of a public morals measure is helpful in applying Article XX(a), the U.S. invocation of Article XX(a) falls squarely within the type of reasoning used in prior reports.

43. The Appellate Body has reasoned a measure that is not even designed to protect public morals (or achieve another objective under Article XX), cannot be “necessary” to protect public morals within the meaning of Article XX(a). Accordingly, in some prior disputes, the Appellate Body and panels have examined whether a measure is designed protect public morals, before proceeding to an assessment of whether the measure is “necessary” to do so within the meaning of Article XX(a).

44. In *Colombia – Textiles*, the Appellate Body, described the evaluation whether a measure is designed protect public morals as “not...particularly demanding”²⁹ and reasoned that a measure meets this threshold so long as the measure’s “design reveals that [it] is not incapable” protecting public morals.³⁰ In the view of the Appellate Body, a measure is demonstrably

²⁹ *Columbia – Textiles (AB)*, paras 5.70 (“We do not see the examination of the ‘design’ of the measure as a particularly demanding step of the Article XX(a) analysis.”)

³⁰ *See Columbia – Textiles (AB)*, para.5.68 (“If this initial, threshold examination reveals that the measure is incapable of protecting public morals, there is not a relationship between the measure and the protection of public morals that meets the requirements of the “design” step.”) and para. 5.77 (“We observe that, once an analysis of the “design” of a measure reveals that the measure is not incapable of protecting public morals, such that there is a relationship between the measure and the protection of public morals, a panel may not refrain from conducting the “necessity” step of the analysis.”)

“incapable” of protecting public morals if there is “no relationship between the measures” and protecting public morals.³¹ This was not a statement that the measure must be directed at a product that itself offends public morals.

45. In *Colombia –Textiles*, the Appellate Body found that Colombia’s “compound tariff” measure met the threshold of being designed to protect public morals because the compound tariff would have the effect of “reducing the profit margin of the persons intending to use imports for money laundering purposes” and thereby disincentivizes persons from attempting to launder money through Colombia’s tariff system.³²

46. Based on the approach taken by the Appellate Body in *Colombia –Textiles*, there is no credible basis to conclude that the measures at issue in this dispute are “incapable” of addressing the unfair trade acts, policies, and practices outline the Section 301 Report. As explained, the tariff measures at issue are structured so as to target particular types of goods that benefit from the unfair and immoral Chinese technology transfer policies. The tariff measure alert U.S. consumers and purchasers to the unfair and immoral practices that underlie many traded Chinese products and signal to U.S. consumers and purchasers that such practices are not acceptable. The tariff measures also raise the economic cost that China will incur so long as it maintains the unfair trade acts, policies, and practices document in the Section 301 Report.³³

47. In this latter sense, then, the tariff measures at issue in this dispute are analogous to the measure at issue in *Colombia –Textiles*, in that they create a “disincentive” to engage in conduct found to be morally objectionable. And because the U.S. tariff measures at issue create a disincentive for China to continue its morally wrong trading behavior, the measures clearly surmount the Appellate Body’s minimal threshold test of being “designed to” protect public morals for purposes of Article XX(a).

12. Please explain whether and how, the Panel should take into account in its assessment under Article XX (a) the relationship between the goods concerned by the additional import duties and China's actions considered in the Section 301 Report?

48. First, nothing in the text of Article XX(a) suggests that the United States is required demonstrate any particular “relationship” between the measures at issue and the “products concerned” in order to justify the measure under that provision. Rather, the fundamental question is whether the measures at issue are “necessary” within the meaning of Article XX(a).

³¹ See *Columbia – Textiles (AB)*, para. 5.89 (“We further recall that a panel may cease its analysis of a defence under Article XX(a) of the GATT 1994 at the stage of assessing the “design” of the measure only where the measure at issue is incapable of protecting public morals, such that there is no relationship between the measure and the protection of public morals.”)

³² See *Columbia – Textiles (AB)*, para. 5.88.

³³ See U.S. First Written Submission, para. 79.

49. As the United States has explained, the measures at issue 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” and until the economic costs of doing so begin to approach or outweigh the economic benefits.”³⁴ Accordingly, “it is necessary for the United States to adopt measures that are capable of changing China’s economic cost-benefit analysis” and the “measures at issue...do just that by imposing significant tariff increases on Chinese products until China takes steps to eliminate the unfair trade acts, policies, and practices detailed in the Section 301 Report.”³⁵

50. Further, as the United States has also explained, the benefits and advantages that China derives from its unfair trade acts, policy, and practices are designed to serve China’s “industrial policy goals” and “economic objectives” writ large and in a comprehensive sense.³⁶ Therefore, any corresponding response to combat China’s unfair trade acts, policies, and practices could also be expected to be broad-based and designed to apply economic pressure to China in a comprehensive fashion, not just with respect to narrow range of or products or industries.

51. Second, as the United States has explained,³⁷ the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, Measure 1) were – in fact – found to benefit from the trade policies documented in the Section 301 Report, including “Made in China 2025.”³⁸ In other words, there is a direct relationship between the “goods concerned by the additional import duties” and the unfair trade acts, policies, and practices that the measures at issue are designed to combat.

52. This linkage is also evident with respect to Measure 2. As explained, the United States adopted those measures only after China refused to take sufficient steps to address the long-standing concerns that prompted the United States to adopt Measure 1, and instead responded by

³⁴ U.S. First Written Submission, para. 78.

³⁵ U.S. First Written Submission, para. 79.

³⁶ See U.S. First Written Submission, para. 78 (referencing Section 301 Report (Exhibit US – 1), pp. 150, 153, 154.)

³⁷ See U.S. Opening Statement, para. 47. (“In addition to raising the cost to China of maintaining its technology-transfer policies, the United States would like to emphasize the links between the specific product coverage of the U.S. measures and the Chinese conduct that the U.S. measures are intended to address. 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.”)

³⁸ See Update to Section 301 Report (Exhibit US-2), p. 7 (“As detailed in the introduction to the Section 301 Report, official publications of the Chinese government and the Chinese Communist Party (CCP) set out China’s ambitious technology related industrial policies. These policies are driven in large part by China’s goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The most prominent industrial policy is ‘Made in China 2025,’ initiated in 2015. 21 Industrial sectors that contribute to or benefit from the “Made in China 2025” industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new materials, and automobiles.”)

imposing retaliatory tariffs on U.S. products (see U.S. Response to Panel Question 4). In this respect, Measure 2 is derivative of Measure 1.

13. Please comment on the following statements made by third parties during the first meeting of the Panel:

- a. Japan's statement made during the third-party session of the first Panel meeting (para. 12, last sentence, of the final version) that "the evidence and evaluation regarding [the relationship between an otherwise GATT-inconsistent measure and public morals] is what matters, not whether the measure refers by name to one of the usual 'public moral' concerns nor the subjective intention of the government of the Member taking the measure".**

53. Japan's statement is well-reasoned, and the United States agrees with it.

54. The United States understand Japan's statement to be a response to the suggestion that a measure (or related instruments) must contain the term "public morals" in order to be justifiable under Article XX(a).³⁹ Nothing in the text of Article XX(a) supports such a view. Indeed, the Appellate Body has rejected the notion that a measure justifiable under Article XX(a) must include an explicit reference to "public morals." As the Appellate Body stated in *Columbia – Textiles*

We note that a measure may expressly mention an objective falling within the scope of 'public morals' in that society. However, an express reference to such objective may not, in and of itself, be sufficient to establish that the measure is 'designed' to protect public morals for purposes of substantiating the availability of the defence under Article XX(a). *Conversely, a measure that does not expressly refer to a 'public moral' may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation.*⁴⁰

55. Further, at any rate, the U.S. measures at issue *do* "expressly mention an objective falling within the scope of "public morals" in the United States – namely, the elimination of the unfair trade acts, policies, and practices documented in the Section 301 Report."⁴¹

³⁹ See Japan's Oral Statement, para. 12 ("Contrary to what the EU suggests in paragraph 42 of its third party submission, the evidence and evaluation regarding this relationship is what matters, not whether the measure refers by name to one of the usual 'public moral' concerns³⁹ nor the subjective intention of the government of the Member taking the measure.") (emphasis added)

⁴⁰ *Columbia – Textiles (AB)*, para. 5.69 (emphasis added)

⁴¹ The United States adopted the measures at issue pursuant to authority under Section 301 of the Trade of 1974, which authorizes the USTR to take actions (including the imposition of duties) that are "appropriate" and "feasible" to "obtain the elimination of" "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce." See e.g. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: *China's Acts, Policies, and*

56. The United States also understand Japan's statement is directed to the suggestion that a measure cannot be justified under Article XX(a) if a Member adopted the measure to pursue other objectives, in addition to the protection of "public morals" (e.g., "economic interests"⁴²).⁴³ As an initial matter, this argument has no legal foundation. Nothing in the text of Article XX(a) supports the view that a measure that is justified under Article XX(a) must have the *singular* objective of protecting "public morals." In any event, the issue of dual purposes does not arise in the context of the current proceeding. The unfair trade acts, policies, and practices documented in the Section 301 Report implicate U.S. "public morals" precisely because China's conduct in this regard gives Chinese companies an economic advantage over U.S. companies through illicit means (e.g., forced technology transfer, cyber-intrusions) that are contrary to U.S standards of right and wrong.⁴⁴

b. Singapore's statement made during the third-party session of the first Panel meeting (para. 10, last sentence) that "neither is the absence of such an explicit reference [to public morals] fatal if the evidence pertaining to the content, structure and other aspects of a measure, nonetheless objectively demonstrate that it was in fact designed to protect public morals".

57. The United States agrees with this statement. Please see U.S. Response to Panel Question 13(a).

c. The statement by Chinese Taipei (para. 2, first sentence) that "the impact on trade of 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 interpretative approach when reviewing a Member's invocation of Article XX(a)."

58. Taiwan's statement comports with the United States' view that China's unfair trade acts, policy, and practices are designed to serve China's "industrial policy goals" and "economic

Practices Related to Technology Transfer, Intellectual Property, and Innovation (issued June 20, 2018; effective July 6, 2018) (Exhibit CHN-2).

⁴² See EU Third Party Submission, para. 42 ("All this may suggest that the measures at issue were not designed to protect 'public morals' within the scope of Article XX(a) of the GATT 1994, but instead to protect purely economic interests.")

⁴³ See Japan's Oral Statement, para. 12 ("Contrary to what the EU suggests in paragraph 42 of its third party submission, the evidence and evaluation regarding [the relationship between an otherwise GATT-inconsistent measure and public morals] is what matters, *not ... the subjective intention of the government of the Member taking the measure.*") (emphasis added)

⁴⁴ See Remarks by Vice President Pence at the Frederic V. Malek Memorial Lecture (October 24, 2019) ("To level the playing field for the American worker against *unethical* trade practices, President Trump levied tariffs on \$250 billion in Chinese goods in 2018. And earlier this year, the President announced we would place tariffs on another \$300 billion of Chinese goods if significant issues in our trading relationship were not resolved by December of this year.") (emphasis added) (Exhibit US-28)

objectives” writ large and in a comprehensive sense (i.e., “as a whole.”),⁴⁵ and the related U.S. view that “any corresponding response to combat China’s unfair trade acts, policies, and practices could also be expected to be broad-based and designed to apply economic pressure to China in a comprehensive fashion, not just with respect to narrow range of or products or industries.” (See U.S. Response to Panel Question 12).

14. Please comment on the principle following from the European Union's statement made during the third-party session of the first Panel meeting (para. 13, last sentence) that "[i]f the US measures were to target specifically those imports of Chinese products whose production has benefitted from the practices which the US is objecting to, such measures could be evaluated differently" [i.e. could be found provisionally justified under paragraph (a) of Article XX].

59. The United States disagrees with the apparent EU argument that measures necessary to protect public morals can only be those measures applied to specific products that offend public morals themselves. This EU argument has no basis in the text of Article XX(a), and the EU has, not surprisingly, failed to point to any text supporting it. The United States also understands the European Union to concede, however, that even on its cramped and non-textual reading of Article XX(a), tariff measures can be justified to the extent they apply to goods that benefit from China’s unfair trade acts, policies, and practices.

60. The United States certainly agrees that tariff measures applied to products that appear to benefit from China’s unfair and immoral practices would qualify as “necessary to protect public morals” under Article XX(a). In this regard, the United States reiterates that the Chinese products subject to additional tariffs under the July 6, 2018 U.S. measure (i.e., Measure 1) were products found to benefit from the Chinese trade policies documented in the Section 301 Report (Exhibit US-1),⁴⁶ including “Made in China 2025.”⁴⁷ (See U.S. Response to Panel Question 12). Therefore, the European Union would apparently concede that, even under its interpretation, Article XX(a) would be justified at least with respect to Measure 1.

⁴⁵ See U.S. First Written Submission, para. 78 (referencing Section 301 Report (Exhibit US-1), pp. 150, 153, 154.)

⁴⁶ Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: *China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28710 (June 20, 2018). (Exhibit CHN-2).

⁴⁷ See Update to Section 301 Report (Exhibit US-2), p. 7 (“As detailed in the introduction to the Section 301 Report, official publications of the Chinese government and the Chinese Communist Party (CCP) set out China’s ambitious technology related industrial policies. These policies are driven in large part by China’s goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The most prominent industrial policy is ‘Made in China 2025,’ initiated in 2015. 21 Industrial sectors that contribute to or benefit from the “Made in China 2025” industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new materials, and automobiles.”)

61. Further, the tariff measure that took effect in September 2018 (Measure 2) is derivative of Measure 1 because the United States adopted those measures only after China made clear that it would not take any steps to address the U.S. concerns that compelled the United States to adopt (Measure 1). Measure 2 is also necessary to protect public morals in part because to fail to respond to China's economic retaliation would demonstrate that the United States Government is willing to acquiesce in theft and forced transfer of U.S. technology by one of its largest trading partners.

15. *In US – Shrimp, both in the original dispute and the proceedings under Article 21.5 of the DSU, the Appellate Body held that:*

[C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. [...] It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX.

In the original dispute, the Appellate Body considered that "the most conspicuous flaw" in the measure's application related to its "intended and actual coercive effect on the specific policy decisions made by foreign governments" (Appellate Body Report, US – Shrimp, para. 161).

What criteria should determine the difference between legitimate unilateral measures justified under Article XX(a) of the GATT 1994 and measures inconsistent with that provision because of their coercive effect on China's policies? In your response, please refer to the text of Article XX and, where relevant, prior panel and Appellate Body reports.

62. The United States questions whether, as a matter of applying Article XX(a), it is useful first to discuss "criteria" in the abstract, and then to attempt to apply those abstract criteria. Rather, each invocation of Article XX(a) must be evaluated on a case by case basis, based on the actual text of Article XX, interpreted in accordance with the customary rules of interpretation of public international law (DSU Art. 3.2).

63. The United States has particular concerns with trying to apply the abstract concept of a "coercive effect" on another Member's policies; this term is not found in Article XX (or any relevant part of the WTO Agreement). This term also could have very different meanings in different contexts. Furthermore, as the Appellate Body has observed, "some degree" of inducement would appear to be "a common aspect of measures falling within the scope of Article XX," including Article XX(a). Therefore, use of market access to protect against, or induce a change in, policy may be a "necessary" feature of a measure justified under Article XX(a); in that case, such "coercive effect" is, by definition, "legitimate" and likewise

provisionally justified under Article XX(a). Furthermore, the United States notes that under Article 22 of the DSU, a Member may obtain authorization to suspend concessions in the event of another Member's failure to comply with DSB recommendations.⁴⁸ For these reasons, the United States fails to see how an analysis of "coercive effect" is a useful analytical tool.

64. Turning to the facts of this dispute, the goal of the U.S. tariff measures is to obtain the elimination of China's unfair and immoral technology transfer policies.⁴⁹ Whether or not someone might argue that the measures involve some sort of "coercive effect" is untied to any relevant legal principle. The United States would emphasize, however, that the goal of the U.S. tariff measures is not to change China's internal policies: to the extent that China wishes to steal or otherwise unfairly acquire technology from Chinese entities, that is not a matter addressed by the U.S. measures. Rather, the U.S. measures are intended to obtain the elimination of China's policies of unfairly and immorally acquiring the technology of U.S. interests. If the U.S. measures require China to change its policies with respect to U.S.-owned technology. Rather, by imposing duties on goods of China, the U.S. measures discourage the U.S. importation of goods benefitting from unfair forced technology transfer, and provide incentives for China to agree to change its forced technology transfer practices and policies.

65. The U.S. measures are "necessary" because, as explained, 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 and until the economic costs of doing so begin to approach or outweigh the economic benefits.⁵⁰ Furthermore, if China is permitted to carry out its various unfair trade acts, policies, and practices without restraint *and* benefit from such conduct by exporting the fruits of such immoral conduct to the United States, U.S. actors 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.

66. Indeed, to fail to respond to China's economic retaliation would also demonstrate that the United States Government is willing to acquiesce in theft and coercion of U.S. technology by one of its largest trading partners – and thus that the United States had abandoned its public morals in the face of China's economic coercion.

⁴⁸ See, DSU, Article 22 ("Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.")

⁴⁹ The United States adopted the measures at issue pursuant to authority under Section 301 of the Trade of 1974, which authorizes the USTR to take actions (including the imposition of duties) that are "appropriate" and "feasible" to "obtain the elimination of" "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce." See *e.g.* Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (June 20, 2018) (Exhibit CHN-2).

⁵⁰ U.S. First Written Submission, para. 78.

67. In addition to establishing that a measure is provisionally justified under Article XX(a), the invoking Member must also demonstrate that the measure at issue is consistent with the chapeau of Article XX. As the United States explained in its first written submission, there is no credible argument that the United States has applied the measures at issue in a manner that constitutes “arbitrary or unjustifiable discrimination.”⁵¹ First, prior panels have reasoned that the term “arbitrary discrimination” within the meaning of the chapeau of Article XX refers to discrimination that is applied in a “capricious, unpredictable, [or] inconsistent” manner.⁵² 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.

68. Second, panels have reasoned that term “unjustifiable” refers to something that is “indefensible” and have reasoned that a measure is “unjustifiable” within the meaning of the chapeau of Article XX if a Member cannot “‘defend’ or convincingly explain the rationale for any discrimination in the application of the measure.”⁵³ The United States has explained the rationale and justification for adopting the measures at issue. Such rationale is exhaustively set out in the Section 301 Report and the implementing instruments for the measures at issue.⁵⁴

16.

- a. Please identify the specific values pertaining to public morals shared by the United States' society that the measures at issue in this dispute aim at protecting and provide information demonstrating the importance attached by the United States, and possibly internationally, to these values.***
- b. Please explain in more detail how the practices described in Parts II and IV of the Section 301 Report put at risk the specific values identified by the United States as public morals. Could you please provide examples of prohibiting, criminalizing or otherwise condemning the practices described in Parts II and IV of the Section 301 Report either in the United States or internationally?***

69. As the United States has explained in its First Written Submission, the Chinese practices described in the Section 301 Report threaten to undermine U.S. moral standards and norms against theft and coercive transfers of technology. These forced technology transfers occur through means and on terms other than those private actors would freely agree. Allowing

⁵¹ See U.S First Written Submission, paras. 82-87.

⁵² See *Brazil – Retreaded Tyres (Panel)*, paras. 7.257 – 7.258; *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.241.

⁵³ See *Brazil – Retreaded Tyres (Panel)*, paras. 7.259 – 7.260.

⁵⁴ See e.g. *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14,906, Section B & D (April, 6 2018) (Exhibit CHN-10).

China's fundamentally unfair policies and practices to go unchecked could weaken the respect for such values in the United States. 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 market, or succumb to such conduct as pre-condition of accessing China's market.

70. As discussed in the Section 301 Report, 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.⁵⁵ In particular, China uses restrictions on foreign investment "to selectively grant market access to foreign investors in exchange for commitments to transfer technology." China also uses State directed investment to unfairly acquire U.S. technology, and supports cyber-theft of U.S. technology.⁵⁶

71. Examples of prohibiting, criminalizing, or otherwise condemning the practices described in the 301 report include that "theft" is universally deemed a criminal offense under U.S. federal and state law.⁵⁷ China's conduct relating to approvals, market access, or investment is inconsistent with U.S. norms reflected in U.S. laws that generally prohibit "extortion".⁵⁸ The Uniform Trade Secrets Act (Exhibit US-19) specifically prohibits the "misappropriation of trade secrets" through the act of "bribery." In addition, misappropriation of trade secrets is also criminalized under the Economic Espionage Act of 1996 (Exhibit US-17).

⁵⁵ See Section 301 Report, Part II (Exhibit US-1); see also German Chamber of Commerce, *Business Confidence Survey 2019-20* (Exhibit US-29), p. 26 (Forty –eight percent of German companies in the Chinese market report that "technology transfer requirements are the most pressing regulatory business challenges they presently face in China.")

⁵⁶ See Section 301 Report (Exhibit US-1), p. 65 ("[T]he Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies, to obtain cutting-edge technologies and intellectual property (IP) and generate large-scale technology transfer in industries deemed important by state industrial plans. The role of the state in directing and supporting this outbound investment strategy is pervasive, and evident at multiple levels of government – central, regional, and local. The government has devoted massive amounts of financing to encourage and facilitate outbound investment in areas it deems strategic. In support of this goal, China has enlisted a broad range of actors to support this effort, including SOEs, state-backed funds, government policy banks, and private companies.")

⁵⁷ See e.g. California Code, Penal Code § 484 (General Theft Statute) (Exhibit US-12); Texas Penal Code, Title 7, Chapter 31 (Offenses against Property – Theft) (Exhibit US-13); 18 U.S. Code Chapter 31 (Embezzlement and Theft); 18 U.S. Code § 1832 (Theft of Trade Secrets) (Exhibit US-14).

⁵⁸ See 18 U.S. Code CHAPTER 41 (EXTORTION AND THREATS) (Exhibit US-30); see in particular 18 U.S.C. §872 (Extortion by Officers or Employees of the United States) ("Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.").

72. Furthermore, numerous U.S. laws address the unfair acquisition of intellectual property and unfair competitive actions. These laws include U.S. civil and criminal laws such as those on cyber-hacking⁵⁹, trade secret theft,⁶⁰ unfair competition,⁶¹ contracts and torts,⁶² patents,⁶³ and governmental takings of property.⁶⁴ The United States in its second written submission also will provide a more elaborate discussion of examples of measures prohibiting the practices described in the Section 301 Report.

c. Could you please indicate which industries are concerned by China's alleged acts, policies and practices relating to technology transfer,

⁵⁹ See Computer Fraud and Abuse Act (18 U.S.C. § 1030) (Exhibit US-16); *see in particular* 18 U.S.C. § 1030 (a)(4):

Whoever— (4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period . . . shall be punished as provided in subsection (c) of this section.

See also, Section 301 Report (Exhibit US-1), pp. 157-163 (referencing criminal indictments of individuals and entities affiliated with the Chinese government under 18 U.S.C. § 1030).

⁶⁰ See *Economic Espionage Act of 1996* (18 U.S. Code § 1831-1832) (Exhibit US-17). The EEA contains two separate provisions that criminalize the theft or misappropriation of trade secrets: 18 U.S.C. § 1831 (economic espionage) and 18 U.S.C. § 1832 (trade secret theft); *Uniform Trade Secrets Act* (1985) (Exhibit US-18), Section 1 (defining trade secret theft to include “espionage through electronic or other means.”). The *Uniform Trade Secrets Act* (1985) has been adopted by every U.S. state. (Exhibit US-19).

⁶¹ See *Federal Trade Commission Act*, Section 5 U.S.C § 45 (Unfair methods of competition unlawful; prevention by the Commission) (Exhibit US-20).

⁶² Restatement (Second) of Contracts, § 205 (Duty of Good Faith and Fair Dealing) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”) (Exhibit US-22); Restatement (Second) of Torts § 766A (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.”); *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 812, 551 N.E.2d 20 n. 6 (Mass. 1990) (a defendant is liable to pay damages in tort for actions intended to interfere with the plaintiff's contractual relations with a third party).

⁶³ See, 35 U.S.C. 200 (Patents Policy and objective) (Exhibit US-21):

It is the policy and objective of the Congress to use the patent system to *promote the utilization of inventions* arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities; to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote *free competition* and enterprise without unduly encumbering future research and discovery; to promote the commercialization and public availability of inventions made in the United States by United States industry and labor.” (emphasis added)

⁶⁴ See, e.g., U.S. Constitution, Fifth Amendment (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”), *available at* https://www.law.cornell.edu/constitution/fifth_amendment.

protection of intellectual property and innovation, explaining whether and how products made or services provided by these industries were considered in the process of the adoption of the additional import duties on List 1 and on List 2 products?

73. As explained above, the products subject to additional duties under Measure 1 were found to benefit from the Chinese policies detailed in the Section 301 Report, including Made in China 2025 (see U.S. Response to Panel Question 12). The industrial sectors that contribute to or benefit from the “Made in China 2025” industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new materials, and automobiles.⁶⁵ The United States adopted Measure 2 only after China refused to take sufficient steps to address the U.S. concerns that prompted the United States to adopt Measure 1, and instead, responded by imposing retaliatory tariffs on U.S. products (See U.S. Response to Panel Questions 4 and 12). All U.S. industries are ultimately concerned and affected by China’s forced technology transfer policies and practices. China’s actions threaten the market-oriented nature of the international trading system and a key basis on which WTO Members have entered into the WTO Agreement. To fail to respond to China’s forced technology transfer practices and its economic retaliation would demonstrate that the United States is willing to acquiesce in theft and coercive transfer of U.S. technology – and thus that the United States had abandoned its public morals in the face of China’s economic coercion

d. Please provide any contemporaneous documents showing how the specific products subject to the additional import duties were selected.

74. See U.S. Response to Panel Questions 4, 12, and 16(a) respectively.

⁶⁵ See, Section 301 Report Update (Exhibit US-2), p. 7.