UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

First Substantive Meeting of the Panel with the Parties

Opening Statement of the United States

October 29, 2019

TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
US-24	BDI, *China, Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy?* (January 2019)
US-25	Xinhua, Commentary: Xi demonstrates China's role as responsible country in New Year address (January 1, 2018)

Mr. Chairman, distinguished Members of the Panel: The United States would like to thank you for serving on this Panel and to thank the Secretariat staff assisting you.

I. INTRODUCTION

1. In bringing this dispute, China is engaging in a profound misuse of the WTO dispute settlement process. As we have explained in our first written submission, China has *already* taken retaliatory tariff actions in response to the U.S. measures at issue in this dispute.[1] Therefore, it is clear that China has no serious intention or expectation of resolving the matter at issue through the WTO dispute settlement process.

2. China's decision to bring this dispute is nothing more than a public relations stunt aimed at having the WTO take China's side in the ongoing bilateral dispute involving unfair, predatory, and harmful technology-transfer polices not covered by WTO rules. Further, China is attempting to use the dispute settlement system as a shield that would assist it in maintaining these unfair trade acts, policies, and practices.

3. The Panel in this dispute should not tolerate China's cynical misuse of the dispute settlement process.

4. First, as the United States will explain below, there is no legal basis for the Panel to issue any of the findings or recommendations requested by China because the Parties have already reached a "settlement of the matter" in this dispute. Accordingly, as required under Article 12.7 of the DSU, the Panel must limit its report to a "brief description of the case" and a statement that the Parties have reach their own solution.

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

[1] *See* U.S. First Written Submission, paras. 25-28.

6. The United States will elaborate on these legal points below. Before doing so, however, the United States will first discuss the matter that gave rise to the measures at issue in this dispute: China's long-standing and well-documented unfair trade acts, policies, and practices.

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

7. 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.[2] The Section 301 Report is over 200 pages in length, and is based on public testimony, public submissions, and other evidence. The evidence includes evidence from affected parties from many WTO Members, not just from the United States. The United States encourages the Panel, including our new Panel member, to read the Report (provided as Exhibit US-1) in its entirety. The Report supported the following conclusions.

8. 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 non-transparent administrative licensing and approvals processes which must be completed in order to establish and operate a business in China.

9. For example, China has uses such foreign ownership restrictions and related policies to compel foreign automakers to transfer technology and intellectual property to Chinese companies. As documented in the Section 301 Report:

> Foreign NEV [new energy vehicle] producers seeking to sell their products in China face pressure to produce their automobiles in China with a JV partner rather than exporting them to China, due to a

[2] *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).

range of Chinese policies, including steep import tariffs and subsidies available for domestically produced NEVs, as well as a new NEV credit system. These pressures to produce NEVs locally work in tandem with China's JV requirements to elicit the transfer of technology from foreign automakers to domestic Chinese automakers.

Specifically, market access rules issued in 2009 by the Ministry of Industry and Information Technology (MIIT), which applied to all enterprises that manufactured NEVs in China for use in China and were a condition to be eligible for certain NEV preference programs, required that NEV JVs hold intellectual property rights in one of three key NEV technologies: batteries, drive systems, or control systems. In effect, this requirement forced foreign NEV manufacturers to transfer their valuable technologies to the NEV JV, which they do not control, in order to gain market access.

[…]

New market access rules issued by MIIT in 2017, which also apply to all enterprises that manufacture NEVs in China for use in China and are a condition to be eligible for certain NEV preference programs, impose an even more onerous standard. These rules require that NEV manufacturers "master" the development and manufacturing technology for a complete NEV, rather than just one of the three key technologies listed in the 2009 market access rules, and possess key R&D capacities. As foreign automaker investment in China must be through a JV in which the foreign company holds no more than 50 percent equity, the foreign automaker effectively must transfer a high degree of key technologies and components to the JV in order for the JV to acquire mastery of the manufacturing process, including electronic and electrical control systems, on-board energy systems, powertrains, and dynamic coupling equipment.

Several submissions from U.S. trade associations pointed to China's NEV rules as evidence of China's unfair technology transfer regime, with one trade association stating in hearing testimony that China's NEV rules present 'a clear case in the electric vehicle sector that you're simply not going to be able to sell that product in China unless that local partner has mastered the ability to leverage the technology and take it to produce it going forth.'[3]

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

[3] *See*, Section 301 Report (Exhibit US – 1), pp. 31-32 (footnotes omitted).

subject to WTO rules, and the United States is pursuing a WTO dispute on this matter. The U.S. measures challenged by China in the current dispute do not relate to these technology licensing measures, and the U.S. invocation of Article XX(a) likewise is not based on these Chinese practices.

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

12. For example, China's has used its outbound investment strategy to facilitate the acquisition of foreign integrated circuit (IC) and semiconductor technology by Chinese companies in support of China's industrial policy goals. As, detailed in the Section 301 Report:

> In recent decades, the Chinese government has repeatedly underscored the importance of developing an indigenous IC industry and challenging U.S. leadership in this sector. Since 2014, the government has taken concrete steps to realize this objective, mobilizing multiple state actors and committing vast sums of money to support the acquisition of foreign IC technology. Chinese companies have been close partners in this effort, and have embarked on what one participant in the investigation referred to as a "buying spree"– acquiring a large number of foreign IC companies and assets, primarily in the United States.
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> In its five-year plans for the Chinese economy, the government has consistently flagged the IC industry as a national priority:
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> - In 1991 China's 8th Five-year National Economic and Social Development Plan Outline (8th Five-year Plan) called the development of the domestic integrated circuit industry a "main task" of the state.

- In 1996, China's 9th Five-year National Economic and Social Development Plan Outline and 2010 Long-Term Goals (9th Five-year Plan) called for the development of new generation integrated circuits, and for China to catch up to global technology levels.
- In 2001, the 10th Five-year National Economic and Social Development Plan Outline (10th Five-year Plan) called for the focused development of high-tech industries with localized breakthroughs and development [] to "vigorously develop the IC and software industry."
- In 2006, China's 11th Five-year National Economic and Social Development Plan Outline (10th Five-year Plan) called for the "vigorous" development of integrated circuits and other industries at the core of the "digitization trend."
- In 2011, China's 12th Five-year National Economic and Social Development Plan Outline (12th Five-year Plan) once again called for rapid development by cultivating a group of "backbone enterprises" and demonstration bases in the strategic emerging industries.
- In 2016, China's 13th Five-year National Economic and Social Development Plan Outline (13th Five-year Plan) called for the active promotion of advanced semiconductor technology.

A series of other government policies and planning documents echo the consistent message of the Five-year Plans. For instance, policies addressing the broad development of science and technology call for the support of a domestic IC industry. In addition, the government released several policies and plans that are specific to the IC industry, and call for its promotion and development. [The Ministry of Industry and Information Technology's] issuance of the Guidelines for the Development and Promotion of the Integrated Circuit Industry (IC Guidelines) in 2014 marked a turning point in the evolution of Chinese policy in the IC sector.

This measure called for establishing a National IC Industry Development Leading Small Group, with responsibility for the overall design and coordination of China's IC industry development. The IC Guidelines also called for substantial funding to support the growth of China's IC industry. The IC Guidelines directed the creation of a National IC Fund to mobilize capital from large enterprises, financial organizations, and society to invest in the development of China's IC industry and promote industrial upgrading. The IC Guidelines also called for policy banks [] and commercial banks to provide financial support to the IC industry.

Taken together, the series of policies and plans issued by the Chinese governments set out a comprehensive strategy for developing indigenous IC capacity and reducing imports.

[…]

A central pillar of this strategy is achieving technology transfer through foreign acquisitions. For example, the Notice on Issuing the Industrial Technology Innovation Capability Development Plan

> (2016-2020) expressly encourages foreign acquisitions to increase the international competitiveness of China's domestic industry through "technology acquisition" and "technology transfer." The National 13th Five-year Science and Technology Innovation Plan calls for the "capture of 'key core technologies' (electronic components, high-end telecom chips, foundational software), integrated circuit equipment, broadband mobile communications […]'.
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> State funding plays a key role in this acquisition strategy. State policies call on the departments under the State Council and all levels of local governments to develop financing measures, including policy funds, loan guarantees, and new financial instruments, to support this effort.
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> […]
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> In recent years, these policy directives have prompted a flood of foreign acquisitions. Since 2014, when the government issued the IC Guidelines, Chinese companies and investors – often backed by state capital – have undertaken a series of acquisitions to achieve technology breakthrough, shrink the technology gap between China and advanced countries, cultivate domestic innovation clusters, and reduce China's reliance on IC imports. Government leadership in these operations is clear. In many cases, the Chinese acquirers openly admit the role played by the state in guiding and facilitating these acquisitions.[4]

13. 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. As detailed in the Section 301 Report:

> [T]he Chinese government provides competitive intelligence through cyber intrusions to Chinese state-owned enterprises through a process that includes a formal request and feedback loop, as well as a mechanism for information exchange via a classified communication system.
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> For example, according to U.S. government information, China National Offshore Oil Corporation (CNOOC), a state-owned enterprise, submitted formal requests to Chinese intelligence services seeking intelligence information on several U.S. oil and gas companies and on U.S. shale gas

[4] *See* Section 301 Report (Exhibit US – 1), pp. 110-114 (footnotes omitted).

technology. One instance occurred in January 2012 in the context of commercial negotiations between a U.S. company ("U.S. Company 1"), CNOOC, and the PRC Ministry of Agriculture regarding oil leaks that had occurred at a facility jointly owned and operated by U.S. Company 1 and CNOOC in June 2011.

In January 2012, these Chinese intelligence services provided CNOOC information ahead of and during negotiations with U.S. Company 1. The information that the intelligence services provided to CNOOC included details on U.S. Company 1's position in the negotiation. CNOOC attributed their ultimate success in the negotiation with U.S. Company 1 to the information that CNOOC had received from the intelligence services. According to information the U.S. Government has access to, senior Chinese Intelligence officials, including a PLA director, Liu Xiaobei, endorsed the use of the intelligence information during CNOOC's negotiations with U.S. Company 1.

In a second instance, in July 2012, CNOOC requested that Chinese Intelligence provide specific information on five named U.S. oil and natural gas companies. Specifically, CNOOC sought information on:

- U.S. Company 2's operations, asset management, and the movements of its senior personnel;
- U.S. Company 3's developments in shale gas technology; and
- The status of U.S. Company 4 and U.S. Company 5's research in certain areas, including lab procedures, fracking technology and fracking formulae.

These examples illustrate how China uses the intelligence resources at its disposal to further the commercial interests of Chinese state-owned enterprises to the detriment of their foreign partners and competitors.

Available evidence also indicates that China uses its cyber capabilities as an instrument to achieve its industrial policy and [science and technology] objectives. Indeed, based on available information on China's cyber intrusions, experts have concluded that China's cyber intrusions and cyber theft align with its industrial policy goals.

For example: As noted above, [security firm] Mandiant observed in its 2013 report that "organizations in all industries related to China's strategic priorities are potential targets of [the PLA's] comprehensive cyber espionage campaign." The victims of the intrusions in Mandiant's data

set match industries that China has identified as strategic priorities in its five year plan and S&T development plans.

In a review of cybertheft by a group associated with China's intelligence services, cybersecurity firm Novetta found the group targeting entities including Fortune 500 companies and firms with innovative information technology. Such targeting converged with China's strategic interests and the aims of China's 11th Five Year plan for the 2006-2011 period.

In 2015, one cybersecurity expert testified to the U.S.-China Economic and Security Review Commission that 'China's commercial cyber espionage activity likely supports Communist Party central planning policies designed to provide a competitive advantage for Chinese companies.' [5]

14. China's policies affect the technology-based enterprises of other WTO Members, not just those in United States. Indeed, non-US industry associations have also raised the same complaints about China as documented in the Section 301 Report. For example, in the *Business Confidence Survey 2018*, the European Union Chamber of Commerce in China reported that

> '[U]nfair technology transfers continue despite government assurances,' with 19% of Chamber members reporting that they had felt compelled to engage in unfair technology transfers to maintain market access in China…European companies in high-technology industries were significantly more likely to report in the affirmative, including: 36% of aerospace and aviation, 33% of civil engineering and construction, 27% of automotive, and 23% of chemical and petroleum companies.[6]

15. Such concerns were echoed more recently in a January 2019 policy paper issued by the Federation of German Industries (BDI), which reports that:

> While Chinese companies have enjoyed relatively free access to the EU's internal market to date, this does not apply equally to foreign companies in China. Despite some reforms, investment bans, investment caps or the obligation to set up joint ventures still exist in several sectors…There is also often no equal treatment for companies that have been present in the Chinese market for a long time. In order to protect its own market and acquire technology and

[5] *See* Section 301 Report (Exhibit US – 1), pp. 164-166 (footnotes omitted).
[6] *See* Update to Section 301 Report (exhibit US-2), p. 23.

know-how, since the middle of the last decade Beijing has cemented new restrictions on foreign firms beyond previously existing investment barriers. Investment restrictions exist, for example, in financial services. Problems include forced technology transfer, lack of implementation of intellectual property rights, arbitrary administrative treatment, including customs clearance, and unequal access to licenses, financing, subsidies and legal remedies.[7]

16. And, as the European Union states in its the 3rd party submission:

> [T[he European Union shares the concerns expressed by the United States regarding the protection of intellectual property rights and discriminatory conditions applying to foreign licensors of intellectual property in China. These are well-known issues and long-standing concerns that the European Union has raised over the years both in political dialogues with China and at the multilateral level, such as in TRIPS Council transitional reviews. The European Union shares both the concerns expressed by the United States and the description of the problem regarding China's technology transfer policies. Foreign ownership restrictions, opaque administrative procedures, vague and unclear rules that leave discretionary leeway to the administration, discriminatory laws and practices, lack of transparency and consistency, are all elements that create the conditions for the Chinese government and State-influenced actors to pressure foreign companies to transfer their technology to Chinese entities.[8]

17. In November 2018, the United States issued a 50-page update to the Section 301 Report.[9] The supplemental report explains that China had 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. As documented in the supplemental report:

> China shows no sign of ceasing its policy and practice of conducting and supporting cyberenabled theft and intrusions into the commercial networks of U.S. companies.
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> […]

[7] BDI, China, *Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy?* (January 2019), p. 3. (Exhibit US – 24)
[8] E.U. Third Party Submission, para. 4.
[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).

> According to a June 2018 report, cybersecurity firms have observed, in the period from mid-2017 through mid-2018, what appear to be Chinese state-sponsored entities attacking firms in cloud computing, Internet of Things, artificial intelligence, biomedicines, civilian space, alternative energy, robotics, rail, agricultural machinery, and high-end medical devices sectors. One cybersecurity firm, CrowdStrike, observed that Chinese state hacking is gaining in pace and volume, while another, FireEye/Mandiant, similarly stated that previously inactive Chinese hacking groups had now been reactivated. In November 2018, cybersecurity firm Carbon Black found a sharp rise in the third quarter of 2018 'in attacks against manufacturing companies—a type of attack that has been frequently tied to Chinese economic espionage.' It also found that 68% of incident response professionals surveyed during the preceding three months assessed that China was the source of the observable cyberattacks, more than any other country.[10]

18. As noted in the Update to the Section 301 Report, companies in Australia, Japan, the Europe Union, and South Korea have also been the subject of cyber-intrusions that appear traceable to the Chinese government.[11]

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

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

20. 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.[12]

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[10] *See* Update to Section 301 Report (Exhibit US – 2), pp. 10-11 (footnotes omitted).
[11] Update to Section 301 Report (Exhibit US – 2), pp. 19-22.
[12] *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).

21. 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. goods with a purported trade value of approximately $16 billion dollars, effective August 23, 2018.[13]

22. 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.[14] These tariffs took effect on September 24, 2018, and were increased effective June 1, 2019.[15]

23. 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.[16]

24. Further – in addition to the retaliatory actions already discussed, China has adopted – or threatened to adopt – 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;[17]

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

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

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

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

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

- Threatening retaliation against any company that complies with certain U.S. laws or makes business decisions that China does not agree with;[18] 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.[19]

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

26. China has openly stated that its unilateral retaliation was adopted in response to the same U.S. measures that China purports to challenge in this WTO dispute. In particular, China has asserted that is retaliatory action is justified because the U.S. measures "severely violate [] China's legitimate rights at the WTO."[20] China – of course – did not obtain DSB authorization before adopting these measures, as required under the DSU.

27. China's decision to bring this dispute is thus transparently hypocritical and boldly cynical. China's action is hypocritical because it cannot credibly challenge the U.S. measures at issue for being "unilateral" and WTO-inconsistent, while at the same time openly adopting its own unilateral tariff measures – in connection with the very same matter – and without any apparent legal basis under the DSU. China's action is cynical, because it now seeks to make use of the DSB process while flagrantly violating the rules attendant to that process – again – with respect to the very same matter at issue.

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[18] *See* MOFCOM, *Ministry of Commerce Spokesperson Answer Questions about China's Establishment of an "Unreliable Entities List" Regime*, (June 1, 2019) (Exhibit US – 8).

[19] *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).

[20] *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.").

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

28. As we explained in our first written submission, the Panel should not make findings or recommendations on China's legal claims. Through their actions, it is apparent that both Parties agree that these matters should be resolved outside of the WTO dispute settlement process.

29. The United States has taken to WTO dispute settlement those elements of China's policies addressed by WTO rules – namely, involving technology licensing. The remainder of China's policies are not subject to WTO rules, and the United States is addressing these policies on a bilateral basis with China. For its part, China's actions likewise express its views that the matter must be addressed outside the WTO system. As noted, China suspended WTO concessions to the United States for the explicit purpose of retaliating against the US measures at issue.[21] China did so without first obtaining authorization from the DSB to impose such countermeasures, as required under the DSU. [22]

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

31. In sum, both parties agree that the matter involving U.S. concerns with China's technology transfer policies, and with China's concerns with the U.S. response, are to be

[21] *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.").

[22] 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.").

addressed outside of the WTO system. Applying the terms of Article 12.7 of the DSU, the parties are in mutual agreement that in terms of WTO rules and procedures, the solution is to take the matter outside of the WTO system. In these circumstances, Article 12.7 provides that "that report of the panel shall be confined brief description of the case and to reporting that a solution has been reached."[23]

32. Accordingly, the report of the Panel in this dispute should be confined to reporting that the Parties have reached their own solution and should not include any examination of the China's legal claims. To be clear, not only is China not entitled to the findings and recommendations that it now seeks, the DSU requires that the report be limited in this manner.

33. If China had been legitimately interested in resolving this matter through the dispute settlement process, it would have followed the procedures attendant to that process. China's decision to ignore those procedures means that China has made an affirmative decision to address this matter outside the of dispute settlement system. This, is China's sovereign right.

34. Having done so, China does not also have the right to avail itself of the dispute settlement process by obtaining findings on the U.S. measures at issue. That is, China cannot legitimately pick and choose at its leisure which DSU procedures it will follow and which it will ignore. China's attempt in this regard is patently inconsistent with Article 3.10 of the DSU, which instructs that "all Members will engage in [the dispute settlement process] in good faith in an effort to resolve the dispute."[24]

35. And, as a practical matter, China's decision to bring this dispute would appear to be a pointless waste of WTO resources, given that China has *already* unilaterally imposed the only remedy that the DSB could potentially authorize: the suspension of the WTO concessions.

36. From a systemic point of view, a decision by this Panel to accede to China's request for legal findings would undermine dispute settlement mechanism by signaling that WTO

[23] *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)

[24] *See*, DSU Article 3.10.

members can ignore DSU procedures – by pre-emptively suspending WTO concessions whenever they feel that their WTO rights have been infringed – and still obtain DSB findings after the fact.

37. Finally, the United States would like to briefly address on an issue raised in third-party submissions: namely, the relationship between Articles 3.6 and 12.7 of the DSU. Based on the text of these two provisions, Article 12.7 operates independently of Article 3.6. By its clear terms, Article 12.7 of the DSU (last sentence) becomes operative "[w]here a settlement among the parties to the dispute has been found."[25] To be sure, such a "settlement among the parties" could be memorialized in the form of a "mutually agreed solution" and notified under Article 3.6. However, nothing in the text of Article 12.7 of the DSU indicates that such a notification is a precondition for the operation of Article 12.7. Therefore, any suggestion that Article 12.7 of the DSU (last sentence) does not apply absent an Article 3.6 notification finds no support in the text the DSU.

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

38. In the event the Panel were to find that the second sentence of Article 12.7 did not apply, the United States has shown that the measures at issue are legally justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

A. The Measures At Issue "Protect Public Morals" Within Meaning Of Article XX(A)

39. As explained in the U.S. first written submission , the measures at issue in this dispute protect public morals with the meaning of Article XX(a) because the United States adopted them to "obtain the elimination"[26] of conduct that violates U.S. standards of right and wrong, namely various unfair trade acts, policies, and practices engaged in by China.

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[25] *See* DSU, Article 12.7 (last sentence) ("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)

[26] *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).

40. Earlier in this statement, the United States summarized the technology transfer polices of China which are the cause of the U.S. imposition of the measures that China seeks to challenge in this dispute. In short, 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.

41. China's policy and practice of state-sanctioned *theft* and coercive trade practices implicate "public morals" within the meaning of Article XX(a) because it violates prevailing U.S. standards of right and wrong as reflected in the state and federal laws of the United States, under which the act of "theft" is universally deemed a criminal offense.[27]

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

43. First, the measures protect U.S. public morals by combatting conduct that is considered immoral under prevailing U.S. standards of right and wrong. On this point, the United States emphasizes that the China's unfair trade acts, policies, and practices have direct impact inside the territory of the United States and on U.S. companies in particular. The United States wishes to be clear that it is not seeking to change China's public morals; rather the U.S. seeks to protect US-based actors from the harmful effects of Chinese conduct that offends U.S. moral standards.

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

[27] *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).

45. Thus, the measures at issue protect public morals by aiming to defend against the corruption of U.S. norms against theft and coercion. In this regard, the United States notes that China is uniquely capable of shaping such norms, given its economic weight, its great power status, and its self-conception as "responsible major country in international affairs."[28] China's unfair conduct thus presents a unique and unparalleled risk to U.S. public morals and requires an urgent response from the United States.

B. The U.S. Measures at Issue are "Necessary" within the meaning of Article XX(a)

46. At the outset, it is important to reiterate that the United States adopted the measures at issue *after* nearly a decade of trying to address China's unfair trade acts, policies, and practices through other means. The United States attempted to bring about changes in Chinese policies through dialogue, admonishment, multilateral forums, bilateral mechanisms,[29] and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.[30] Regrettably, none of these efforts have proven to be effective in putting an end to these unfair and immoral practices.

47. The failure of these efforts demonstrates that China will not abandon its unfair trade acts, policies, and practices until and unless the economic costs of doing so begin to approach or outweigh the economic benefits.[31] As the United States has explained, the U.S. tariffs measures at issue thus play a necessary role toward the goal of eliminating China's unfair trade acts, policies, and practices by raising the cost of such practices and thereby reducing China's incentive to continue engaging in such conduct going forward.

48. In addition to raising the cost to China of maintaining its technology-transfer policies, the United States would like to emphasize the links between the specific product coverage of the U.S. measures and the Chinese conduct that the U.S. measures are intended to address. The Chinese products subject to additional tariffs under the July 6, 2018 U.S. measure were

[28] Xinhua, Commentary: Xi demonstrates China's role as responsible country in New Year address (January 1, 2018). (Exhibit US-25)
[29] *See*, Section 301 Report (Exhibit US – 1), pp. 4, 8.
[30] *See*, Section 301 Report, pp. 157-153 (Exhibit US – 1); Update to Section 301 Report (Exhibit US – 2), pp. 13-19.
[31] *See e.g.* Ryan Lucus, *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).

selected precisely because those products benefit from the unfair trade policies documented in the Section 301 Report.[32]

49. The measures at issue are clearly necessary when evaluated under the factor-based test that the Appellate Body has often applied to assess a measure's necessity for purposes of Article XX of the GATT 1994. Such factors include (1) the relative importance the objective pursued by the measure; (2) the contribution of the measure to that objective; and (3) the trade-restrictiveness of the measure. [33]

50. First, the measures at issue pursue the vitally important objective of upholding U.S. norms against theft and coercion that are threatened by China's unfair trade acts, policies, and practices. Such values are of tremendous importance to U.S. society and the functioning of the U.S. economy. Indeed, it is difficult to see how upholding moral values against theft and coercion could be considered anything less than a vitally important objective. Moreover, the Appellate Body has observed that "Members have the right to determine the level of protection that they consider appropriate" and that "may set different levels of protection even when responding to similar interests of moral concern."[34]

51. Second, the measures at issue make a substantial contribution to the objective or protecting U.S. public morals. As explained, the U.S. tariff measures at issue play a necessary role toward the goal of eliminating China's unfair trade acts, policies, and practices by raising the cost of such practices and reducing China's incentive to continue engaging in such conduct going forward. The U.S. measures also target Chinese goods that benefit from these policies.

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

[32] *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).

[33] *See e.g.* Appellate Body Report, *EC – Seal products*, para. 5.169.

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

of the United States government thus convey to U.S. citizens that China's policies are not successful and will not be rewarded in the marketplace, and thereby reduce the incentive for U.S. actors to adopt behavior similar to China's.

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

54. The measures have already been effective in encouraging China to enter into serious negotiations. Therefore, any suggestion that tariff measures are *ipso facto* incapable of addressing unfair technology transfer policies is flatly wrong.

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

56. In sum, the measures at issue protect U.S. public morals by combatting the harms associated with China's unfair trade acts, policies, and practices, and preventing the United States' norms against theft and coercion from being corrupted by having China's conduct go unchecked. The measures are necessary because it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices until the economic costs of doing so begin to approach or outweigh the economic benefits; the measures at issue play the necessary role of altering China's cost-benefit in this regard, by imposing significant tariff increases on Chinese products until China takes steps to eliminate the unfair trade acts detailed in the Section 301 Report. Further, the United States' decision to adopt the measure at issue comes after nearly a decade of attempting to address China's conduct through other means. That none of these prior efforts have proven to be effective further confirms the necessity of the measures at issue in this dispute.

VI. CONCLUSION

57. This concludes the U.S. opening statement. We look forward to answering the Panel's questions.