

UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

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<i>Brazil – Taxation (Panel)</i>	Panel Report, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R / WT/DS497/R / Corr. 1 and Add. 1, adopted 11 January 2019, as modified by Appellate Body Report, WT/DS472/AB/R / WT/DS497/AB/R and Add. 1
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<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>Colombia – Textiles (Panel)</i>	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/R and Add. 1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R and Add. 1
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<i>US – Shrimp (Thailand) / US –</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for</i>

<i>Customs Bond Directive (AB)</i>	<i>Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008</i>
<i>US – Softwood Lumber V (AB)</i>	<i>Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, adopted 31 August 2004</i>
<i>US – Zeroing (Japan) (Article 21.5 – Japan) (AB)</i>	<i>Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan, WT/DS322/AB/RW, adopted 31 August 2009</i>

TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
US-1	<i>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</i> (March 22, 2018) (“Section 301 Report”)
US-2	<i>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</i> (November 20, 2018) (“Update to Section 301 Report”)
US-3	Ministry of Commerce, People’s Republic of China (MOFCOM), <i>Announcement on Imposing Tariffs on Some Goods Originating in the US</i> (June 17, 2018)
US-4	MOFCOM, <i>Announcement on Imposing Tariffs on Certain Goods Originating in the US</i> (August 10, 2018)
US-5	MOFCOM, <i>Announcement on Levying Tariffs on Goods and Commodity Imports from the US</i> (September 19, 2018)
US-6	MOFCOM, <i>China to increase tariffs on imported U.S. products</i> (May 14, 2019)
US-7	Doug Palmer, <i>China Has Begun ‘Phase Two’ of Retaliation, Former U.S. Diplomat Says</i> , Politico, (June 6, 2018)
US-8	MOFCOM, <i>Ministry of Commerce Spokesperson Answers Questions about China’s Establishment of an “Unreliable Entities List” Regime</i> , (June 1, 2019)
US-9	Sarah Zhang, <i>China will not rule out using rare earth exports as leverage in trade war with US</i> , South China Morning Post (May 29, 2019)
US-10	<i>NDRC official talks about the development of China’s rare-earth industry</i> , Global Times (May 29, 2019)
US-11	<i>China to impose additional tariffs on U.S. imports worth 75 bln USD</i> , Xinhua (August, 23, 2019)
US-12	California Code, Penal Code § 484 (General Theft Statute)
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 Lucas, <i>Charges Against Chinese Hackers Are Now Common. Why Don't They Deter Cyberattacks?</i> , 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
US-20	Federal Trade Commission Act, Section 5 U.S.C § 45
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

I. INTRODUCTION

1. Technology, intellectual property, and innovation are the foundation of the competitiveness of the United States and many other Members in the world economy. China has chosen to adopt a range of policies and practices to obtain an unfair competitive edge over other Members by stealing or otherwise unfairly acquiring their technology and intellectual property. Where those policies or practices can be addressed through WTO rules, the United States is pursuing WTO dispute settlement. Most of China's practices, however, are not covered by existing WTO disciplines.

2. In these circumstances, the United States is pursuing its sovereign right to protect its fundamental economic competitiveness from China's unfair, predatory, and harmful technology-transfer policies. The purpose of the U.S. tariff action is to obtain the elimination of China's unfair practices, and thereby to promote a fair and sustainable trading system for the United States and all other Members that rely on technology and intellectual property for their competitiveness in world markets. Unfortunately, China has responded not by reforming its unfair technology-transfer policies, but instead by imposing retaliatory tariffs on most U.S. goods.

3. In pursuing this course of action, China has demonstrated what the Panel should conclude in response to China's pursuit of this dispute – namely, that this is a bilateral dispute between the United States and China concerning key economic issues not covered by existing WTO rules. In short, this dispute is fundamentally *not* about WTO rights and obligations.

4. China's decision to pursue this dispute represents a profound misuse and abuse of the WTO dispute settlement system. Having already adopted retaliation in response to the U.S. measures aimed at obtaining a fair world trading system, China knows full well that any WTO findings will not contribute to the resolution of the matter. Rather, China's pursuit of this dispute is a cynical and hypocritical attempt to try to have the WTO side with China in the ongoing dispute involving China's unfair technology transfer policies. To elaborate:

5. In bringing this dispute, China seeks to abuse the WTO dispute settlement system by attempting to use it as a shield for a broad range of unfair and trade-distorting technology transfer policies and practices not covered by WTO rules. In doing so, it is China, and certainly not the United States, that – as China puts it – “is undermining”¹ the viability of the multilateral trading system.

6. China's decision to launch this dispute is hypocritical. China is currently retaliating against the United States by imposing duties on most U.S. exports – over \$100 billion of trade. China cannot legitimately challenge measures at issue for being “unilateral”² and WTO-inconsistent, while at the same time openly adopting its own unilateral tariff measures in connection with the very same matter.

¹ See China's First Written Submission, para. 5.

² See China's First Written Submission, paras. 3, 4, 5, 24.

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

8. Under these circumstances, the outcome of a dispute settlement proceeding would be pointless, and, worse – a misuse by China of the dispute settlement system by trying to have the WTO side with China in support of its fundamentally unfair technology transfer policies. As noted, China has already taken the unilateral decision that the U.S. measures cannot be justified under WTO rules, and on that basis, already imposed tariff measures on most U.S. goods. Accordingly, addressing China’s legal claims would not “secure a positive solution to [this] dispute,”³ as China has already adopted the response that China unilaterally has determined is appropriate.

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

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

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

³ See DSU Article 3.7 (Providing in part that “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

⁴ 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)

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

13. Indeed, such fundamentally unfair policies and practices undermine support for an international trading system that permits such practices to escape discipline, undermine U.S. norms against theft and coercion, and undermine the belief in fair competition and respect for innovation, all of which are key aspects of U.S. culture (as well as that in a number of other Members).). The United States does not undertake these activities against Chinese citizens or companies. China’s non-reciprocal and morally wrong behaviour further threatens to undermine U.S. society’s belief in the fairness and utility of the WTO trading system, if that system creates the conditions for, and fails to address, a fundamentally uneven playing field. Accordingly, the measures at issue in this dispute are legally justified because they are measures “necessary to protect public morals” within the meaning of Article XX(a) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

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

15. The United States emphasizes that a world trading system where one Member can adopt policies to steal or unfairly acquire technology and intellectual property from its trading partners, and where the organization responsible for overseeing world trade would entertain a request to issue findings in support of the Member adopting these unfair actions, is simply unsustainable. In order to maintain the viability and relevance of the WTO, this Panel must reject China’s request that the Panel make findings that China might use as support for maintaining its fundamentally unfair technology transfer policies and practices.

II. FACTUAL BACKGROUND

16. As explained below, China’s unfair trade acts, policies, and practices are long-standing and well-documented. China cannot credibly dispute their existence, their unfairness, or their distortionary impacts on world trade.

A. China’s Unfair Trade Acts, Policies, and Practices

17. In March 2018, the United States released a comprehensive report (“Section 301 Report”) on China’s policies relating to technology transfer, intellectual property, and other unfair trade

acts.⁵ The Section 301 Report is over 200 pages in length, and is based on public testimony, public submissions, and other evidence. The United States encourages the Panel to read the Report (provided as Exhibit US-1) in its entirety. The Report supported the following conclusions.

18. First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies. China's foreign ownership restrictions prohibit foreign investors from operating in certain industries unless they partner with a Chinese company, and in some cases, unless the Chinese partner is the controlling shareholder. China's requirements lay the foundation for China to require or pressure the transfer of technology. Pressure is applied through administrative licensing and approvals processes which must be completed in order to establish and operate a business in China.

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

20. Third, China directs and unfairly facilitates the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies. The role of the Chinese state in directing and supporting this outbound investment strategy is pervasive, and evident at multiple levels of government – central, regional, and local. China has devoted massive amounts of financing to encourage and facilitate outbound investment in areas it deems strategic. China employs tools such as investment approval mechanisms and a system of encouraged sectors to channel and support outbound investment.

21. Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. Through these cyber intrusions, China has gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications. China has used cyber-enabled theft and cyber intrusions to serve its industrial policy objectives.

22. In the course of the China Section 301 investigation, the United States Trade Representative (USTR) determined that U.S. concerns with China's technology licensing measures could be addressed through WTO dispute settlement.⁶ Accordingly, immediately following the issuance of the Section 301 Report in March 2018, the United States initiated a

⁵ See Office of United States Trade Representative ("USTR"), *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) (the "Section 301 Report") (Exhibit US – 1).

⁶ See Update to Section 301 Report (US – Exhibit 2), p. 5; see also *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 (April 6, 2018), Section D ("WTO Dispute on Certain Discriminatory Technology Regulations") (Exhibit CHN – 10).

WTO dispute involving China’s technology licensing measures.⁷ Consultations did not resolve the matter, and the DSB established a panel at its November 2018 meeting. That dispute remains ongoing.

23. The trade measures that the United States implemented subsequent to release of the Section 301 Report are unconnected to the matters at issue in the ongoing WTO dispute involving China’s technology licensing measures.⁸ Accordingly, the U.S. tariff measures at issue in this dispute are intended to obtain the elimination of the first, third, and fourth categories of unfair Chinese policies, and do not relate to the technology licensing issue addressed in the ongoing WTO dispute.

24. In November 2018, the United States issued a 50-page supplemental report.⁹ The supplemental report explains that China has not fundamentally altered its unfair, unreasonable, and market-distorting practices that were the subject of the March 2018 report. Indeed, certain practices, such as cyber-enabled theft of intellectual property, appear to have grown worse.

B. China’s Retaliatory Measures on U.S. Goods

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

26. First, on June 16, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on \$50 Billion of Imported Products Originating from the United States. Through this legal instrument, the Government of China announced two lists of tariff subheadings subject to an additional 25 percent duty on U.S. goods. The 25 percent additional duties on the first list – containing 545 tariff subheadings – went into effect on July 6, 2018. According to China, this list applies to U.S. goods with an annual trade value of \$34 billion.¹⁰

27. Second, on August 8, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on \$16 Billion of Imported Products Originating from the United States. Under this notice, China imposed additional tariffs of 25 percent on U.S.

⁷ See *China — Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542).

⁸ See *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 (April 6, 2018), Section D (“Because the Trade Representative intends to address these issues through recourse to WTO dispute settlement, the proposed tariff action does not relate to or take into account harm caused by these acts, policies, and practices.”) (Exhibit CHN – 10).

⁹ See USTR, *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 2, 2018) (“Update to Section 301 Report”) (Exhibit US – 2).

¹⁰ See Ministry of Commerce People’s Republic of China (MOFCOM), *Announcement on Imposing Tariffs on Some Goods Originating in the US* (June 17, 2018) (Exhibit – 3).

goods with a purported trade value of approximately \$16 billion dollars, effective August 23, 2018.¹¹

28. Third, on September 19, 2018, China issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on Approximately \$60 Billion of Products Originating from the United States. Under this notice, China imposed additional tariffs of either 5 percent or 10 percent on over 5,000 products, with a trade value of approximately \$60 billion dollars.¹² These tariffs took effect on September 24, 2018, and were increased effective June 1, 2019.¹³

29. Fourth, on August 23, 2019, China announced that would impose tariffs of 5 to 10 percent on U.S. goods with a trade value of \$75 billion. China will reportedly implement the tariffs in two batches, effective September 1, 2019, and December 15, 2019, respectively.¹⁴

30. Further, it appears that China has also adopted various non-tariff retaliatory measures, including:

- Using administrative tools to target U.S. businesses operating in China, either through heightened scrutiny of their business operations or through the imposition of what appear to be retaliatory administrative sanctions;¹⁵
- Threatening retaliation against any company that complies with certain U.S. laws or makes business decisions that undermine Chinese government interests;¹⁶ and
- A proposed ban or restrictions on rare earth exports as a response to U.S. actions taken to address unfair Chinese practices and to protect U.S. national security.¹⁷

31. In sum, instead of addressing its unfair trade acts, policies, and practices, China has increased tariffs on U.S. goods with an annual trade value of approximately \$110 billion and threatened additional retaliation to further protect the unreasonable acts, policies, and practices

¹¹ See, MOFCOM, *Announcement on Imposing Tariff on Certain Goods Originating in the US* (August 10, 2018) (Exhibit US – 4).

¹² See MOFCOM, *Announcement on Levying Tariffs on Goods and Commodity Imports from the US* (September 19, 2018) (Exhibit US – 5).

¹³ See MOFCOM, *China to increase tariffs on imported U.S. products* (May 14, 2019) (Exhibit US – 6).

¹⁴ See, *China to impose additional tariffs on U.S. imports worth 75 bln USD*, Xinhua (August, 23, 2019) (Exhibit US – 11).

¹⁵ See Doug Palmer, *China Has Begun ‘Phase Two’ of Retaliation, Former U.S. Diplomat Says*, POLITICO (June 6, 2018) (Exhibit US – 7).

¹⁶ See MOFCOM, *Ministry of Commerce Spokesperson Answer Questions about China’s Establishment of an “Unreliable Entities List” Regime*, (June 1, 2019) (Exhibit US – 8).

¹⁷ See 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) (Exhibit US – 9); See also NDRC official talks about the development of China's rare-earth industry, Global Times (May 29, 2019) (Exhibit US – 10).

identified in the Section 301 Report. China has openly stated that its retaliation was adopted in response to the same increased tariffs that China purports to challenge in this WTO dispute.¹⁸

III. MEASURES AT ISSUE

32. The measures that China raises in its request for panel establishment are additional duties that the United States implemented with respect to certain products from China on July 6, 2018, and September 17, 2018.¹⁹ The United States implements these measures through the following instruments.

- 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) (“**Measure 1**”);²⁰ and
- Notice of Modification of Section 301 Action: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (issued September 21, 2018; effective September 24, 2018) (“**Measure 2**”).²¹

33. In addition, China's First Written Submission purports to raise claims with respect to a third measure.²²

- Notice of Modification of Section 301 Action: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (issued May 9, 2019; effective May 10, 2019) (“**Measure 3**”).²³

34. As discussed in the Section VI below, this third measure (i.e., “Measure 3”) was not included in China's request for panel establishment, and is not within the Panel's terms of reference.

¹⁸ 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.”).

¹⁹ See Request for the Establishment of a Panel by China (December 6, 2018) (WT/DS543/7).

²⁰ See Exhibit CHN – 2.

²¹ See Exhibit CHN – 3.

²² See China's First Written Submission, para. 22.

²³ See Exhibit CHN – 4.

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

35. China’s initiation and prosecution of this dispute amounts to a grave misuse of the WTO dispute settlement system. As noted, instead of addressing legitimate U.S. concerns with China’s unfair practices regarding technology transfer, China already has determined by itself to take retaliatory tariff action against over \$100 billion in U.S. exports, which is a substantial majority of all U.S. goods exported to China. In these circumstances, China’s request for DSB findings on the U.S. tariff measures is simply an attempt to gain a talking point in defense of its unfair trade, acts, policies, and practices; there is no live WTO matter at issue between the parties.

36. Nonetheless, in this part of the U.S. submission, the United States will recall the key DSU provisions describing the purpose of WTO dispute settlement, and elaborate why China’s pursuit of DSB findings amounts to a misuse of the system. The United States will then explain that in the particular circumstances of this dispute, the Panel should issue a report as provided for in Article 12.7 of the DSU.²⁴ In particular, the report of the Panel should be confined to a brief description of the case and to reporting that the parties have reached their own resolution.

**A. China’s request for DSB findings is inconsistent with nine separate principles
of WTO dispute settlement**

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

**1. The WTO dispute settlement system has no role to play because
China and the United States have reached their own solution**

38. There is no role for WTO dispute settlement where, as here, the parties to a dispute have reached their own solution. This principle is reflected in the DSU, including in Article 12.7, which provides in relevant part that “[w]here a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.” Thus, in light of the circumstances of this dispute, the report of the Panel should “be confined” to reporting that the parties have reached their own solution. As described earlier, those circumstances include that China and the United States have taken actions in their own sovereign interests, recognizing that this matter does not

²⁴ 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.”).

involve the WTO. In particular, China has taken the unilateral decision to adopt aggressive industrial policy measures to steal or otherwise unfairly acquire the technology of its trading partners; the United States has adopted tariff measures to try to obtain the elimination of China's unfair and distortive technology-transfer policies; and China has chosen to respond – not by addressing the legitimate concerns of the United States – but by adopting its own tariff measures in an attempt to pressure the United States to abandon its concerns, and thus in an effort to maintain its unfair policies indefinitely. There is no further role for WTO dispute settlement in these circumstances.

2. China's pursuit of this dispute, and findings by this Panel, would not serve to "preserve the rights and obligations of Members"

39. Article 3.2 of the DSU, second sentence, provides in part that "Members recognize that [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements."²⁵ As the unfair trade acts, policies, and practices of China are not covered by existing "rights and obligations... under the covered agreements", there are no such "rights and obligations" to be preserved through the dispute settlement process. And with respect to the U.S. tariff measures, China has already taken the countermeasures that it itself has chosen; in these circumstances; DSB findings on the U.S. tariff measures would do nothing to preserve rights and obligations. To the contrary, at most, such findings may encourage China to maintain its unfair trade acts, policies, and practices and to maintain its retaliatory measures taken in defense of those policies.

3. China's pursuit of this dispute, and findings by this Panel, will not facilitate the "prompt settlement" of this dispute.

40. Article 3.3 of the DSU provides that the "prompt settlement of disputes... is essential to the effective functioning of the WTO...".²⁶ Given that China has already taken every retaliatory measure that China sees fit to adopt, China's pursuit of DSB findings does nothing in terms of leading to a "prompt settlement" of the matters covered by and arising from the U.S. Section 301 investigation. In addition, DSB findings would not promote the "effective functioning of the WTO".²⁷

41. To the contrary, China apparently believes that such findings might somehow assist it in maintaining its unfair technology transfer policies which, as noted above, only serve to undermine the fairness of the world trading system and Members' support for that system. Finally, DSB findings would not serve to maintain the balance of rights and obligations.²⁸ Rather, China has already decided to take unilateral measures in response to the U.S. tariff measures at issue in this dispute.

²⁵ See DSU, Article 3.2, second sentence, first clause.

²⁶ See DSU Article 3.3.

²⁷ See DSU Article 3.3.

²⁸ See DSU Article 3.3.

4. China’s pursuit of this dispute, and findings by this Panel, would not “achiev[e] a satisfactory settlement”

42. Article 3.4 of the DSU provides that “[r]ecommendations 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.”

43. In considering how Article 3.4 of the DSU applies to the current situation, a preliminary question is what “the matter” encompasses. As addressed below, both narrow and broader interpretations of the “matter” are plausible. And in either case, DSB recommendations or rulings would not promote a satisfactory settlement of the “matter” in this dispute. Rather, the matter needs to be resolved by the United States and China on a bilateral basis, and indeed, the matter is currently under discussion by both parties, from working levels to the highest levels of government.

44. A narrow sense of the term “matter” would be as used in Article 7 of the DSU, governing the “terms of reference of panels.”²⁹ In this narrow sense, the term “matter” would be China’s specific claims that the two U.S. tariff measures identified in the panel request are in breach of U.S. obligations under the GATT 1994. DSB findings would not help resolve this matter. The United States has transparently explained that it has adopted the tariff measures to address unfair technology transfer policies of China that cannot be addressed under current WTO rules, and China has openly retaliated by placing tariffs on most U.S. exports, and has taken other retaliatory measures as well. In these circumstances, DSB findings on the U.S. tariff measures would not promote a satisfactory settlement of the matter.

45. A broader sense of the term “matter” would encompass the full situation: China’s aggressive industrial policies; China’s adoption of a range of unfair policies and practices aimed at stealing, coercing or otherwise unfairly acquiring key technologies of its trading partners; China’s unwillingness to address these legitimate concerns; and China’s unilateral retaliation on U.S. exports as a means to attempt to maintain its unfair policies in the face of U.S. efforts to address these longstanding problems. Under this broader meaning, DSB findings on the U.S. tariff measures certainly would not promote a resolution of the matter. To the contrary, at most, DSB findings would provide China with a rhetorical point in support of its efforts to maintain its unfair trade acts, policies, and practices, and would thus inhibit, rather than promote, a satisfactory settlement.

²⁹ See Article 7.1 of the DSU:

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

“To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”

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[.]”

46. Article 3.5 of the DSU states that solutions should not “impede the attainment of any objective” of the covered agreements.³⁰ 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.

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.”³¹ This goal is repeated in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization.³² 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.

48. Furthermore, the preamble to the Marrakesh Agreement expresses the objective of “develop[ing] an integrated, more viable and durable multilateral trading system.”³³ 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

³⁰ DSU Article 3.5 (“All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.”).

³¹ See GATT 1994, Preamble.

³² See Marrakesh Agreement Establishing the World Trade Organization (“Marrakesh Agreement”), Preamble (“*Being* desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations...”).

³³ See, Marrakesh Agreement, Preamble (“*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations...”).

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.”

6. China’s pursuit of this dispute, and findings by this Panel, would not be “fruitful” or achieve a “positive solution”

49. Article 3.7 of the DSU provides that, “[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful” and that “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Here, the facts and circumstances strongly indicate that China – in deciding to bring this dispute – did not fulfil its obligation to “exercise its judgement”³⁴ that the procedures “would be fruitful”³⁵ in terms of “securing a positive solution.”³⁶ To the contrary, China is well aware that this DSB proceeding will not contribute to the resolution of the issues arising from China’s unfair trade acts, policies, and practices.

50. For over two years, the United States has fully explained the scope of its investigation, the reason for its findings that China’s technology transfer policies were unfair or discriminatory, and that the United States had imposed additional tariffs on goods of China in order to obtain the elimination of China’s unfair practices. Further, the United States fully explained, and China is well aware, that the practices addressed in the investigation do not involve WTO issues, and that the U.S. investigation is not a WTO matter. China has no basis for believing that bringing this dispute would in any way secure – or even promote – a positive solution. Indeed, China’s actions in adopting unilateral retaliatory duties on most U.S. goods, prior to any dispute settlement findings, belies any possible argument by China that, in China’s judgment, this dispute would secure a positive solution.

7. China’s pursuit of this dispute, and findings by this Panel, would not enhance the “security and predictability” of the WTO trading system

51. Article 3.2 of the DSU provides, in part, that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”³⁷ The findings sought by China would not enhance the “security and predictability” of the multilateral trading system but would rather undermine it by having the WTO side with China in support of its fundamentally unfair technology transfer policies.

52. First, findings by this Panel cannot enhance the security and predictability of the system because China’s unfair and trade-distorting technology transfer policies addressed in the U.S. Section 301 investigation are not subject to current WTO rules. China certainly has not argued otherwise. To do so, of course, would amount to an argument by China itself that China is breaching WTO rules. In short, there is no role for WTO dispute settlement in correcting the

³⁴ See, DSU Article 3.7, first and second sentences.

³⁵ See, DSU Article 3.7, first and second sentences.

³⁶ See, DSU Article 3.7, first and second sentences.

³⁷ See DSU, Article 3.2.

severe distortions affecting the world trading system that result from China’s unfair and aggressive policies.

53. At the same time, China’s adoption of industrial policies to steal or otherwise unfairly acquire key technologies undermines the fundamental fairness of the world trading system, and thereby undermines the WTO system itself. Thus, although the WTO dispute settlement is not a tool for addressing these problems, it certainly should not allow itself to be twisted so as to support China’s attempt to maintain those unfair policies in circumstances where a Member (here, the United States) has taken concrete steps to address them. For these reasons, maintaining the “security and predictability”³⁸ of the world trading system requires the WTO dispute settlement system to recognize its limitations, and not to try to stand in the way of efforts to address fundamental distortions affecting Members’ confidence in that system.

54. Second, in terms of providing “security and predictability,”³⁹ there is no call for the DSB to issue findings with respect to the measures at issue. This is not a situation where a party is seeking a DSB recommendation in order to seek authorization to impose countermeasures with respect to another Member maintaining an allegedly WTO-inconsistent action. China decided not to seek DSB authorization before taking countermeasures. In particular, China has already responded to the U.S. tariff measures by imposing its own tariffs on most U.S. exports to China, and, as well, is taking other non-tariff retaliatory measures. Thus, issuing findings or a recommendation on the allegedly WTO-inconsistent U.S. tariff measures would do nothing in terms of providing “security and predictability” within the meaning of Article 3.2 of the DSU.

**8. China’s suspension of concessions was not taken as a last resort
subject to DSB authorization**

55. Article 3.7 of the DSU provides that the suspension of concessions or other obligations is a “last resort,” and “subject to the authorization by the DSB of such measures.”⁴⁰ China is plainly acting inconsistently with the last sentence of DSU 3.7. Under this provision, China – and not the United States – is the “Member invoking the dispute settlement procedures.”⁴¹ Having chosen to invoke these procedures, one would expect that China would comply with these procedures. But China has not.

56. Here, China’s first resort was to apply additional duties on goods of the United States “on a discriminatory basis vis-à-vis” the United States well before any request for panel

³⁸ See DSU, Article 3.2, first sentence.

³⁹ See DSU, Article 3.2, first sentence.

⁴⁰ 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.”).

⁴¹ See, DSU Article 3.7, last sentence.

establishment.⁴² Furthermore, contrary to the last sentence of DSU 3.7, China has adopted these tariff measures without any “authorization by the DSB of such measures.”⁴³ In short, China has taken the hypocritical stance of both invoking the WTO dispute settlement procedures, and flagrantly violating those procedures.

9. China’s pursuit of this dispute is not in “good faith”

57. Article 3.10 of the DSU provides, in part, that “if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.” In the circumstances present here, it is extraordinarily difficult to see any basis for believing that China is engaging in these procedures in good faith.

58. To the contrary, where a Member complains that another Member has imposed additional tariffs, while taking the very same actions itself, good faith cannot be discerned. Rather, China’s hypocritical invocation of WTO dispute settlement procedures can only be viewed as a cynical attempt to misuse the WTO system to try to obtain some rhetorical support for maintenance of its unfair, trade distorting measures not involving WTO disciplines. Furthermore, China knows full well how to resolve this dispute – it is to engage constructively with the United States to address the policies China has adopted to unfairly obtain the technology of its trading partners, causing tens of billions of dollars annually in harm to the United States alone. Finally, as discussed above, China is well aware that its request for a WTO panel to issue findings regarding the U.S. response to China’s unfair policies will in no way advance a resolution of the dispute.

B. In the circumstances of this dispute, the Panel should issue a report noting that both parties understand this matter is not a WTO issue

59. In the previous section, the United States has explained how China’s request for DSB findings on the U.S. tariff measures is inconsistent with nine separate, though thematically-linked, principles of WTO dispute settlement, as explicitly stated in the DSU. In sum: China already has taken self-help in the form of tariff measures, and other retaliatory measures, affecting most U.S. exports. At most, DSB findings on the U.S. tariff measures would provide China with a public relations point that China presumably would employ in an effort to maintain unfair and harmful technology transfer policies that are coercive to the viability of the multilateral trading system. China’s pursuit of this dispute cannot be seen as anything other than an attempted misuse of the system.

60. Furthermore, by having taken far-reaching and unilateral retaliatory actions, China recognizes that the matter arising from China’s unfair trade acts, policies, and practices and the U.S. response to obtain the elimination of those policies will not be resolved through WTO dispute settlement. In essence, China exhibits through its actions that agrees with the United States on one key point – this matter is fundamentally not a WTO issue – either in terms of China’s unfair policies, the U.S. response to those policies, or China’s retaliation. Rather, both

⁴² By the time China had requested the establishment of a panel on December, 6, 2018, it had already adopted retaliatory tariff measures against the United States on July 6, 2018; August 23, 2018; and September 24, 2018, respectively. *See supra* Section II.B.

⁴³ *See*, DSU Article 3.7, last sentence.

parties are taking actions in their own sovereign interests, and are attempting to resolve these matters in inter-governmental, bilateral discussions at the highest levels. Accordingly, there is no live dispute between the United States and China involving WTO rights and obligations.

61. Therefore, the Panel should follow the guidance provided in the last sentence of Article 12.7 of the DSU. It provides: “Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.”⁴⁴ As explained, what is settled between the parties is that both parties have determined to act in accordance with their own sovereign interests, and that this matter does not involve any live issues regarding the interpretation and application of the WTO Agreement. Given this situation, the Panel should decline China’s request that the WTO dispute settlement system insert itself into the ongoing interactions and discussions between the United States and China regarding China’s unfair technology transfer policies by issuing a panel report with findings on the allegedly WTO-inconsistent U.S. tariff measures. Instead, in accordance with the last sentence of Article 12.7 of the DSU, the Panel should issue a report that is “confined to a brief description of the case and to reporting that a solution has been reached.”⁴⁵

62. In closing, the United States would emphasize that China’s request for findings on the U.S. tariff measures poses a threat to the WTO dispute settlement system. It is China that is causing severe harm to the viability of the world trading system through policies not subject to existing WTO disciplines, and it is China that, instead of restoring fairness, is already taking self-help by imposing trade measures affecting most U.S. exports to China. Perversely, the misguided findings requested by China could only call into question the fundamental usefulness of the WTO dispute settlement system and of the multilateral trading system as a whole.

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

63. As explained above, this matter does not involve an open legal issue between the parties, as China has already unilaterally decided to respond to the U.S. additional duties by adopting its own retaliatory measures. Through their actions, the parties have already found a settlement of the matter for the time being. The Panel’s report must therefore be limited to noting that a resolution has been found. Even aside from this, the United States notes that, were the Panel to examine China’s contentions, it would find that the measures at issue are legally justified because they are “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994.

64. Article XX(a) of the GATT 1994 provides in relevant part:

⁴⁴ DSU, Article 12.7.

⁴⁵ DSU, Article 12.7.

[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals[.]

65. A Member seeking to establish that a measure is justified under Article XX(a) of the GATT 1994 must demonstrate that the measure (1) protects public morals; (2) is “necessary” to achieve that objective;⁴⁶ and (3) is not being applied in a manner that constitutes “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade” within the meaning of the chapeau of Article XX.⁴⁷

A. The measures at issue “protect public morals” within the meaning of Article XX(a)

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

1. A measure “protects public morals” within the meaning of Article XX(a) if the measure is designed to prevent or address outcomes that violate national standards of right and wrong

67. The ordinary meaning of the word “public” is defined as “[o]f or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation,”⁴⁸ whereas the ordinary meaning of “morals” is defined as “of or pertaining to the distinction between right and wrong.”⁴⁹ Therefore, the ordinary meaning of the term “public morals” refers to community or national standards of right and wrong. Accordingly, prior WTO panels have found that the term “public morals” refers to “standards of right and wrong conduct maintained

⁴⁶ See, e.g., *Colombia – Textiles (Panel)*, para. 7.293 (“In the context of Article XX(a), ... a Member wishing to justify its measure must demonstrate: (i) that it has adopted or enforced the measure ‘to protect public morals’, and (ii) that the measure is ‘necessary’ to protect such public morals.”).

⁴⁷ The Chapeau of Article XX provides

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures

⁴⁸ See *The New Short Oxford English Dictionary* (4th Edition) (1993), p. 2404

⁴⁹ See *The New Short Oxford English Dictionary* (4th Edition) (1993), p. 1827.

by or on behalf of a community or nation”.⁵⁰ It follows that the public morals of each Member may vary “in their respective territories, according to their own systems and scales of values.”⁵¹

68. In practice, panels have found that a measure “protect[s] public morals” within the meaning of Article XX(a) to the extent the measure is designed to prevent conduct or outcomes deemed morally objectionable within a Member’s territory. Such measures have included measures designed to prevent (1) “money laundering, organized crime, fraud, underage gambling, and pathological gambling”⁵² (2) the dissemination of audio visual products and publications that contain morally objectionable content;⁵³ and (3) harm to animal welfare.⁵⁴

2. The measures at issue “protect public morals” within the meaning of Article XX(a) because they uphold U.S. standards of right and wrong, including norms against theft, coercion, and unfair domestic and international competition, and are explicitly designed to “eliminate” China’s unfair trade acts, policies, and practices, which violate those standards

69. The measures at issue in this dispute “protect public morals” with the meaning of Article XX(a) because the United States adopted the measures to “obtain the elimination”⁵⁵ of conduct that violates U.S. standards of rights and wrong, namely China’s unfair trade acts, policies, and practices. That these policies and practices may *not* offend China’s sense of public morals, as China engages in the practices, is irrelevant, if highly regrettable. As noted, each WTO Member may seek to protect the public morals of its society.

70. As discussed above, the comprehensive and thoroughly documented Section 301 Report demonstrates that China engages in the following unfair trade acts, policies, and practices:

⁵⁰ See *Brazil – Taxes (Panel)*, para. 7.520; *EC – Seal Products (Panel)*, para. 7.380; *US – Gambling (Panel)*, paras. 6.461-6.468; *Colombia – Textiles (Appellate Body)*, footnote 155.

⁵¹ See *Brazil – Taxes (Panel)*, para. 7.520.

⁵² See *US – Gambling (Panel)*, para. 6.486 – 6.497 (finding that the Illegal Gambling Act was a measure to “protect public morals” because it “was adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.”).

⁵³ See *Publications and Audiovisual Products (Panel)*, para. 7.766 (“It is clear to us that the above-mentioned Chinese requirements that the content of reading materials and finished audiovisual products must be examined prior to importation, and that such products cannot be imported if they contain prohibited content, are measures to protect public morals in China.”).

⁵⁴ See *EC – Seal Products (Panel)*, paras. 7.410 – 7.411.

⁵⁵ 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* (issued June 20, 2018; effective July 6, 2018) (Exhibit CHN – 2).

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

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

73. Third, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. Through these cyber intrusions, China has gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.⁵⁶

74. In other words, China – as a matter of state policy and practice – uses coercion and subterfuge to *steal* or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S. companies with the aim of advantaging Chinese companies and achieving China’s industrial policy goals. China’s policy and practice of state-sanctioned *theft* implicates “public morals” within the meaning of Article XX(a) because it violates prevailing U.S. “standards of right and wrong” as reflected in the state and federal laws of the United States, under which the act of “theft” is universally deemed a criminal offense.⁵⁷ While community standards of right and wrong can be derived from many sources (including “prevailing social, cultural, ethical and religious values”⁵⁸), standards of right and wrong are clearly reflected in a jurisdiction’s *criminal law*.⁵⁹

75. The sense of right and wrong held by U.S. society is further offended if such fundamentally unfair policies and practices are left unchecked. China’s behaviour of theft, cyber-hacking, and government coercion and misappropriation undermines U.S. norms against theft and coercion, and the U.S. belief in fair competition and respect for innovation. These norms, all of which are key aspects of U.S. culture (as well as that in a number of other Members)⁶⁰, also find reflection in additional U.S. civil and criminal laws, such as those on,

⁵⁶ See Update to the Section 301 Report, pp. 3-4.

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 –13); 18 U.S. Code Chapter 31 (Embezzlement and Theft); 18 U.S. Code § 1832 (Theft of Trade Secrets) (Exhibit US – 14).

⁵⁸ See *US—Gambling (Panel)*, para. 6461.

⁵⁹ See *The New Short Oxford English Dictionary* (4th Edition) (1993), p. 549 (noting that the word “crime” refers to “sinfulness, wickedness, wrongdoing” or “an evil or injurious act; a grave offence.”).

⁶⁰ See, e.g., Minutes of the DSB Meeting of April 27, 2018 (WT/DSB/M/412), paras. 5.16, 5.17 (statements by the European Union and Chinese Taipei); Minutes of the DSB Meeting of May 28, 2018 (WT/DSB/M/413), paras. 4.14, 4.15, and 4.18 (statements by the European Union, Chinese Taipei, and Japan); Minutes of the DSB Meeting of October 29, 2018 (WT/DSB/M/420), para. 8.4 (statement by Japan); and Minutes of the DSB Meeting of November 21, 2018 (WT/DSB/M/421), paras. 5.4 and 5.5 (statements by Japan and the European Union).

cyber-hacking⁶¹, trade secret theft,⁶² unfair competition,⁶³ contracts and torts,⁶⁴ patents,⁶⁵ and governmental takings of property.⁶⁶

76. China's behaviour of theft, cyber-hacking, and government coercion and misappropriation is additionally offensive to U.S. values as it is carried out by a foreign government and WTO Member. China's behaviour is fundamentally unfair, wrong, and non-reciprocal; the United States does not undertake these activities against Chinese citizens or

⁶¹ See Computer Fraud and Abuse Act (18 U.S.C. § 1030) (US Exhibit – 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 (US Exhibit – 1), pp. 157-163 (referencing criminal indictments of individuals and entities affiliated with the Chinese government under 18 U.S.C. §1030).

⁶² 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).

⁶³ See *Federal Trade Commission Act*, Section 5 U.S.C § 45 (Unfair methods of competition unlawful; prevention by the Commission) (Exhibit US – 20).

⁶⁴ 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).

⁶⁵ 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)

⁶⁶ 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.

companies.⁶⁷ As such, China’s morally wrong behaviour further threatens to undermine U.S. society’s belief in the fairness and utility of the WTO trading system, if that system creates the conditions for, and fails to address, a fundamentally uneven playing field.⁶⁸

77. In sum, the unfair trade acts, policies, and practices detailed in the Section 301 Report clearly violate prevailing U.S. standards of right and wrong and thus implicate U.S. “public morals” within the meaning of Article XX(a) of the GATT 1994. And, because the United States adopted the measures at issue to address (*i.e.*, “obtain the elimination of”) such unfair trade acts, policies, and practices, the measures at issue “protect public morals” within the meaning of Article XX(a).⁶⁹

B. The measures at issue are “necessary” within the meaning of Article XX(a)

78. China employs the unfair trade acts, policies, and practices detailed in the Section 301 Report to advance its “industrial policy” goals⁷⁰ and broader “economic objectives.”⁷¹ Therefore, it is reasonable to conclude that China will continue to pursue its unfair trade acts,

⁶⁷ See, Section 301 Report (Exhibit US -1), p. 44 (“According to the Organization for Economic Co-operation and Development (OECD), [unlike China] very few countries employ foreign equity limitations or screen foreign investments on the basis of potential technology-related benefits.”); *see also* Section 301 Report (Exhibit US -1), referencing *Presidential Policy Directive – 2014 Directive on Signals Intelligence Activities*, Daily Comp. Pres. Docs. Section 1(c) (Jan. 17th, 2014) (“It is the longstanding policy of the United States, most recently reaffirmed in 2014 in Presidential Policy Directive 28 (PPD-28), that “[t]he collection of foreign private commercial information or trade secrets is authorized only to protect the national security of the United States or its partners and allies. It is not an authorized foreign intelligence or counterintelligence purpose to collect such information to afford a competitive advantage to U.S. companies or U.S. business sectors commercially”).

⁶⁸ See Section 301 Report (Exhibit US – 1), p. 172, citing Derek Scissors, *Chinese Economic Espionage Is Hurting the Case for Free Trade*, HERITAGE (Nov. 19, 2012) (“China’s troubling track record of using cyber intrusion and cyber theft to target U.S. companies in sectors prioritized by China’s industrial policies is “hurting the case for free trade” because “[m]utually beneficial economic exchange occurs only when there is acceptance of the rule of law. If the legal protection of property rights is ignored, free exchange makes much less sense: One side just takes from the other.”)

⁶⁹ Moreover, as noted in the Section 301 Report, China’s conduct and support of cyber-enabled theft and economic espionage against U.S. companies violates specific provisions of U.S. federal law, under which the United States Department of Justice has indicted several individuals and entities affiliated with the Chinese government. *See* Section 301 Report, pp. pp. 157-153 (Exhibit US – 1); Section 301 Report (Update), pp. 13-19 (Exhibit US – 2).

Further, the United States government has barred *itself* from engaging in espionage for the purpose of advantaging U.S. companies or commercial sectors. *See* Section 301 Report, citing Presidential Policy Directive 28 (PPD-28, 2014)) (“The collection of foreign private commercial information or trade secrets is authorized only to protect the national security of the United States or its partners and allies. It is not an authorized foreign intelligence or counterintelligence purpose to collect such information to afford a competitive advantage to U.S. companies or U.S. business sectors commercially.”).

⁷⁰ *See* Section 301 Report (Exhibit US – 1), pp. 17, 20, 27, 29, 36, 63, 149, 150, 153.

⁷¹ *See* Section 301 Report (Exhibit US – 1), pp. 150, 153, 154.

policies, and practices while it is advantageous to China to do so, for example, until the economic costs of doing so begin to approach or outweigh the economic benefits.⁷²

79. Consequently, an effort that aims to protect U.S. society from morally wrong stealing, coercion, or otherwise forced technology transfer and to induce China to abandon its unfair trade acts, policies, and practices must reduce or negate the economic benefits that China seeks to obtain from engaging in such acts, policies, and practices. In other words, to protect U.S. interests in moral (right or wrong) economic behaviour, it is necessary for the United States to adopt measures that are capable of changing China's economic cost-benefit analysis. The measures at issue in this dispute do just that by imposing significant tariff increases on Chinese products until China takes steps to eliminate the unfair trade acts, policies, and practices detailed in the Section 301 Report.

80. Moreover, the United States adopted the measures at issue after nearly a decade of trying to address China's unfair trade acts, policies, and practices. The United States attempted to bring about changed behaviour by China through dialogue, admonishment, multilateral forums, bilateral mechanisms,⁷³ and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.⁷⁴ That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

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

C. The measures at issue are *not* being applied in manner inconsistent with the chapeau of Article XX

82. The chapeau of Article XX provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures

83. Therefore, a measure that is "necessary to protect public morals" within the meaning of Article XX(a) must not be applied in a manner that constitutes "arbitrary discrimination" or a "disguised restriction on international trade". As explained below, the United States has not applied the measures at issue in a manner inconsistent with the chapeau of Article XX because

⁷² See e.g. Ryan Lucas, *Charges Against Chinese Hackers Are Now Common. Why Don't They Deter Cyberattacks?*, NPR (February 9, 2019) ("Why hasn't America dissuaded more cybertheft? One reason, experts say, is that the value of the intellectual property China has been accused of stealing dwarfs the costs that indictments impose on Beijing.") (Exhibit US – 15).

⁷³ See, Section 301 Report (Exhibit US – 1), pp. 4, 8.

⁷⁴ See, Section 301 Report, pp. 157-153 (Exhibit US – 1); Update to Section 301 Report (Exhibit US – 2), pp. 13-19.

no other government is engaging in forced technology transfer policies and practices of the type or to the extent that China is, causing tens of billions of dollars of annual harm to the United States.

1. The United States has not applied the measures at issue in a manner that constitutes “arbitrary or unjustifiable discrimination”

84. Prior panels have founds 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.⁷⁵ 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.

85. As noted, the United States adopted the measures at issue following nearly a *decade* of trying to address China’s unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms,⁷⁶ and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.⁷⁷ Then, the United States conducted a comprehensive eighth month investigation, resulting in the production of the 200-page report that exhaustively documented China’s unfair trade acts, policies, and practices.⁷⁸ The evidence collected during the investigation includes, public media reports, journal articles, over 70 written submissions, and witness testimony from the representatives of U.S. companies, workers, trade and professional associations, think tanks, as well as law firms and representatives of trade and professional associations headquartered in China.⁷⁹ Moreover, even after the report was released in March 22, 2018, the United States continued to constructively engage China concerning the unfair trade acts, policies, and practices included in the investigation. It was only after these engagements with China failed, that the United States ultimately decided to adopt the measures at issue on July 6, 2018, and August 23, 2018, respectively.⁸⁰

86. Panels have found 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.”⁸¹ The United States has explained the rationale and justification for

⁷⁵ See *Brazil – Retreaded Tyres (Panel)*, para. 7.257 – 7.258; *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.241.

⁷⁶ See, Section 301 Report (Exhibit US – 1), pp. 4, 8.

⁷⁷ See, Section 301 Report, pp. 157-153 (Exhibit US – 1); Update to Section 301 Report (Exhibit US – 2), pp. 13-19.

⁷⁸ See Section 301 Report (Exhibit US – 1).

⁷⁹ See Section 301 Report (Exhibit US – 1), pp. 9, 19.

⁸⁰ See Update to Section 301 Report (Exhibit US – 2), p. 4.

⁸¹ See *Brazil – Retreaded Tyres (Panel)*, paras. 7.259 – 7.260.

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.⁸²

87. According, the reasons explained above, there is no basis to conclude that the United States has adopted or applied the measures at issue in a manner that constitutes “arbitrary or unjustifiable discrimination” within the meaning of the chapeau of Article XX.

2. The United States has not applied the measures at issue in a manner that constitutes “a disguised restriction on international trade”

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

89. As observed by the panel in *EC – Asbestos* in relation to the ordinary meaning of the terms in this phrase:

[T]he key to understanding what is covered by “disguised restriction on international trade” is not so much the word “restriction”, inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word “disguised”. In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb “to disguise” implies an intention. Thus, “to disguise” (*déguiser*) means, in particular, “conceal beneath deceptive appearances, counterfeit”, “alter so as to deceive”, “misrepresent”, “dissimulate”. *Accordingly, a restriction which formally meets the requirements of [Article XX] will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.*⁸³

90. Not only has the United States made no attempt to disguise or conceal its reasons for adopting the measures at issue, the United States has announced such reasons and objectives in the Section 301 Report and its implementing instruments. That is, from the time the implemented the measures at issue it has consistently stated that it did so in order to “obtain the elimination of” China’s unfair trade acts, policies, and practices.

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

⁸² 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).

⁸³ *EC – Asbestos (Panel)*, para. 8.236 (emphasis added).

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

92. The United States has explained in Section IV why this dispute does not involve an open legal issue between the parties that requires adjudication by this Panel. As the parties have settled the matter for the time being, the Panel must, pursuant to DSU Article 12.7, note in its report the resolution found. Even aside from the fact the Panel’s work should end there, the United States has explained that, were the Panel to examine China’s contention, it would find that the measures at issue are legally justified under Article XX(a) of the GATT 1994.

93. The United States also explains in this Section that the Panel is legally precluded from examining and making findings on one of the measures at issue in this dispute – Measure 3. Because that measure was issued and took effect *after* the date this Panel was established,⁸⁴ the measure falls outside the Panel’s terms of reference as set by the DSB.

A. Measure 3 is not within the Panel’s terms of reference because it was not identified in China’s panel request and it did not exist when the Panel was established

94. There are two distinct reasons why the Panel should find that Measure 3 is not within its terms of reference. First, China did not identify Measure 3 in its panel request. Second, Measure 3 did not exist at the time of panel establishment. For these reasons, Measure 3 does not form part of the matter falling within the Panel’s terms of reference and there is no basis for the Panel to issue findings or recommendations with respect to this measure.

1. Measure 3 was not identified in China’s panel request

95. Articles 7.1 and Article 6.2 of the DSU govern a panel’s terms of reference. 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 its panel request.⁸⁵ Under Article 6.2, the “matter” to be examined consists of “the specific measures at issue” and “a brief summary of the legal basis for the complaint.”⁸⁶ Consequently, under the plain meaning of the DSU, the measures within a panel’s terms of reference are only those “specific measures” identified in the panel request; no other measures are properly within the panel’s terms of reference.

96. China’s panel request identifies Measure 1 and Measure 2 as “Measures at Issue”.⁸⁷ China’s panel request does not identify Measure 3 as a specific measure at issue. Therefore, only Measure 1 and Measure 2 form part of the matter referred to the DSB by China in its panel request, and only those two measures fall within the Panel’s terms of reference consistent with

⁸⁴ See *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (issued May 9, 2019); effective May 10, 2019) (Exhibit CHN – 4).

⁸⁵ DSU, Article 7.1.

⁸⁶ DSU, Article 6.2; see *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

⁸⁷ China’s Panel Request, paras. B(1) and B(2).

Article 7.1 of the DSU. As Measure 3 was not identified as a specific measure at issue in China’s panel request, it did not form part of the matter referred to the DSB by China, and therefore is not within the Panel’s terms of reference. Thus, the Panel cannot make findings or issue a recommendation with respect to Measure 3.

2. Measure 3 did not exist at the time of panel establishment

97. 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.”⁸⁸ Similarly, in *EC – Selected Customs Matters*, the panel and the Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both reasoned that, under the DSU, a panel is to determine whether the measure at issue is consistent with the relevant obligations “at the time of establishment of the Panel.”⁸⁹

98. As China acknowledges, 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.⁹⁰ Specifically, the DSB established this Panel on January 18, 2019, whereas Measure 3 was not issued until May 9, 2019, and did not take effect until May 10, 2019. Accordingly, Measure 3 falls outside the Panel’s terms of reference as defined by Articles 7.1 and 6.2 of the DSU, and there is no legal basis for the Panel to issue findings or recommendations with respect to Measure 3.

B. China has advanced no meritorious argument to support the view that Measure 3 is included within the Panel’s terms of reference

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

1. The DSU does not support the view that Measure 3 falls within the Panel’s terms of reference because it *modifies* a measure identified in China’s panel request

⁸⁸ *EC – Chicken Cuts* (AB), para. 156.

⁸⁹ See, e.g., *EC – Selected Customs Matters* (AB), para. 187 (finding that the panel’s review of the consistency of the challenged measure with the covered agreements properly should “have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel”); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they “might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel”).

⁹⁰ See China’s First Written Submission, para. 26.

100. China argues that Measure 3 is within the Panel’s terms of reference because it modifies a measure identified in China’s panel request, and because the panel request itself refers to “any modification” of the measures identified therein.⁹¹ China’s argument is without legal foundation.

101. Simply put, the DSU provides no support for the view that a measure not identified in a panel request can fall within a panel’s terms of reference because it modifies a measure that is identified in a panel request.⁹² As explained above, the measures for which a panel is authorized to make findings and recommendations are the measures that fall within the panel’s terms of reference, as defined in Articles 7.1 and 6.2 of the DSU. Under Articles 7.1 and 6.2, a panel’s terms of reference are limited to measures that are (1) specified in the party’s request for the establishment of a panel; and (2) in existence on the date the panel was established. Neither provision suggests that a panel may assert jurisdiction over a measure that otherwise falls outside of its terms of reference set by Article 6.2 or 7.1 of the DSU, e.g., because the measure may “modify” measures identified in the request for panel establishment. Nor has China identified any other text in the DSU that would otherwise support such a view.

102. In sum, China’s argument that Measures 3 is within the Panel’s terms of reference – even though it was issued and took effect *after* the date of panel establishment – finds no support in the DSU.

2. The Appellate Body’s report in *Chile – Price Band System* does not support China’s view that Measure 3 is within the Panel’s terms of reference

103. Contrary to China’s argument, the Appellate Body’s report in *Chile – Price Band System* does not support – much less confirm – the view that that a measure issued after the date of panel establishment can fall within a panel’s terms of reference.⁹³

104. First, the DSU does not assign precedential value to Appellate Body reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of the Appellate Body. 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.”⁹⁴ 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,⁹⁵ the Panel

⁹¹ See China’s First Written Submission, para. 26.

⁹² China’s First Written Submission, para. 26.

⁹³ See China’s First Written Submission, para. 27.

⁹⁴ DSU, Article 3.9.

⁹⁵ 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, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf.

in this dispute is not bound by any of the legal interpretations adopted by the Appellate Body in *Chile – Price Band System*, or any other Appellate Body report.⁹⁶

105. 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, Article 11 of the DSU would preclude a panel from applying such reasoning in its adjudication of the matter before it.⁹⁷

106. In this regard, the United States emphasizes that the text of Articles 6.2 and 7.1 of the DSU provides that a panel’s terms of reference is limited to those measures specifically identified in the request for establishment of a panel, and no other measures. Accordingly, measures enacted *after* the date of establishment – such as Measure 3 – are not within a panel’s terms of reference. Therefore, to the extent that the Appellate Body report in *Chile – Price Band System* could be read to imply that measures enacted after the date of panel establishment are within a panel’s terms of reference, that report is erroneous as a matter of law, is not persuasive, and does not support – much less confirm – the legal conclusion that Measure 3 is within the Panel’s terms of reference.

107. Second, at any rate, the Appellate Body’s report in *Chile – Price Band System* does not, in fact, support the proposition that a measure issued after the date of panel establishment can fall within a panel’s terms of reference. Rather, that Appellate Body report, 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.”).⁹⁸ In this regard, it is important to emphasize that no provision of the DSU – including Article 6.2 – precludes a panel from examining an instrument issued after the date of panel establishment *for the purpose of* interpreting or understanding the content of the measure identified in the panel request. To the extent the “amendment” at issue in *Chile – Price Band System* provided such interpretive context for

⁹⁶ 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 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)*).

⁹⁷ 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 . . .”).

⁹⁸ *Chile – Price Band System (AB)*, para. 137.

measures identified in Argentina’s panel request, the panel was free to examine the “amendment,” even if the amendment *itself* was not within the panel’s terms of reference.⁹⁹

108. Therefore, any suggestion that the “amendment” at issue in *Chile – Price Band System* was within the panel’s terms of reference is properly viewed as *dicta*, because the Appellate Body’s finding that it was “appropriate [for the panel] to consider the measure *as amended*”¹⁰⁰ was not legally dependent on a finding that the “amendment” *itself* fell within the panel’s terms of reference. Accordingly, the Appellate Body report in *Chile – Price Band System* does not support China’s argument that Measures 3 is within the Panel’s terms of reference, e.g., because it did “not change the essence”¹⁰¹ of a measure identified in China’s panel request.

3. The DSU does not authorize a panel to make findings on measures that fall outside its terms of reference in order “to secure a positive solution to [a] dispute”

109. The text of the DSU does not support China’s suggestion that the inclusion of Measure 3 in the Panel’s terms of reference is necessary “to secure a positive solution to the dispute.”¹⁰²

110. As noted, Articles 6.2 and 7.1 of the DSU demarcate a panel’s terms of reference. Neither provision suggests that a panel may review a measure that otherwise falls outside of its terms of reference set by Article 6.2 or 7.1 of the DSU because – in the view of the complaining Member – doing so is necessary “to secure a positive solution to the dispute.” China’s use of that phrase appears to be an implicit reference to Article 3.7 of the DSU.¹⁰³ That provision, however, describes the aims of the dispute settlement system as a whole, and does not alter the specific provisions in the DSU governing terms of reference.

111. Furthermore, China’s policy argument is unpersuasive. Apparently, China’s argument is premised on the concern that Measure 3 would somehow “escape scrutiny” and be exempt from DSB findings unless the Panel asserts jurisdiction over Measure 3 in contravention of Articles 7.1 and 6.2 of the DSU.¹⁰⁴ This, however, is incorrect. When a Member successfully establishes that a measure is inconsistent with a WTO obligation, the DSB will recommend that the measure be brought into conformity with WTO rules. The Member subject to the recommendation is not somehow exempt from the compliance provisions of the DSU simply because that Member may

⁹⁹ See *EC – Selected Customs Matters (AB)*, para. 188 (“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 panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.”).

¹⁰⁰ In practical terms, there was no real difference between considering the “amendment” as interpretive context versus “consider[ing] the measure *as amended*” by the amendment.

¹⁰¹ See China’s First Written Submission, para. 27 and 28.

¹⁰² See China’s First Written Submission, para. 27 and 28.

¹⁰³ See DSU, Article 3.7 (Providing in part that “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

¹⁰⁴ See China’s First Written Submission, para. 28.

have later amended or modified the measure subject to DSB recommendations. For example, a Member may have recourse to proceedings under DSU Article 21.5 to refer issues of compliance to the original panel, if available.¹⁰⁵

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

VII. CONCLUSION

113. For the foregoing reasons, the United States respectfully requests that the Panel reject China's request for findings under Articles I and II of the GATT 1994 with respect to the allegedly WTO-inconsistent tariff measures. The United States instead requests that the Panel issue a report with a "brief description" of the pertinent facts of the dispute and "reporting that a solution has been reached" by the parties, as prescribed by Article 12.7 of the DSU.

114. And even aside from the fact the Panel's work should conclude with issuance of the DSU Article 12.7 report described above, were the Panel to examine China's contentions, the Panel should find that the U.S. measures are justified under Article XX(a) of the GATT 1994, and that Measure 3 falls outside the Panel's terms of reference.

¹⁰⁵ See *US — Zeroing (EC)* (Article 21.5 — EC) (*AB*), paras. 301–302 ("The task of a panel under Article 21.5 of the DSU is to examine the questions of the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB. This examination will cover the instruments or actions that the responding Member has identified as measures "taken to comply". However, other closely connected measures *or omissions* in compliance by the responding Member fall within the scope of compliance proceedings and will be examined by the compliance panel in order to determine whether such actions or omissions undermine or negate the compliance achieved by the declared measures "taken to comply", or establish inexistent or insufficient compliance.").