UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

January 8, 2020

Table of Contents

Table of Reports

SHORT TITLE	FULL CITATION
Colombia – Textiles (AB)	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add. 1, adopted 22 June 2016
Colombia – Textiles (Panel)	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add. 1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R and Add. 1
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

Consolidated Table of Exhibits

Exhibit	Description
US-1	*Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (March 22, 2018) ("Section 301 Report")
US-2	*Update Concerning China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (November 20, 2018) ("Update to Section 301 Report")
US-3	Ministry of Commerce, People's Republic of China (MOFCOM), *Announcement on Imposing Tariffs on Some Goods Originating in the US* (June 17, 2018)
US-4	MOFCOM, *Announcement on Imposing Tariffs on Certain Goods Originating in the US* (August 10, 2018)
US-5	MOFCOM, *Announcement on Levying Tariffs on Goods and Commodity Imports from the US* (September 19, 2018)
US-6	MOFCOM, *China to increase tariffs on imported U.S. products* (May 14, 2019)
US-7	Doug Palmer, *China Has Begun 'Phase Two' of Retaliation, Former U.S. Diplomat Says*, Politico, (June 6, 2018)
US-8	MOFCOM, *Ministry of Commerce Spokesperson Answers Questions about China's Establishment of an "Unreliable Entities List" Regime*, (June 1, 2019)
US-9	Sarah Zhang, *China will not rule out using rare earth exports as leverage in trade war with US*, South China Morning Post (May 29, 2019)
US-10	*NDRC official talks about the development of China's rare-earth industry*, Global Times (May 29, 2019)
US-11	*China to impose additional tariffs on U.S. imports worth 75 bln USD*, Xinhua (August, 23, 2019)
US-12	California Code, Penal Code § 484 (General Theft Statute)
US-13	Texas Penal Code, Title 7, Chapter 31 (Offenses against Property – Theft)
US-14	8 U.S. Code CHAPTER 31 (Embezzlement and Theft)
US-15	Ryan Lucus, *Charges Against Chinese Hackers Are Now Common. Why Don't They Deter Cyberattacks?*, NPR (February 9, 2019)
US-16	Computer Fraud and Abuse Act (18 U.S.C. § 1030)
US-17	Economic Espionage Act of 1996 (18 U.S. Code § 1831-1832)
US-18	Uniform Trade Secrets Act (1985)

US-19	Uniform Trade Secrets Act (1985) – adoption tracker
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
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)
US – 26	Statement by the United States on the Precedential Value of Panel or Appellate Body Reports Under the WTO Agreement and DSU, Meeting of the DSB (December 18, 2018)
US – 27	Statement from the Press Secretary Regarding the President's Working Dinner with China (December 1, 2018)
US – 28	Remarks by Vice President Pence at the Frederic V. Malek Memorial Lecture (October 24, 2019)
US – 29	German Chamber of Commerce, Business Confidence Survey 2019-20
US – 30	18 U.S. Code CHAPTER 41 (EXTORTION AND THREATS)
US – 31	*Sherman Act*, Section 15 U.S.C. § 1
US – 32	*Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958)

I. INTRODUCTION

1. As the United States has explained in its written and oral submissions, there is no legal basis for the Panel to issue the findings or recommendations requested by China because the Parties have reached a "settlement of the matter" within the meaning of Article 12.7 of the DSU. And, even if the Panel were to examine the measures at issue, it would conclude that they are "necessary to protect public morals" and therefore legally justified under Article XX(a) of the GATT 1994. Nothing that China has said in its statements at the first substantive meeting or in its written responses to questions from the Panel serve to rebut the United States' *prima facie* case on either score.

2. First, that a "settlement of the matter" has been reached is confirmed by objective facts on the record. As explained in section II below, China has failed to adduce any evidence to rebut these objective facts. Instead, rather astonishingly, China asserts that the Panel is "not permitted" to consider the objective evidence that a settlement has been reached. China's position finds no support in the DSU and is affirmatively contradicted by Article 11 of the DSU, which states that the function of a panel is to make an "objective assessment" of the matter before it. Nor is there any support in the DSU for China's assertion that a "settlement" within the meaning of Article 12.7 must be memorialized in the form of a "mutually agreed solution."

3. Second, China has failed to rebut the United States' *prima facie* showing that the measures at issue are justified under Article XX(a). Indeed, China does not even attempt to rebut the U.S. argument that the measures at issue are "necessary" within the meaning of Article XX(a). Instead, China goes no further than to argue that the measures at issue are not "designed to" protect public morals. But, as explained in Section III below, the phrase "designed to" does not appear in the text of Article XX(a) and is not the applicable standard for whether a measure is "necessary" within the meaning of Article XX(a). Further, at any rate, the measures at issue in this dispute clearly satisfy the "designed to" and other "necessity" tests applied in previous panel and Appellate Body reports.

4. Third, China does nothing to substantiate its *new* assertion that the conclusions set out in the Section 301 Report are "factually baseless." As explained in Section IV below, China's statement is ridiculous on its face and should be rejected outright unless and until China proffers evidence to support it.

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

5. As the United States has explained, the parties have settled the matter within the meaning of Article 12.7 of the DSU. Accordingly, consistent with the requirements of Article 12.7, the Panel should reject China's request for legal findings on the measures at issue and confine its report to a brief statement of the facts and a notation that a settlement has been reached. To be clear, not only is China not entitled to the findings and recommendations that it now seeks, the DSU requires that the Panel's report be limited in the manner prescribed in Article 12.7.

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

7. First, China has already applied tariff measures to imports from the United States in excess of its WTO commitments for the explicit purpose of retaliating against the measures for which it now seeks legal findings.[1] China, of course, did so without first obtaining the authorization from the DSB pursuant to the DSU.[2] China does not dispute the fact that it has already imposed retaliatory tariff measures in response to the U.S. measures at issue. Nor does China dispute that these retaliatory measures remain in effect.

8. In this regard, China cannot credibly deny that this matter has been resolved for purposes of the WTO dispute settlement process. Of course, if China was truly interested in resolving this matter through the dispute settlement process, it would have sought to obtain DSB authorization *before* taking retaliatory action against the United States, or perhaps withdrawn the retaliatory measures upon initiating this dispute. If China had removed its retaliatory tariffs, there would be at least some basis to its assertion that the matter "remains unresolved,"[3] as China could credibly argue that it had not taken the final step contemplated by the DSU (*i.e.*, the suspension of concessions). Conversely, the fact that China continues to apply the retaliatory tariffs belies the argument that this matter presents a live controversy for the Panel to adjudicate.

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

10. Third, China's decision to pursue this dispute has been a pointless waste of WTO resources, given that China has already unilaterally imposed the only remedy that the DSB could potentially authorize: the suspension of the WTO concessions. As a practical matter, findings by this Panel that the dispute has not been resolved would divert WTO dispute settlement resources from parties that have not engaged in self-help as China has. And, from a systemic point of view, a decision by this Panel to accede to China's request for legal findings would undermine the dispute settlement mechanism by signaling that WTO members can ignore DSU procedures – by pre-emptively suspending WTO concessions whenever they feel that their WTO rights have been infringed – and still obtain DSB findings after the fact.

11. In sum, the actions (and omissions) of both parties show that – as an objective matter – the parties have agreed to settle the matter at issue outside of the WTO system. In these

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

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

[3] *See* China's Answer to Panel Questions, para. 11.

circumstances, Article 12.7 of the DSU commands that "the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."[4] Accordingly, the Panel's report in this dispute must be limited in the manner prescribed in Article 12.7 of the DSU. As explained below, China's arguments to the contrary are without merit.

A. China's Assertion That the Panel May Not Objectively Assess whether the Parties Have Settled the Matter Finds No Support in the DSU

12. As the United States has explained, objective evidence on the record confirms that the parties have settled the matter at issue for purposes of Article 12.7 of the DSU. China, however, asserts that the Panel is not "permitted" to objectively assess whether there is a "settlement" between the parties within the meaning of Article 12.7 of the DSU.[5] This assertion finds no support in the DSU.

13. First, the argument that the Panel is precluded from making such an objective assessment is contradicted by the clear terms of the DSU. Specifically, Article 11 of the DSU states that "a panel *should* make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[6] Accordingly, the Panel in this dispute should objectively assess whether the facts on the record support a finding that the parties have settled the matter within the meaning of Article 12.7 of the DSU. Certainly, nothing in the text of Article 11 supports the view that the Panel is *not* "permitted" to make such an objective assessment.

14. Second, nothing in the text of Article 12.7 of the DSU itself suggests that panels are not permitted to objectively assess whether the parties to a dispute have settled the matter at issue. Article 12.7 simply refers to a circumstances where a "settlement of the matter among the parties to the dispute has been found." Article 12.7 does not specify or delimit the evidence that a panel may consult to discern the existence of a "settlement," much less mandate that the *subjective* views of one party be dispositive to this question, as China seems to suggest. Therefore, Article 12.7 of the DSU does not indicate that a panel should not fulfil its function under Article 11, that is, that a panel should make an "objective assessment of the facts of [a] case and the applicability of and conformity with the relevant covered agreements."

15. Third, Article 7.1 of the DSU does not support China's view that a panel may not objectively assess whether a "settlement" exists within the meaning of Article 12.7 of the DSU.[7]

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[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).

[5] *See* China's Answer to Panel Questions, para. 12.

[6] DSU Article 11.

[7] *See* China's Answer to Panel Questions, para. 12.

Indeed, Article 7.1 is concerned with a wholly different issue – namely, the scope of the "matter referred to the DSB." Article 12.7, on the other hand, is concerned with whether the matter so-referred has been settled. While a panel may look to Article 7.1 to determine the scope of a settlement reached by the parties, Article 7.1 itself is not relevant to the question of whether a "settlement has been found" within the meaning of Article 12.7 of the DSU. China's reliance on Article 7.1 is therefore misplaced.

B. The Operation of Article 12.7 of the DSU (last sentence) Does Not Require the Notification of a "Mutually Agreed Solution" under Article 3.6 of the DSU

16. China argues that the parties have not settled the matter within the meaning of Article 12.7 (last sentence) because the parties have not concluded a "mutually agreed solution" within the meaning of Article 3.6 of the DSU, or notified such a solution to the DSB. [8] This argument is without merit.

17. Article 12.7 and Article 3.6 of the DSU operate independently. 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."[9] While a "settlement among the parties" could be memorialized in the form of a "mutually agreed solution" and notified under Article 3.6, nothing in the text of Article 12.7 of the DSU mandates that such a notification is a precondition for the operation of Article 12.7. Accordingly, there is no legal support for China's suggestion that Article 12.7 of the DSU (last sentence) does not apply absent a "mutually agreed solution" and a notification thereof under Article 3.6 of the DSU.

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

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

19. As explained above, China is not entitled to any legal findings on the measures at issue in light of the parties settlement of the matter within the meaning of Article 12.7 of the DSU (last sentence). And, as explained in the remainder of Section III below, even if the Panel were to entertain China's legal claims, it should find that the measures at issue are "necessary to protect public morals" and thus justified under Article XX(a) of the GATT 1994. Moreover, as the United States explains in Section IV, China's view that the measures at issue cannot qualify for coverage under Article XX(a) because they (1) do not target morally offensive products *per se* and (2) are aimed at inducing China to adopt certain policy changes, finds no support in the text of Article XX(a) or the reports cited by China. In addition, China makes no attempt to substantiate its assertion that the allegations set out in the Section 301 Report are "factually

[8] *See* China's Answer to Panel Questions, para. 14.

[9] *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).

baseless." To the contrary, the hundreds of sources on which the Section 301 Report's findings are based are highly credible.

A. The U.S. Measures at Issue "Protect Public Morals" Within the Meaning of Article XX(a)

20. As the United States has explained, the measures at issue in this dispute "protect public morals" within the meaning of Article XX(a) because the United States adopted the measures to "obtain the elimination"[10] of conduct that violates U.S. standards of right and wrong, namely China's unfair trade acts, policies, and practices as documented in the Section 301 Report.[11]

21. To review, 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.[12] In particular, China uses restrictions on foreign investment "to selectively grant market access to foreign investors in exchange for commitments to transfer technology." China also uses State directed investment to unfairly acquire U.S. technology, [13] and supports cyber-theft of U.S. technology and trade secrets.

B. China's Forced Technology Transfer, Cyber-theft, and Outbound Investment Policies and Practices are Contrary to U.S. Norms against Theft, Misappropriation of Property, and Unfair Competition

22. In the broadest sense, China's policies and practices in this regard can be summarized as state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets. China's conduct implicates "public morals" within the meaning of Article

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[10] 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).

[11] *See* U.S. First Written Submission, paras. 66-77.

[12] *See* Section 301 Report, Part II (Exhibit US-1); *see also* German Chamber of Commerce, *Business Confidence Survey 2019-20* (Exhibit US-25), p. 26 (Forty-eight percent of German companies in the Chinese market report that "technology transfer requirements are the most pressing regulatory business challenges they presently face in China.")

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

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.[14] As the United States has explained, the conduct documented in the Section 301 Report is also inconsistent with the moral standards reflected in U.S. laws that criminalize the specific acts of cyber-enabled theft, [15] economic espionage, and the misappropriation of trade secrets[16] (including though the act of "bribery" or "extortion").[17]

23. China's outbound investment policies result in conduct inconsistent with U.S. norms on unfair competition[18], as reflected in U.S. laws against anti-competitive behaviour, such as the Sherman Act[19] and the Federal Trade Commission Act.[20]

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

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

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

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

[16] *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).

[17] *See* U.S. Responses to Questions from the Panel, para. 70-71.

[18] *See* Section 301 Report (Exhibit US-1), pp. 63-64 (*citing* Jost Wübbeke, et. al., Mercator Institute For China Studies, MADE IN CHINA 2025: *The Making Of A High-Tech Superpower And Consequences For Industrial Countries 7-8* (Dec. 2016)) ("China's technology acquisitions are partly supported and guided by the state. China pursues an outbound industrial policy with government capital and highly opaque investor networks to facilitate high-tech acquisitions abroad. This undermines the principles of fair competition: China's state-led economic system is exploiting the openness of market economies in Europe and the United States. Chinese high-tech investments need to be interpreted as building blocks of an overarching political programme. It aims to systematically acquire cutting-edge technology and generate large-scale technology transfer.")

[19] *See Sherman Act*, Section 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal") (Exhibit US-31).

[20] *See Federal Trade Commission Act*, Section 15 U.S.C § 45 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") (Exhibit US-20).

24. These statutes articulated standards of behavior that have maintained a highly competitive free market in the United States for more than a century. The first anti-competitive statute was the Sherman Act, which codified the fair competition moral underpinnings of the U.S. economy in 1890. The importance of the Sherman Act to the fundamental principles of the United States is best summarized by the U.S. Supreme Court in *Northern Pacific Railway Co.*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[21]

25. The United States does not simply view unfair competitive practices as merely a detriment to business and innovation. Ultimately, these practices are viewed as a threat to the "preservation of our democratic political and social institutions". Accordingly, certain violations of these laws, such as monopolization, are even criminalized.[22]

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

27. Of specific relevance with regard to China's use of state-directed investment to unfairly acquire U.S. technology[23] is the Sherman Act's prohibition and criminalization of

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[21] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958) (Justice Hugo Black) (Exhibit US-32).

[22] *Sherman Act*, 15 U.S.C. § 1 ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.") and *Sherman Act*, 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.") (Exhibit US-31).

[23] *See* Section 301 Report (Exhibit US-1), p. 65 ("[T]he Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies, to obtain cutting-edge technologies and intellectual property (IP) and generate large-scale technology transfer in industries deemed important by state industrial plans. The role of the state in directing and supporting this outbound investment strategy is pervasive, and evident at multiple levels of government – central, regional, and local. The government has devoted massive amounts of financing to encourage and facilitate outbound investment in areas it deems

monopolization – or even attempts at monopolization – in any aspect of interstate trade or commerce.[24] Monopolistic power is characterized by the ability to act independently of competition or market-based considerations. The Chinese government has implemented an investment policy that seeks to create Chinese dominance in specific sectors through non-market based funding and investment strategies. That is, Chinese economic entities are not subject to market disciplines in making investments for state-desired technologies through state-provided or state-directed financing. And China's market share targets for sectors identified in its Made in China 2025 industrial plan demonstrate that China is using this state-directed investment to unfairly acquire U.S. technology in order to dominate not only the Chinese market, but markets around the world, including the United States. Specifically, as documented in the Section 301 Report:

> The "Made in China 2025" Key Area Technology Roadmap (Made in China Roadmap) sets explicit market share targets that are to be filled by Chinese producers both domestically and globally in dozens of high-tech industries.
>
> For example, indigenous new energy vehicles are to achieve an 80% domestic market share with foreign sales accounting for 10% of total sales by 2025. Similarly, domestically produced energy equipment is to achieve 90% domestic market share, with exports accounting for 30% of production, by 2020, and renewable energy equipment with indigenous IP is to achieve 80% domestic market share by 2025. In comparison to previous plans, Made in China 2025 expands its focus to capturing global market share, not just dominance in the China market, and is part of a "broader strategy to use state resources to alter and create comparative advantage in these sectors on a global scale."[25]

28. Market-based considerations do not drive China's outbound investment and acquisition activities.[26] Instead, as recognized by the European Commission:

> the [Chinese] government's determination to further develop the dominant role of the state-owned economy, in particular by selectively creating large SOEs, shielded from competition domestically and expanding internationally which would serve the Government's

strategic. In support of this goal, China has enlisted a broad range of actors to support this effort, including SOEs, state-backed funds, government policy banks, and private companies.").

[24] *Sherman Act*, Section 15 U.S.C. § 2 (Exhibit US-31).

[25] *See* Section 301 Report (Exhibit US-1), pp. 15-16.

[26] *See* Section 301 Report (Exhibit US-1), p. 148.

> strategic industrial policies rather than focusing on their own economic performance."[27]

29. China's use of foreign acquisitions and investment to upgrade its domestic industries seeks to undermine the ability of U.S. companies to innovate and adapt, and, ultimately, will degrade U.S. competition in the key sectors targeted by the Chinese government. As a direct consequence of these unfair and market-distorting actions, Chinese firms will increase market share at the expense of U.S. firms, whose market share will decline in both U.S. and global markets, giving Chinese firms greater market share and power.[28]

30. Again, these acquisitions and investments are not based on market conditions, nor is it simply that more successful companies are taking over those that are less successful. If that were the case, there would be two way investment – *i.e.*, U.S. companies would be making similar investments and acquisitions of Chinese companies. Instead, as recognized in the Section 301 Report, investment for technology transfer is flowing primarily in one direction, from China into the United States.[29] The Chinese government provides investment money to allow less innovative and less productive firms to purchase or procure critical U.S. technologies from more innovative and more productive firms, all at prices that those less productive Chinese firms would be unable to finance on market-based terms. As a result, the market share of firms is not determined by fair competition, but by the unfair influence of the Chinese government, all in an attempt to gain market share and power.

31. The U.S. market is based on fundamental concepts of fair competition and fair play, which are reflected in U.S. unfair competition and antitrust laws. China's government-backed investment strategies and market share goals undermine those notions of fair competition and fair play. As such, they are inconsistent with U.S. public morals within the meaning of Article XX(a). For the United States not to take action against China's unfair policies and practices would mean the United States is abandoning the "free and unfettered competition as the rule of trade" standard that underpins the U.S. economy and, ultimately, our "democratic political and social institutions". [30]

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[27] *See* Section 301 Report (Exhibit US-1), p. 85 (*citing* European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations 108-109 (SWD(2017)483 final/2) (Dec. 20, 2012)).

[28] *See* Section 301 Report (Exhibit US-1), p. 150-151 (*citing* Ryan Morgan, *Two Sessions: Made in China 2025*, APCO Forum (Mar. 26, 2017) ("Businesses in China are not only facing competition from domestic firms that are slowly catching up, but also face the risk of Chinese firms acquiring their international competitor. A business that becomes Chinese through acquisition can then receive government support and other domestic advantages, potentially putting their foreign business competition at an immediate and severe competitive disadvantage both domestically and globally.").

[29] *See* Section 301 Report (Exhibit US-1), pp. 151-152.

[30] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958) (Justice Hugo Black) (Exhibit US-32).

C. The Measures at Issue Aim to Protect "Public Morals" By Seeking to Prevent the Undermining U.S. Moral Standards against Theft, Misappropriation, and Unfair Competition.

32. The Chinese practices described in the Section 301 Report threaten to undermine U.S. moral standards and norms against theft, misappropriation, and unfair competitive practices. Allowing China's fundamentally unfair policies and practices to continue to go unchecked could weaken the respect for such values in the United States. The measures at issue aim to protect U.S. morals by seeking to "obtain the elimination" of the conduct documented in the Section 301 Report and thereby prevent the corrupting effects that China's conduct could have on actors within the United States.

33. If China is permitted to carry out its various unfair trade acts, policies, and practices without restraint, U.S. citizens, businesses, and other entities may come to believe that such conduct is "normal" and conclude that they have no choice but to emulate such conduct to compete in the U.S. market, or succumb to such conduct as a pre-condition of accessing China's market. The risk of this normalizing effect is particularly acute in the case of China, given its economic weight, its great power status, and its self-conception as a "responsible major country in international affairs."[31] China's unfair conduct thus presents a unique and unparalleled risk to U.S. public morals that requires protection from the United States.

34. Further, there is clear nexus between the product coverage of the U.S. measures at issue and the objective of protecting public morals by persuading China to abandon the unfair trade acts, policies, and practices documented in the Section 301 Report. As the United States has explained, the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, Measure 1) were found to benefit from the trade policies documented in the Section 301 Report, including "Made in China 2025."[32] In other words, there is a clear and

[31] Xinhua, Commentary: Xi demonstrates China's role as responsible country in New Year address (January 1, 2018) (Exhibit US-25).

[32] *See* Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: *China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, (issued June 20, 2018; effective July 6, 2018), Section B (Exhibit CHN-2) ("USTR and the Section 301 Committee have carefully reviewed the public comments and the testimony from the three-day public hearing. In addition, and consistent with the Presidential directive, USTR and the interagency Section 301 Committee have carefully reviewed the extent to which the tariff subheadings in the April 6, 2018 notice include products containing industrially significant technology, including technologies and products related to the ''Made in China 2025'' program. Based on this review process, the Trade Representative has determined to narrow the proposed list in the April 6, 2018 notice to 818 tariff subheadings, with an approximate annual trade value of $34 billion"); *see also* Update to Section 301 Report (Exhibit US-2), p. 7 ("As detailed in the introduction to the Section 301 Report, official publications of the Chinese government and the Chinese Communist Party (CCP) set out China's ambitious technology related industrial policies. These policies are driven in large part by China's goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The most prominent industrial policy is 'Made in China 2025,'initiated in 2015. 21 Industrial sectors that contribute to or benefit from the "Made in China 2025" industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new materials, and automobiles.").

direct relationship between the "goods concerned by the additional import duties" and the unfair trade acts, policies, and practices that the measures at issue are designed to combat.

35. This linkage is also evident with respect to U.S. tariff measures that took effect on September 24, 2018 (*i.e.*, Measure 2). As explained, the United States adopted the additional duty measures that took effect on September 24, 2018, after China "made clear—both in public statements and in government-to-government communications—that it [would] not change its policies" and instead "responded …by increasing duties on U.S. exports to China."[33] In this respect, Measure 2 is derivative of Measure 1.

36. On this point, the United States emphasizes that China's unfair trade acts, policies, and practices have direct impact inside the territory of the United States and on U.S. companies and citizens, in particular. The United States wishes to be clear that it is not seeking to change China's public morals or export U.S. public morals to China. Rather the United States seeks to protect U.S.-based actors from the harmful effects of Chinese conduct that is contrary to U.S. moral standards.

D. The Measures are "Necessary" within the Meaning of Article XX(a)

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

38. First, as explained, China engages in the conduct described in the Section 301 Report to advance its "industrial policy" goals[34] and broader "economic objectives."[35] Therefore, it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices while it is advantageous to China to do so – that is, until the economic costs of doing so begin to approach or outweigh the economic benefits.[36] Accordingly, to protect U.S. interests in moral (right or wrong) economic behaviour, it is necessary for the United States to adopt

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

[34] *See* Section 301 Report (Exhibit US-1), pp. 17, 20, 27, 29, 36, 63, 149, 150, 153.

[35] *See* Section 301 Report (Exhibit US-1), pp. 150, 153, 154.

[36] *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).

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.

39. Second, the necessity of the measures at issue is further confirmed by the United States' prior efforts – over more than a decade – to address China's unfair trade acts and policies through other means, without success. As detailed in the Section 301 Report, the United States has attempted to bring about changed behaviour by China through dialogue, admonishment, multilateral forums, bilateral mechanisms,[37] and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.[38] That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

40. Third, it was only *after* the United States adopted the measures at issue that China agreed to enter into negotiations with the United States to address the concerns documented in the Section 301 Report. This provides further empirical evidence of the necessity of the measures at issue, particularly when juxtaposed against the United States' earlier (and unsuccessful) efforts to encourage China to abandon the conduct detailed in the Section 301 Report. While China has yet to address the entirety of U.S. concerns, such negotiations are reasonably viewed as predicate (*i.e.*, "necessary") step to the actions that China may eventually take to address U.S. concerns in earnest.

E. The Measures at Issue satisfy the "Necessity" Tests Applied in Prior DSB reports

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

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

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

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

[38] *See* Section 301 Report, pp. 157-153 (Exhibit US-1); Update to Section 301 Report (Exhibit US-2), pp. 13-19.0

43. At the outset, the United States emphasizes that the phrase "designed to" does not appear in the text of Article XX(a) of the GATT 1994. While the phrase has appeared in prior dispute settlement reports, the United States reiterates that the DSU does not assign precedential value to Appellate Body or panel reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of prior reports. Rather, a panel must apply the text of a covered agreement as understood through application of customary rules of interpretation. [39] Accordingly, there is no requirement in the DSU to show that a measure is "designed to" protect public morals to establish a defense under Article XX(a).

44. Nonetheless, to the extent that the Panel opts to analyse whether the U.S. measures are "designed to" protect public morals as part of its Article XX(a) analysis, it would find that the measures at issue in this dispute are clearly "designed to" protect public morals based on the reasoning used in prior reports.

45. In *Colombia –Textiles*, for example, the Appellate Body described the evaluation of whether a measure is designed protect public morals as "not…particularly demanding"[40] and reasoned that a measure meets this threshold so long as the measure's "design reveals that [it] is not incapable" of protecting public morals.[41] Further, the Appellate Body reasoned that a measure is demonstrably "incapable" of protecting public morals if there is "no relationship between the measure and protection of public morals."[42]

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

47. First, as noted, the United States adopted the measures at issue with the explicit goal of *eliminating* the unfair trade acts, policies, and practices documented in the Section 301 Report. Specifically, the United States adopted the measures at issue pursuant to authority under Section 301 of the Trade Act 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,

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[39] *See* U.S. Response to Question from the Panel, paras. 15-18.

[40] *Columbia – Textiles (AB)*, para 5.70 ("We do not see the examination of the 'design' of the measure as a particularly demanding step of the Article XX(a) analysis.")

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

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

policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce."[43]

48. Second, as explained, the tariff measures at issue are structured so as to target particular types of goods that benefit from the conduct detailed in the Section 301 Report. In this regard, the tariff measures alert U.S. consumers and purchasers to the unfair and immoral practices that underlie many traded Chinese products and signal to U.S. consumers and purchasers that such practices are not acceptable.

49. Third, the tariff measures raise the economic cost that China will incur so long as it maintains the unfair trade acts, policies, and practices documented in the Section 301 Report, [44] and thus gives China an incentive to abandon the unfair trade acts, policies, and practices documented in the Section 301 Report.[45] In this respect, the measures at issue are analogous to the measures at issue in *Colombia –Textiles*. In that dispute, the Appellate Body found that Colombia's "compound tariff" was designed to protect public morals because the compound had the effect of "reducing the profit margin of the persons intending to use imports for money laundering purposes" and thereby dis-incentivized persons from attempting to launder money through Colombia's tariff system.[46]

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

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

51. Further, the measures at issue are clearly "necessary" when evaluated under the factor-based test certain past reports have applied to assess a measure's necessity for purposes of Article XX of the GATT 1994. Such factors include (1) the relative importance of the objective pursued by the measure; (2) the contribution of the measure to that objective; (3) the trade-restrictiveness of the measure; [47] and (4) the existence of "reasonably available" alternative measures.[48]

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[43] *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).

[44] *See* U.S. First Written Submission, para. 79.

[45] *See* U.S. First Written Submission, para. 79.

[46] *See Columbia – Textiles (AB)*, para. 5.88.

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

[48] *Columbia – Textiles (AB)*, para. 5.74. ("As we have noted, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive. The Appellate Body has explained that an alternative measure may be found not to be 'reasonably

52. 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 Members "may set different levels of protection even when responding to similar interests of moral concern."[49]

53. Second, the measures at issue make a substantial contribution to the objective of protecting U.S. public morals. As explained, the U.S. tariff measures at issue play a "necessary" role toward the goal of eliminating China's unfair trade acts, policies, and practices by raising the cost of such practices and reducing China's incentive to continue engaging in such conduct going forward. Further, as noted above, it was only *after* the United States adopted the measures at issue that China entered into negotiations to address the concerns documented in the Section 301 Report. While China has yet to address the entirety of the U.S. concerns, such negotiations are reasonably viewed as predicate (*i.e.*, "necessary") step to the actions that China may eventually take to address U.S. concerns in the entirety.

54. The measures 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 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.

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

56. Fourth, the United States has long since exhausted reasonably available alternatives to the measures at issue. As noted, the United States adopted the measures at issue *after* a decade of trying to address China's conduct though other means. As documented in the Section 301 Report, the United States attempted to bring about changes in China's policies and practices through dialogue, admonishment, engagement in multilateral forums, bilateral mechanisms,[50] and the pursuit of criminal charges against individuals and entities affiliated with the Chinese

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available' where 'it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties")

[49] Appellate Body Report, *EC – Seal Products*, para. 5.200.

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

government.[51] That none of these prior efforts have proven durably effective further demonstrates the necessity of the measures at issue.

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

57. China argues that the measures at issue fall outside the scope of Article XX(a) because they (1) do not target morally offensive products *per se* and (2) are aimed at inducing China to adopt certain policy changes. As explained below, China's arguments on this score find no support in the text of Article XX(a) or the reports cited by China. Further, China makes no attempt to substantiate its assertion that the findings in the Section 301 Report are "factually baseless"[52], despite the fact that those findings are based on hundreds of sources, including dozens of statements of organizations.[53] By simply denying that there is any factual basis for the findings in the Section 301 Report, China is essentially asserting that the Panel should find that *all of these sources* are fraudulent and that *all of these organizations* are engaged in willful misrepresentations. There is no basis for the Panel to make such a finding and discount the credibility and veracity of those sources and organizations.

A. The Argument that a Measure Justified under Article XX(d) *Must* Apply to Products that "Embody Morally Offensive Content or Conduct" Finds No Support in the Text of the GATT 1994

58. As a legal matter, there is no foundation to China's assertion that a measure cannot fall within the scope of Article XX(a) unless the measure applies to products that embody "morally offensive content or conduct."[54] And, at any rate, the U.S. measures at issue *do* target products that benefit from the morally problematic conduct detailed in the Section 301 Report.

59. First, by its terms, Article XX(a) refers to measures that are "necessary to protect public morals," *not* measures necessary to protect public morals from morally offensive products.

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

[52] *See* China's Response to Questions from the Panel, para. 85.

[53] These organizations include: the American Apparel and Footwear Association (AAFA); American Chamber of Commerce in Shanghai (AmCham); American Chemistry Council (ACC); BSA | The Software Alliance (BSA); Computing Technology Industry Association (CompTIA); Coalition of Service Industries (CSI); Consumer Technology Association (CTA); International Association of Machinists and Aerospace Workers, (IAM) AFL-CIO; Commission on the Theft of Intellectual Property (IP Commission); Information Technology Industry Council (ITI); Information Technology & Innovation Foundation (ITIF); National Association of Manufacturers (NAM); Pharmaceutical Research and Manufacturers of America (PhRMA); Rhodium Group; Semiconductor Industry Association (SIA); Telecommunications Industry Association (TIA); US-China Business Council (USCBC); U.S. Chamber of Commerce; United States Council for International Business (USCIB). *See* Section 301 Report, Appendix C (Summary of Public Submissions) (Exhibit US-1).

[54] *See* China's Answers to Question from the Panel, para. 16 ("At the most basic level, to be 'designed' *to protect* public morals, a measure must be designed to apply to products that *actually embody the morally offensive content or conduct*.").

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

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

61. Further, the benefits and advantages that China derives from its unfair trade acts, policy, and practices are designed to serve China's "industrial policy goals" and "economic objectives" writ large and in a comprehensive sense. Therefore, a corresponding response to China's unfair trade acts, policies, and practices could also be expected to be broad-based and designed to apply economic pressure to China in a comprehensive sense, not just with respect to a narrow range of morally offensive products.

62. Second, as a factual matter, the measures at issue do – in fact – apply to products that embody morally offensive conduct. As the United States has explained,[55] the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, Measure 1) benefit from the trade policies documented in the Section 301 Report, including "Made in China 2025."[56]

[55] *See* U.S. Opening Statement, para. 47. ("In addition to raising the cost to China of maintaining its technology-transfer policies, the United States would like to emphasize the links between the specific product coverage of the U.S. measures and the Chinese conduct that the U.S. measures are intended to address. The Chinese products subject to additional tariffs under the July 6, 2018 U.S. measure were selected precisely because those products benefit from the unfair trade policies documented in the Section 301 Report.")

[56] *See* Update to Section 301 Report (Exhibit US-2), p. 7 ("As detailed in the introduction to the Section 301 Report, official publications of the Chinese government and the Chinese Communist Party (CCP) set out China's ambitious technology related industrial policies. These policies are driven in large part by China's goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The most prominent industrial policy is 'Made in China 2025,'initiated in 2015. 21 Industrial sectors that contribute to or benefit from the "Made in China 2025" industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new0 materials, and automobiles.")

B. There is no Merit to China's Argument that the Measures at Issue Are Not Justified under Article XX(a) because the United States Adopted them to Influence China's Policies

63. China's argument that Article XX(a) cannot justify measures that seek to encourage changes in another Member's policies is without merit.[57]

64. First, nothing in the text of Article XX(a) supports the view that Article XX(a) excludes measures aimed at inducing policy changes in other WTO Members. By its terms, Article XX(a) provides that "nothing in the GATT 1994 shall be construed to prevent the application of *any* measure necessary to protect public morals."[58] Therefore, so long as a Member can establish that a measure that aims to influence the policies or practices of another Member are "necessary to protect public morals," such a measure can be justified under Article XX(a). In other words, nothing in the text of Article XX(a) rules out the possibility that inducing policy changes in another Member may be necessary for the "protect[tion] of public morals" within the meaning of Article XX(a).

65. Second, the argument advanced by China has been considered and rejected in past reports. This Panel should likewise find that nothing in the text of Article XX(a) would exclude a measure simply because, in addition to being necessary to protect a Member's public morals, the Member *also* seeks to change another Member's behavior creating the threat to those morals. As the *US – Shrimp (AB)* report observed, measures that seek to promote policy changes in another WTO Member *can* be justified under the subparagraphs of Article XX:

> [C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. *It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX*. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.[59]

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[57] *See* China's Response to Questions from the Panel, paras. 31-36.

[58] GATT, Article XX(a) (emphasis added).

[59] *US – Shrimp (AB)*, para. 121 (emphasis added). 0

66. Therefore, China's contention that the measures at issue are categorically unjustified under Article XX(a) because they are aimed at "influencing China" to take "specific policy decisions"[60] does not comport with the understanding of Article XX reflected in past reports.

67. Third, China's attempt to analogize between the measures at issue in *US – Shrimp* and the measures at issue in this dispute fails. In *US – Shrimp*, the Appellate Body found that the measures at issue constituted "unjustifiable" and "arbitrary discrimination" within the meaning of the chapeau of Article XX because they compelled other WTO Members to adopt a "specific" and "comprehensive" regulatory regime as prescribed by the United States, *without* allowing for any "comparable" regulatory schemes that would also achieve the United States' legitimate resource conservation objectives.[61]

68. In contrast, the measures at issue in this dispute are not aimed at encouraging China to adopt any particular regulatory regime, much less a regulatory regime or model prescribed by the United States. Rather, the United States adopted the measures at issue to obtain the elimination of specific policies and practices affecting the United States as documented in the Section 301 Report, including forced technology transfer and cyber-enabled theft of U.S. technologies. As far as the United States is concerned, it appears that China can simply stop engaging in such practices affecting U.S. persons, firms, and technologies, and need not adopt "a comprehensive regulatory scheme" to do so. At any rate, given that China denies engaging in the conduct documented in the Section 301 Report, [62] it would appear that China does not consider that it needs to make any such regulatory changes. And, even if China did consider that a new regulatory scheme (or schemes) would be necessary to eliminate the unfair trade acts, policies, and practices documented in the Section 301 Report, nothing in the U.S. measures at issue (*contra* the measures at issue in *US – Shrimp*) prescribe any particular regulatory regime that China must implement to address U.S. concerns.

C. CHINA DOES NOT SUBSTANTIATE ITS ASSERTION THAT THE SECTION 301 REPORT IS "FACTUALLY BASELESS", AND THE EVIDENCE PLAINLY CONTRADICTS THAT ASSERTION

69. For the reasons explained above, China has failed to make any credible legal argument to rebut the United States' *prima facie* case under Article XX(a) of GATT 1994. Further, China has made no serious attempt to dispute the factual accuracy of the content of the Section 301 Report. Instead, China simply asserts that the findings of the Section 301 Report are "factually baseless."[63] China's assertion on this score must be rejected outright.

70. To be clear, the United States has brought forward a public morals defense and therefore bears the burden of making out that defense. The United States has sought to do so by citing to the findings in the Section 301 Report, including the hundreds of citations and secondary sources

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[60] *See* China's Response to Questions from the Panel, para. 36.

[61] *See US – Shrimp (AB)*, paras. 161-177 (emphasis added).

[62] *See* China's Response to Questions from the Panel, para. 85.

[63] *See* China's Response to Questions from the Panel, para. 85.

identified in the report. To the extent China's assertion that the Section 301 Report is "factually baseless" is part of its response to the United States' defensive arguments under Article XX(a), China *does* bear the burden of substantiating *its* assertion with affirmative argumentation and evidence. Unless or until China does so, there is no basis for the Panel to credit China's claim that the allegations in the Section 301 Report lack a factual basis.

71. And China's contention that the findings in the Section 301 Report are "factually baseless" is ridiculous on its face. As explained, the United States issued the Section 301 Report following a comprehensive eighth month investigation, resulting in the production of the 200-page document that exhaustively detailed China's unfair trade acts, policies, and practices.[64] The evidence collected during the investigation includes public media reports, journal articles, over 70 written submissions, and witness testimony from representatives of U.S. companies, workers, trade and professional associations, think tanks, as well as law firms and representatives of trade and professional associations headquartered in China.[65]

72. By simply denying that there is any factual basis for the findings in the Section 301 Report, China is essentially asserting that the Panel should find that *all of these sources* are fraudulent and that *all of these organizations* are engaged in willful misrepresentations. China has obviously provided no basis for the Panel to draw such a conclusion. What is more, the diversity of sources and organizations reporting similar experiences with China supports their veracity and credibility. And the fact that it could be against the interests *in China* of these sources or organizations, a fact evidenced by China's blanket denial that it engages in forced technology transfer, further supports their veracity and credibility.

73. That China may contest some or all of the Report's findings is not remarkable. But the suggestion that its findings are "factually baseless" is patently absurd.

V. CONCLUSION

74. For the foregoing reasons, the United States respectfully reiterates its request 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.

75. And even aside from the fact that 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.

[64] *See* Section 301 Report (Exhibit US-1).

[65] *See* Section 301 Report (Exhibit US-1), pp. 9, 19.