UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA
(DS543)

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

March 31, 2020

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. First Written Submission	
US-1	*Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (March 22, 2018) ("Section 301 Report")
US-2	*Update Concerning China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (November 20, 2018) ("Update to Section 301 Report")
US-3	Ministry of Commerce, People's Republic of China (MOFCOM), *Announcement on Imposing Tariffs on Some Goods Originating in the US* (June 17, 2018)
US-4	MOFCOM, *Announcement on Imposing Tariffs on Certain Goods Originating in the US* (August 10, 2018)
US-5	MOFCOM, *Announcement on Levying Tariffs on Goods and Commodity Imports from the US* (September 19, 2018)
US-6	MOFCOM, *China to increase tariffs on imported U.S. products* (May 14, 2019)
US-7	Doug Palmer, *China Has Begun 'Phase Two' of Retaliation, Former U.S. Diplomat Says*, Politico, (June 6, 2018)
US-8	MOFCOM, *Ministry of Commerce Spokesperson Answers Questions about China's Establishment of an "Unreliable Entities List" Regime*, (June 1, 2019)
US-9	Sarah Zhang, *China will not rule out using rare earth exports as leverage in trade war with US*, South China Morning Post (May 29, 2019)
US-10	*NDRC official talks about the development of China's rare-earth industry*, Global Times (May 29, 2019)
US-11	*China to impose additional tariffs on U.S. imports worth 75 bln USD*, Xinhua (August, 23, 2019)
US-12	California Code, Penal Code § 484 (General Theft Statute)

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US-13	Texas Penal Code, Title 7, Chapter 31 (Offenses against Property – Theft)
US-14	8 U.S. Code CHAPTER 31 (Embezzlement and Theft)
US-15	Ryan Lucus, *Charges Against Chinese Hackers Are Now Common. Why Don't They Deter Cyberattacks?*, NPR (February 9, 2019)
US-16	Computer Fraud and Abuse Act (18 U.S.C. § 1030)
US-17	Economic Espionage Act of 1996 (18 U.S. Code § 1831-1832)
US-18	Uniform Trade Secrets Act (1985)
US-19	Uniform Trade Secrets Act (1985) – adoption tracker
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US-21	35 U.S.C. 200 (Patents Policy and objective)
US-22	Restatement (Second) of Contracts, § 205
US-23	Restatement (Second) of Torts § 766A
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US-24	BDI, China, Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy? (January 2019)
US-25	Xinhua, Commentary: Xi demonstrates China's role as responsible country in New Year address (January 1, 2018)
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US-29	German Chamber of Commerce, Business Confidence Survey 2019-20
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US-33	*Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China*
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1 GENERAL ISSUES

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:

1. During the second substantive meeting, the United States explained at some length that the Phase One U.S.-China Economic and Trade Agreement ("Phase One Agreement") both (i) confirmed that the parties have reached their own bilateral solution regarding each Party's additional duties, and (ii) confirmed that the U.S. measures are justified under Article XX(a) of the GATT 1994. The Panel's question provided China a further opportunity to attempt to rebut these fundamental points. China's response, however, is cursory, and 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.

Article 12.7 of the DSU

2. Before turning to China's cursory rebuttal, we will summarize how the actions and omissions of both parties demonstrate that – as an objective matter – the parties have agreed to settle the matter at issue outside of the WTO system. Specifically, the parties' agreement to settle this matter outside the WTO system is confirmed by the following objective facts on the record:

(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,[1] and without first obtaining the authorization to do so from the DSB pursuant to the DSU;[2]

[1] *See, e.g.*, Ministry of Commerce People's Republic of China (MOFCOM), *Announcement on Imposing Tariffs on Some Goods Originating in the US* (June 17, 2018) (Exhibit US – 3) ("The US has ignored China's opposition and serious representation, resolutely behaved against the WTO rules. It has severely violated China's legitimate rights in the WTO and threatened China's economic interest and safety. In the face of the emergency that the US has violated the international rules against China, in order to defend its legitimate rights, China decided to impose a tariff rate of 25% on the US imports like farm products, auto and aquatic products.").

[2] DSU Article 3.7 ("The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.").

(2) the U.S. decision to, nonetheless, refrain from challenging China's retaliatory actions at the WTO;

(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); and

(4) the Phase One 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.[3]

3. 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. That is, the parties understand that both parties are taking the tariff measures it believes appropriate in connection with the parties' disagreement over China's technology transfer policies. 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,[4] such as achieving a "satisfactory settlement of the matter"[5] or a "positive solution to the dispute."[6] Instead, the DSU findings that China seeks would only serve as a statement that the WTO wishes to stand in the way of any Member taking actions to address China's unfair and trade-distorting technology transfer policies.

4. China has no answer to these fundamental realities regarding the way China and the United States are actually handling issues regarding China's unfair and immoral technology transfer policies and both party's additional duties. 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

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[3] *See* Phase One Agreement, p. 7-3, para. 4(b) (Exhibit US – 33).

[4] *See* U.S. First Written Submission, paras. 37-58.

[5] DSU Article 3.4 ("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.").

[6] DSU, Article 3.7 ("Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.").

> discriminatory duties on imports from China by the United States is a violation of the United States' obligations under the WTO.[7]

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.[8] Thus, China – in pointing out that the Panel's terms of reference include a legal issue (as is true in every dispute) – 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.

5. Indeed, under China's argument, the third sentence of Article 12.7 – contrary to its plain text – would not apply in most cases involving a mutually agreed solution. In particular, in most if not all mutually agreed solutions, the disputing parties will not agree on the merits of the legal claims raised in the panel request. Rather, the disputing parties typically agree on certain actions or courses of conduct that resolve the dispute to their mutual satisfaction, without any agreement on whether the responding party has breached the WTO Agreement. Yet, 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.

Article XX (a) of the GATT 1994

6. 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. To recall, 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.

7. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The U.S. tariffs led to a decision by China and the United States to engage in a broad-ranging negotiation concerning their economic and trade relationship, including with respect to technology transfer. The Phase One Agreement covers

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[7] China's Responses to Panel Questions Following the Second Substantive Meeting, Response to Panel Question 18, para. 3.

[8] *See* DSU, Article 12.7 ("Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. 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.*"). (emphasis added)

some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement.

8. 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 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.[9]

9. Third, the Phase One Agreement confirms that forbidding forced technology transfer is a fundamental norm. For example, 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."[10]

10. 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."[11] Neither of these arguments have validity. On the second argument – concerning the relationship between the products subject to additional duties and China's unfair and immoral policies – the United States has explained at length (and without any rebuttal by China) both that Article XX(a) requires no particular relationship,[12] 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 1.[13]

11. For the first argument – which is nothing more than reliance on a two-word label ("*post hoc*") – the United States will provide some further observations. China has repeated this phrase throughout this dispute, but has never explained precisely what China means, and how it might tie to the legal issues in this dispute.

12. As a factual matter, China certainly cannot mean that the reasoning behind the U.S. measures was provided only to this panel during this proceeding, and not at the time the measures were adopted. To the contrary, the United States adopted the measures at issue

[9] *See, e.g.*, U.S. Second Written Submission, para. 40

[10] Phase One Agreement, p. 2-1 (Exhibit US – 33).

[11] China's Responses to Panel Questions Following the Second Substantive Meeting, Response to Panel Question 18, para. 5.

[12] *See, e.g.*, U.S. Second Written Submission, paras. 59-61; U.S. Opening Statement at the Second Substantive Meeting, paras. 33-39.

[13] *See, e.g.*, U.S. Second Written Submission, para. 62; U.S. Responses to Panel Questions Following the Second Substantive Meeting of the Parties, Response to Panel Question 21, paras. 1-11; U.S. Opening Statement at the First Substantive Meeting, para. 47.

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.[14] 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.[15] 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.[16] Thus, the justification for the U.S. measures was anything but "*post hoc*".

13. Furthermore, 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 180-degrees wrong. As China itself acknowledges, the party asserting an Article XX justification has the burden of establishing that defense.[17] Of course, 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.

14. Although this is an obvious point, 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*."

15. For example, the measure at issue in *US – Gambling* (i.e., the Federal Wire Act") did not mention "morality." In that dispute, the United States presented evidence showing that gambling was detrimental to public morals, and successfully showed that challenged measure was provisionally justified under Article XIV(a) of the GATS.[18] Similarly, the panel and Appellate Body found that the measure at issue in *Colombia – Textiles* was designed to protect "public morals" for purposes of Article XX(a), notwithstanding that none of relevant implementing instruments made mention of "morality."[19] Rather, the Appellate Body found the measure at issue in *Colombia – Textiles* was designed to protect "public morals" because record evidence entered by Colombia showed that (1) "combating money laundering" was a "public morals"

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[14] *See* Section 301 Report (Exhibit US – 1), pp. 4-10, 19.

[15] *See* Section 301 Report (Exhibit US – 1).

[16] *See* 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* (issued June 20, 2018; effective July 6, 2018) (Exhibit CHN – 2).

[17] *See* China's Second Written Submission, para. 23 (citing, *EC – Seal Products (AB)*, para. 5.169).

[18] *See US—Gambling (AB)*, para. 372.

[19] *See Colombia—Textiles (AB)*, para. 5.68.

objective in Colombia;[20] and (2) the challenged measure (*i.e.*, Colombia's "compound tariff") was "not incapable of combating money laundering."[21]

16. Finally, the United States notes that perhaps China is implicitly relying on findings in disputes involving anti-dumping and countervailing duties under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs And Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[22] Those types of disputes, however, are completely inapplicable, as both the AD Agreement and SCM Agreement contain procedural provisions requiring administering authorities to explain their reasoning. In contrast, there are no comparable procedural obligations in Article XX; this dispute does not involve decisions of administering authorities under the AD or SCM Agreement; and thus there is no basis for any type of argument that a justification for the measure at issue is allegedly "*post hoc*."

2 MEASURES AT ISSUE

To China

22. Could you comment on the United States' position that the increase of the additional duty on List 2 products from 10% to 25% had "its own, particular rationale"[23] compared to the imposition of the 10% additional duty on List 2 products?

U.S. Comment on China's Response to Panel Question 22:

17. China continues to argue that the "increase of the additional duty on List 2 products from 10% to 25%" ("Measure 3") is within the Panel's terms of reference because it is similar in "essence" to Measure 1 and Measure 2.[24] However, as the United States has explained in prior submissions, Measure 3 falls outside the Panel's terms of reference as demarcated by Articles 7.1 and 6.2 of the DSU because – as China acknowledges – Measure 3 was enacted after the date of panel establishment and was thus not identified in China's request for the establishment of a panel.[25] As the United States has also explained, none of the Appellate Body reports cited in China's prior submissions support the proposition that a measure enacted after the date of panel

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[20] *See Colombia—Textiles (AB)*, para. 5.50.

[21] *See Colombia—Textiles (AB)*, paras. 5.95-5.100; *see also* U.S. Second Written Submission.

[22] *See, e.g.*, *EC – Fasteners (China) (Article 21.5 – China) (AB)*, para. 5.59.

[23] Citing United States' response to the Panel's Question 4 after the first substantive meeting, para. 36. China notes that this reference is actually to paragraph 31.

[24] China's Responses to Panel Question Following the Second Substantive Meeting, Response to Panel Question19, paras 6-7.

[25] *See* U.S. Responses to Panel Questions Following the First Substantive Meeting, Responses to Panel Question 2, paras. 5-9.

establishment is swept into a panel's terms of reference because the measure is similar in "essence" to a measures identified in a panel request.[26]

18. With respect to the question posed by the Panel, the United States notes that China does not dispute that the "rationale" that prompted the United States to adopt Measure 3 was different than the rationales behind Measures 1 and 2. Instead, China asserts that rationale behind the United States' decision to adopt Measure 3 is "irrelevant" to a consideration of whether Measure 3 is the same or different in "essence" than Measures 1 and 2. China's position on this score is nonsensical because a measure's "rationale" is clearly a central – if not core – feature of the measure's "essence". Indeed, the word "rationale" refers to "the fundamental or underlying reason for or basis of a thing."[27] Accordingly, a measure's "rationale" is the fundamental or underlying reason for the measure." It is difficult – if not impossible – to see how the "fundamental or underlying" reason (*i.e.*, the "rationale") behind a Member's decision to adopt a measure can be disentangled from the measure's "essence," however conceived.

19. The record evidence before the Panel supports a finding that the rationale behind Measure 3 was different than the rationales behind Measures 1 and 2, respectively.[28] China does not dispute this fact in its response to Question 22. Accordingly, for the reasons explained above, and for the all the reasons relying on the text of the DSU as set out in prior U.S. submissions, Measure 3 is outside the Panel's terms of reference.

3 ARTICLE XX(A) OF THE GATT 1994

23. Please indicate prior disputes where a measure was found not to be necessary to protect or secure a public policy objective without consideration of the availability of less trade-restrictive alternatives.

U.S. Comment on China's Response to Panel Question 23:

20. China's response to this question is that China need not address alternative measures because, according to China, the U.S. measures "do not contribute to any 'public morals objective' within the meaning of Article XX(a)."[29] Implicit in China's response is that if the United States has shown a contribution to a public morals objective, China's rebuttal would necessarily fail without any identification of alternative measures that could achieve the

[26] *See* U.S. Responses to Panel Questions Following the First Substantive Meeting, Response to Panel Question 3, paras. 10-26.

[27] *See The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 188.

[28] *See* U.S. Responses to Panel Questions Following the First Substantive Meeting, Response to Panel Question 4, paras. 21-31.

[29] China's Responses to Panel Questions Following the Second Substantive Meeting, Response to Panel Question 18, para. 9.

protection of public morals sought by the U.S. measure.[30] And here, the United States has amply shown how the U.S. measures at issue contribute to the protection of public morals.

21. To recall, the United States has explained why the measures at issue are "necessary" to protect public morals within the meaning of Article XX(a) of the GATT 1994,[31] and how the measures otherwise satisfy the relevant "necessity" tests that the Appellate Body and panels have applied in prior disputes.[32] Further, the United States has explained why each of China's arguments to the contrary finds no support in the text of Article XX(a),[33] the object and purpose of the GATT 1994,[34] prior DSB reports,[35] or common sense.[36] And, while China has asserted that the findings in the Section 301 Report are "factually baseless,"[37] it has not attempted to enter any evidence that disputes a single allegation contained in the Report or its Update. In short, the United States has made out a *prime facie* case that the measures at issue contribute to the protection of public morals and China has presented no arguments that would rebut this conclusion.

22. Furthermore, any consideration of alternative measures would only buttress the United States' *prime facie* showing that the measures at issue are necessary within the meaning of Article XX(a). As explained in prior submissions, the United States adopted the measures at issue after nearly a decade of trying to address China's unfair trade acts, policies, and practices through other means, such as dialogue, admonishment, multilateral forums, bilateral mechanisms,[38] and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.[39] That none of these non-trade (or non trade-restrictive) efforts proved durably effective confirms the necessity of the measures at issue in this dispute.

23. In fact, even after the United States put these necessary measures in place, China continues to engage in the unfair and immoral practices documented in the Section 301 Report.

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[30] In prior reports that Appellate Body has found that a complaining party bears the burden of identifying what alternative measures the responding party should have taken in lieu of the challenge measure(s). *See, e.g.*, *EC – Seal Products (AB)*, para. 5.169 ("The burden of proving that a measure is 'necessary to protect public morals' within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken.").

[31] *See* U.S. Second Written Submission, paras. 37-40.

[32] *See* U.S. Second Written Submission, paras. 41-56.

[33] *See* U.S. Second Written Submission, paras. 41-57.

[34] *See* U.S. Opening Statement at the Second Meeting, paras. 44-48; U.S. Second Written Submission, paras. 58-68.

[35] *See* U.S. Opening Statement at the Second Meeting, paras. 49-51.

[36] *See* U.S. Opening Statement at the Second Meeting, paras. 52-54.

[37] U.S. Second Written Submission, paras. 69-73.

[38] *See* Section 301 Report (Exhibit US – 1), pp. 4, 8.

[39] *See* Section 301 Report, pp. 157-153 (Exhibit US – 1); Update to Section 301 Report (Exhibit US – 2), pp. 13-19.

For example, on February 3, 2020, the Office of the People's Government of Guangdong Province issued "Certain Recommendations of Guangdong Province on Accelerating the Development of the Semiconductor and Integrated Circuit Industries."[40] This document was issued to all departments, government organizations, and municipal government authorities under the Guangdong Provincial Government in order to implement a development plan "regarding the development of the integrated circuit industry, accelerate the development of our province's semiconductor and integrated circuit industries, improve the industries' core competitiveness."[41]

24. Notably, this measure calls for enterprises in Guangdong to acquire foreign semiconductor companies, including R&D centers, and for provincial special purpose funds to provide "vigorous" support for such overseas investments to advance development in this sector.[42] This kind of measure, where a Chinese provincial government drives foreign acquisitions, particularly of companies with valuable intellectual property or R&D, through government-funded financial support, is covered extensively in Section IV of the Section 301 Report, Section IV.C.2.b, which deals with these type of policies in the semiconductor and integrated circuit industries specifically.[43]

25. In short, the United States has demonstrated in detail how the measures at issue contribute to the objective of protecting "public morals" within the meaning of Article XX(a) of the GATT 1994. China has presented no arguments or evidence sufficient to rebut such a finding, nor to rebut the United States' overall *prima facie* case that the measures are justified under Article XX(a). Accordingly, there is no merit to the argument that China need not identify alternative measures that the United States could have taken on grounds that measures do not contribute to a public morals objective.

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[40] *See* February 2020 Guangdong Province Semiconductor Industry Development Measure (Exhibit US – 35).

[41] February 2020 Guangdong Province Semiconductor Industry Development Measure (Exhibit US – 35), preamble.

[42] February 2020 Guangdong Province Semiconductor Industry Development Measure (Exhibit US – 35), para. 15.

[43] *See* Section 301 Report (Exhibit US – 1), pp. 110-120.