UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

April 7, 2020

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

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

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

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

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

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

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

Member endorses forced technology transfer policies and practices such as those employed by China.

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

II. FACTUAL BACKGROUND

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

9. 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.

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.

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.

12. 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.

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

A. China's Retaliatory Measures on U.S. Goods

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

15. 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.

16. 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.

17. 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.

18. 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.

19. In sum, instead of addressing its unfair trade acts, policies, and practices, China has increased tariffs on U.S. goods with an annual trade value of approximately $110 billion and threatened additional retaliation to further protect the unreasonable acts, policies, and practices identified in the Section 301 Report. China has openly stated that its retaliation was adopted in response to the same increased tariffs that China purports to challenge in this WTO dispute.

III. MEASURES AT ISSUE

20. The measures that China raises in its request for panel establishment are additional duties that the United States implemented with respect to certain products from China on July 6, 2018, and September 17, 2018. In addition, China's First Written Submission purports to raise claims with respect to a third measure. This third measure (i.e., "Measure 3") was not included in China's request for panel establishment, and is not within the Panel's terms of reference.

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

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

22. There is no role for WTO dispute settlement where, as here, the parties to a dispute have reached their own solution. This principle is reflected in the DSU, including in Article 12.7, which provides in relevant part that "[w]here a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."

23. Article 3.2 of the DSU, second sentence, provides in part that "Members recognize that [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements." As the unfair trade acts, policies, and practices of China are not covered by existing "rights and obligations… under the covered agreements", there are no such "rights and obligations" to be preserved through the dispute settlement process. And with respect to the U.S. tariff measures, China has already taken the countermeasures that it itself has chosen; in these circumstances.

24. Article 3.3 of the DSU provides that the "prompt settlement of disputes… is essential to the effective functioning of the WTO…" Given that China has already taken every retaliatory measure that China sees fit to adopt, China's pursuit of DSB findings does nothing in terms of leading to a "prompt settlement".

25. Article 3.4 of the DSU provides that "[r]recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." The United States has transparently explained that it has adopted the tariff measures to address unfair technology transfer policies of China that cannot be addressed under current WTO rules, and China has openly retaliated by placing tariffs on most U.S. exports, and has taken other retaliatory measures as well. In these circumstances, DSB findings on the U.S. tariff measures would not promote a satisfactory settlement of the matter. At most, DSB findings would provide China with a rhetorical point in support of its efforts to maintain its unfair trade acts, policies, and practices, and would thus inhibit, rather than promote, a satisfactory settlement.

26. Article 3.5 of the DSU states that solutions should not "impede the attainment of any objective" of the covered agreements. At most, China might see any DSB findings against the U.S. measures as encouragement to prolong this dispute by maintaining its aggressive and trade distorting policies for as long as possible. This result would be inconsistent with the fundamental objectives of the WTO Agreement and the GATT 1994, and thus – contrary to DSU 3.5 – would impede the attainment of the objectives of the covered agreements.

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

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

29. Article 3.7 of the DSU provides that the suspension of concessions or other obligations is a "last resort," and "subject to the authorization by the DSB of such measures." China's first resort was to apply additional duties on goods of the United States "on a discriminatory basis vis-à-vis" the United States well before any request for panel establishment. Furthermore, China has adopted these tariff measures without any "authorization by the DSB of such measures."

30. Article 3.10 of the DSU provides, in part, that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." China's hypocritical invocation of WTO dispute settlement procedures can only be viewed as a cynical attempt to

misuse the WTO system to try to obtain some rhetorical support for maintenance of its unfair, trade distorting measures not involving WTO disciplines. China is well aware that its request for a WTO panel to issue findings regarding the U.S. response to China's unfair policies will in no way advance a resolution of the dispute.

31. In sum: China already has taken self-help in the form of tariff measures, and other retaliatory measures, affecting most U.S. exports. At most, DSB findings on the U.S. tariff measures would provide China with a public relations point that China presumably would employ in an effort to maintain unfair and harmful technology transfer policies that are coercive to the viability of the multilateral trading system. China's pursuit of this dispute cannot be seen as anything other than an attempted misuse of the system.

32. Therefore, the Panel should follow the guidance provided in the last sentence of Article 12.7 of the DSU. It provides: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Given this situation, the Panel should decline China's request that the WTO dispute settlement system insert itself into the ongoing interactions and discussions between the United States and China regarding China's unfair technology transfer policies by issuing a panel report with findings on the allegedly WTO-inconsistent U.S. tariff measures. Instead, in accordance with the last sentence of Article 12.7 of the DSU, the Panel should issue a report that is "confined to a brief description of the case and to reporting that a solution has been reached."

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

33. Were the Panel to examine China's contentions, it would find that the measures at issue are legally justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

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

35. The measures at issue in this dispute "protect public morals" with the meaning of Article XX(a) because the United States adopted the measures to "obtain the elimination" of conduct that violates U.S. standards of rights and wrong, namely China's unfair trade acts, policies, and practices. As noted, each WTO Member may seek to protect the public morals of its society.

36. China – as a matter of state policy and practice – uses coercion and subterfuge to *steal* or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S companies with the aim of advantaging Chinese companies and achieving China's industrial policy goals. China's policy and practice of state-sanctioned *theft* implicates "public morals" within the meaning of Article XX(a) because it violates prevailing

U.S. "standards of right and wrong" as reflected in the state and federal laws of the United States, under which the act of "theft" is universally deemed a criminal offense.

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

38. China employs the unfair trade acts, policies, and practices detailed in the Section 301 Report to advance its "industrial policy" goals and broader "economic objectives." 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, for example, until the economic costs of doing so begin to approach or outweigh the economic benefits.

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

40. Moreover, the United States adopted the measures at issue after nearly a decade of trying to address China's unfair trade acts, policies, and practices. That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

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

42. The United States has not applied the measures at issue in a manner inconsistent with the chapeau of Article XX because no other government is engaging in forced technology transfer policies and practices of the type or to the extent that China is, causing tens of billions of dollars of annual harm to the United States.

43. Given the deliberate nature in which the United States proceeded *before* adopting the measures at issue in this dispute, there is no credible basis to conclude that the United States has applied the measures in a "capricious, unpredictable, [or] inconsistent" (i.e., "arbitrary") manner.

44. As noted, the United States adopted the measures at issue following nearly a *decade* of trying to address China's unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms, and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government. Then, the United States conducted a comprehensive eighth month investigation, resulting in the production of the 200-page report that exhaustively documented China's unfair trade acts, policies, and practices. Even after the report was released in March 22, 2018, the United States continued to constructively engage China concerning the unfair trade acts, policies, and practices included in the investigation. It was only after these engagements with China failed, that the United States

ultimately decided to adopt the measures at issue on July 6, 2018, and August 23, 2018, respectively.

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

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

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

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

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

49. China argues that Measure 3 is within the Panel's terms of reference because it modifies a measure identified in China's panel request, and because the panel request itself refers to "any modification" of the measures identified therein. Simply put, the DSU provides no support for the view that a measure not identified in a panel request can fall within a panel's terms of reference because it modifies a measure that is identified in a panel request.

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

51. The text of the DSU does not support China's suggestion that the inclusion of Measure 3 in the Panel's terms of reference is necessary "to secure a positive solution to the dispute."

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

VII. CONCLUSION

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

under Article XX(a) of the GATT 1994, and that Measure 3 falls outside the Panel's terms of reference.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

54. As 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. Therefore, it is clear that China has no serious intention or expectation of resolving the matter at issue through the WTO dispute settlement process. The Panel in this dispute should not tolerate China's cynical misuse of the dispute settlement process.

55. 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" under Article 12.7 of the DSU.

56. 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.

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

57. On 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. The Report supported the following conclusions.

58. 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. 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.

59. 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.

60. 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. 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.

61. 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. China has used cyber-enabled theft and cyber intrusions to serve its industrial policy objectives.

62. 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.

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

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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. China – of course – did not obtain DSB authorization before adopting these measures, as required under the DSU.

III. 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

70. 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.

71. As noted, China suspended WTO concessions to the United States for the explicit purpose of retaliating against the US measures at issue. China did so without first obtaining authorization from the DSB to impose such countermeasures, as required under the DSU.

72. 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.

73. 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 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."

74. 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.

75. 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 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.

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

76. 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. 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" of conduct that violates U.S. standards of rights and wrong, namely various unfair trade acts, policies, and practices engaged in by China.

77. 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.

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

79. First, the measures protect U.S. public morals by combatting conduct that is considered immoral under prevailing U.S. standards of right and wrong.

80. 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. 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 of accessing China's market.

81. As the United States has explained, the U.S. tariffs 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 thereby reducing China's incentive to continue engaging in such conduct going forward.

82. 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.

83. 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.

84. 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.

85. Second, the measures at issue make a substantial contribution to the objective or protecting U.S. public morals 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.

86. 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.

87. 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.

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. INTRODUCTION

88. 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.

89. First, that a "settlement of the matter" has been reached is confirmed by objective facts on the record. 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. 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."

90. Second, 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). 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.

91. Third, China does nothing to substantiate its *new* assertion that the conclusions set out in the Section 301 Report are "factually baseless."

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

92. 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.

93. 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. China, of course, did so without first obtaining the authorization from the DSB pursuant to the DSU. 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.

94. 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).

95. 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.

96. 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 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." Accordingly, the Panel's report in this dispute must be limited in the manner prescribed in Article 12.7 of the DSU. China's arguments to the contrary are without merit.

97. China 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. This assertion finds no support in the DSU.

98. 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."

99. 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."

100. 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. Indeed, Article 7.1 is concerned with a wholly different issue – namely, the scope of the "matter referred to the DSB." China's reliance on Article 7.1 is therefore misplaced.

101. 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. This argument is without merit.

102. 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.

103. 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

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

105. 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" 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.

106. 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 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.

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

108. 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.

109. 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.

110. 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".

111. 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. 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.

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

113. 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.

114. First, as explained, China engages in the conduct described in the Section 301 Report to advance its "industrial policy" goals and broader "economic objectives." 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.

115. 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. That none of these efforts have proven to be durably effective further confirms the necessity of the measures at issue in this dispute.

116. 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. 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.

117. 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). 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.

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

118. 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). 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.

119. In *Colombia –Textiles* the Appellate Body described the evaluation of whether a measure is designed protect public morals as "not…particularly demanding" 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. 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."

120. 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.

121. 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.

122. 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

123. 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, and thus gives China an incentive to abandon the unfair trade acts, policies, and practices documented in the Section 301 Report.

124. 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).

B. 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

125. 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.

126. 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.

127. 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.

128. 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.

129. 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. 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)

130. 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. China's arguments find no support in the text of Article XX(a) or

the reports cited by China. China makes no attempt to substantiate its assertion that the findings in the Section 301 Report are "factually baseless.

131. 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." 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.

132. 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. 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.

133. 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.

134. 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, 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."

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

136. 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. B XX(a) provides that "nothing in the GATT 1994 shall be construed to prevent the application of *any* measure necessary to protect public morals." 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).

137. Second, the argument advanced by China has been considered and rejected in past reports. 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. 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" does not comport with the understanding of Article XX reflected in past reports.

138. 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.

139. 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. 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.

140. 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. 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. 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

141. The United States respectfully reiterates its request that the Panel reject China's request for findings 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. And, 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.

EXECUTIVE SUMMARY OF THR U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

142. This dispute is best viewed as an attack by China on the legitimacy and relevance of the WTO itself in the current, real-world trading order. Fortunately the text of the WTO Agreement contains two alternative routes for the Panel to avoid this harm to the WTO. Were the Panel to take either of these approaches, the WTO system would be safeguarded, and the parties would remain in a posture of offsetting actions that are undoubtedly contributing to a deeper and more intensive dialogue of the conditions and actions needed for fair trading conditions.

143. The irrelevance of this dispute in terms of real world of economics and trade is further confirmed by developments in the last few weeks. On January 15, 2020, the United States and China signed an historic and enforceable Phase One economic and trade agreement. Covering all commitments, the agreement establishes a strong dispute resolution system that ensures prompt and effective implementation and enforcement. In connection with reaching this

agreement, the United States agreed to modify its Section 301 tariff actions in a significant way. Those tariff reductions took effect on February 14, which as noted was the day of entry into force of the agreement.

144. This Phase One Agreement, as well as upcoming negotiations on a Phase Two Agreement, represents the real world status of the U.S.-China economic and trade relationship, including the role that additional duties imposed by either party play in that relationship. And what does the Phase One Agreement say about this dispute, or the U.S. additional duties that China challenges in this dispute? Nothing. And why is that? Because, as the United States has explained throughout this dispute, both parties have decided to handle the additional duties imposed by the other side on a bilateral basis, adjusting them in accordance with the status of the bilateral negotiations.

145. Moreover, if as China requests, the Panel were to reject the valid U.S. Article XX(a) defense, the result would go beyond making the WTO appear irrelevant. Such findings would make the WTO appear counterproductive and even harmful to furthering a fair and sustainable system of world trade. It is essentially undisputed that China has adopted the unfair and harmful practices identified in the U.S. Section 301 report, and that these practices damage not just the United States, but every Member that relies on technology for its competitiveness. It is also undisputed that these practices cannot be addressed through challenges under existing WTO rules. And it is no answer to say that the WTO also has a negotiating function, and new rules could be developed. This answer is untenable – seeking new rules does nothing to address the harms felt today, and new rules must be adopted by consensus.

146. In addition to confirming that the parties have reached their own bilateral solution regarding each Party's additional duties, the Phase One Agreement also confirms the validity of the U.S. invocation of Article XX(a).

147. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The Phase One agreement covers some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement.

148. Second, the Agreement confirms the necessity of the U.S. tariff measures in addressing the unfair technology transfer issues identified in the Section 301 report. The tariff measures led to the negotiations, and it cannot reasonably be questioned that those tariff measures were the only available tool that would have enabled the parties to reach this successful outcome.

149. Third, the Phase One agreement confirms that forbidding forced technology transfer is a fundamental norm. The first sentence of the technology transfer chapter states that "The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern."

150. 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 should

conclude that they are "necessary to protect public morals" and therefore legally justified under Article XX(a) of the GATT 1994.

151. First, that a "settlement of the matter" has been reached is confirmed by objective facts on the record. China has failed to adduce any evidence to rebut these objective facts. Instead, China continues to assert that the Panel is not authorized to consider the objective evidence that a settlement has been reached. China's position, of course, finds no support in the DSU and is affirmatively contradicted by Article 11 of the DSU. Nor is there any support in the DSU for China's continued assertion that there cannot be "settlement" within the meaning of Article 12.7 unless and until the parties notify a "mutually agreed solution" to the Dispute Settlement Body.

152. Second, China does not make any serious attempt to rebut the U.S. argument that the measures at issue are "necessary" within the meaning of Article XX(a). Instead, China continues to argue that the measures at issue cannot be justified under Article XX(a) because they apply to products that are not themselves morally offensive. This view finds no support in the text of Article XX(a) or the prior reports cited by China. China's new argument that "economic concerns" are categorically outside the scope of Article XX(a) is without legal foundation and, as we shall explain, is contrary to commonsense.

II. CHINA HAS FAILED TO REBUT THAT THE PARTIES HAVE ARRIVED AT A "SETTLEMENT OF THE MATTER" WITHIN THE MEANING OF ARTICLE 12.7 OF THE DSU

153. The parties have settled the matter within the meaning of Article 12.7 of the DSU. Accordingly, as required by 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.

154. The parties' agreement to settle this matter outside the WTO system is confirmed by objective facts on the record, including:

(1) China's decision to decision to unilaterally impose WTO-inconsistent measures on U.S. goods for the explicit purpose of retaliating against the measures for which it now seeks legal findings, and without first obtaining the authorization from the DSB pursuant to the DSU;

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

(3) the decision of both parties to enter into high-level negotiations with the aim of resolving U.S. concerns with Chinese conduct documented in the Section 301 Report and China's concerns with the U.S. response (*i.e.*, the U.S. measures at issue).

(4) the Phase One Economic and Trade Agreement, which explicitly provides that each Party may apply additional duties in order to enforce the agreement, and that the other Party may not challenge those duties in the WTO.

155. In other words, the actions 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 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."

156. China continues to argue that the Panel must accept at face value China's assertion that the parties have not arrived at a settlement within the meaning of Article 12.7 of the DSU. However, Article 11 of the DSU, provides 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." 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, as China argues.

157. Article 11 explicitly provides 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." Accordingly, there be no serious question that the Panel in this dispute has the authority to assess whether Article 12.7 of the DSU applies to the matter before it.

158. Nothing in the DSU supports the view that panels are precluded from objectively assessing whether there is a settlement of the matter within the meaning of Article 12.7 of the DSU. Indeed, if anything, panels have an affirmative obligation to make such an objective assessment, and certainly in cases where one or both parties submits that a settlement has in fact been reached. Second, a practical matter, the question of whether the parties have reached a "settlement of the matter" is a fundamental aspect of the "matter" before a panel.

159. The text of the DSU does not support China's assertion that Article 3.7 of the DSU is the "sole means by which a panel can ascertain" whether the parties have arrived a settlement within the meaning of Article 12.7 of the DSU. Article 12.7 of the DSU (last sentence) becomes operative "[w]here a settlement among the parties to the dispute has been found." 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. The text of the DSU simply does not support China's contention that the absence of a notification under Article 3.7 would somehow preclude a finding that the parties have in fact reached a "settlement" within the meaning of Article 12.7 where objective facts on the record support such finding.

III. CHINA HAS STILL FAILED TO REBUT THE UNITED STATES' CASE THAT THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

160. China's assertion that some impermeable bright line exists between "economic" concerns, on the one hand, and "moral" concerns, on the other, finds no support in the text of Article XX. Nor, frankly does such a view comport with simple common sense.

161. First, nothing in the text of Article XX(a) itself suggests that "public morals" cannot (or must not) relate to issues of economic concern. China's attempt to place "economic" concerns outside the scope of Article XX(a) should be rejected as legally baseless.

162. Second, the context provided by other paragraphs of Article XX affirmatively rebuts the view that the phrase "public morals" could be read to exclude any concerns that are "economic" in nature. Specifically, unlike certain other paragraphs of Article XX, Article XX(a) does not include a proviso that could be understood to narrow the scope of the core operative text. The fact that Article XX(a) is unaccompanied by any such analogous limiting or conditional language further supports the view that "public morals" cannot be read to a priori exclude "economic concerns" as a definitive matter.

163. Third, other paragraphs of Article XX disprove China's assertion that there can be no overlap between "economic" concerns and "moral" concerns. For example, Article XX(d) covers measures "necessary to secure compliance with laws or regulations" *inter alia* "relating to the prevention of deceptive practices." No one could reasonably dispute that the prevention of deceptive practices is motivated both by moral and economic concerns. Another example is Article XX(e), which covers measures "relating to the products of prison labor." Members may adopt such measures for reasons of morality or to protect economic actors from unfair competition with goods produced with little or no cost of labor. Thus, there simply exists no bright line in Article XX between "moral" concerns and "economic" concerns.

164. Fourth, the idea that "economic" and "moral" concerns are definitely distinct goes against simple common sense. As the United States has argued, some types of conduct or behavior would appear to be immoral precisely because of the economic harms that result from such conduct. For example, when someone steals money from a bank, we would all agree the bank and its customers suffer a harm that is "economic" in nature. We would also agree that act that brought about this economic harm – namely the act of theft – is immoral, because it is contrary to standards of wrong. In this sense, the United States posits that most people would find it somewhat odd – if not nonsensical – to say that the act of stealing money from a bank does not implicate "moral" concerns because it imposes harms that are economic in nature.

165. For the foregoing reasons, China's arguments that the "the term 'public morals' in Article XX(a) must be understood to exclude economic concerns" is without any legal or practical foundation.

166. China continues to argue that a measure cannot be justified under Article XX(a) unless the measure applies to products that "embody [] morally offensive content or conduct." As the United States has explained, however, China's assertions on this score finds no support in the text of Article XX(a).

167. 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. 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 inherently morally offensive. Certainly, it may be the case 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 any such a relationship. A measure

may therefore be necessary to protect public morals without being applied only to products that are inherently morally offensive.

168. In its second written submission, China advances several new arguments to support its view that cover of Article XX(a) is limited to measures that apply to morally offensive products per se. None of China's new arguments find support in Article XX(a) or prior reports.

169. There is no merit to the argument that the inclusion of the word "protect" in Article XX(a) means that measures justified under that provision may only target products that are themselves morally offensive. Article XX(a) refers to measures "necessary to protect public morals" – full stop – not measures necessary to protect public morals from morally offensive *products*. And, that Article XX(a) does not specify any particular threat (or source of offence) to "public morals" suggests that the drafters recognized that threats to "public morals" could emanate from a variety of sources or circumstances, not just morally offensive products per se. Accordingly, the argument that word "protect" implies protection against morally offensive products should be rejected as contrary to the clear text of Article XX(a) and thus meritless.

170. Contrary to what China suggests, nothing about the limited and conditional nature of Article XX(a) supports the legal conclusion that measures justified under Article XX(a) must target products that are inherently morally offensive. Indeed, apart from the criteria set out in the chapeau and lettered paragraphs of Article XX, there are no other limits or conditions that govern the general exceptions under Article XX. The only cross-cutting limit or condition that pertains to the exceptions under Article XX is the "requirement" that a measure is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade." Accordingly, if a measure meets the criteria specified in a paragraph at (a) through (j) of Article XX and satisfies the requirement of the chapeau of Article XX, the measure necessarily falls within the relevant conditions or limitations that govern the invocation of general exceptions under Article XX.

171. China's argument that interpreting Article XX(a) in light of the object and purpose of the GATT 1994 supports the view that measures justified under Article XX(a) must target morally offensive products relies on a fundamental misunderstanding of the customary rules of treaty interpretation. Customary rules of treaty interpretation preclude a panel from adopting an interpretation that is not supported by a plain reading of the text of an agreement. And, under no circumstances would it be correct to adopt an interpretation that is contrary to the clear text of an agreement based the subjective view that doing so would advance the "object and purpose" of the agreement. But this is precisely what China asks the panel to do – that is, to adopt a non-textual limitation on Article XX(a) simply because China believes it would somehow advance the object and purpose of the GATT 1994. As such, China's argument must be rejected.

172. Furthermore, China has not explained, nor can it explain, why its proposed limitation would comport with "object and purpose" of the treaty.

173. China asserts that "all" of the prior panel and Appellate Body reports that have addressed Article XX(a) have concerned measures that targeted products considered to be morally offensive. This is not correct, and would be irrelevant at any rate. First, contrary to China's characterization, in *Colombia – Textiles*, Colombia did not seek to justify its "compound tariff"

measure under Article XX(a) by arguing that the textile, apparel, and footwear products at issue were themselves products that were morally problematic or offensive. And, in *Brazil – Taxation*, Brazil made no argument that the digital television equipment or other products at issue were inherently morally offensive. Second, even if it were the case that past disputes involving Article XX(a) had involved measures that targeted products that were morally offensive per se, this would not stand for the proposition that Article XX(a) is so limited in scope.

174. China argues that the United States took into account certain "economic concerns" in the course of adopting and implementing the measures at issue, and that this somehow undermines the "public morals" objective of the measures. This argument is without merit.

175. First, as the United States has explained, the argument that that "moral" and "economic" concerns are mutually exclusive finds no support in the text of Article XX(a) and does not comport with simple common sense.

176. Second, throughout the open and transparent process of selecting the products of China subject to additional duties, the United States has made clear that it would seek to avoid disproportionate economic harm to U.S. interests, while at the same time maintaining strong measures so as not to undermine the objective of obtaining the elimination of conduct documented in the Section 301 Report. That the United States would take steps mitigate the economic harms associated with adopting the measures at issue is not at all inconsistent with pursuing a "public morals" objective.

177. China argues that a finding that the measures at issue are justified under Article XX(a) would "set a dangerous precedent" and signal that Members can adopt GATT-consistent measures "whenever" they consider that the policies of another Member are "immoral" or "unfair." This is nothing more than a "slippery slope" argument – which is usually one of the weakest types of arguments. And is particularly weak here, given the unique facts and circumstances.

178. First, an invocation of Article XX(a) that is as demonstrably specious and convenient as China suggests is unlikely to satisfy the requirements of the chapeau of Article XX, which provides that a measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Therefore, the language of the chapeau serves as backstop that prevents the sort of dangerous precedents to which China alludes.

179. Second, a finding that the measures at issue are justified under Article XX(a) is not practically or legally capable of setting the dangerous precedent that China warns of, because any such finding would be squarely grounded in the unique facts of this dispute.

180. In this regard, the United States would like to, once again, remind the Panel of the historical background against which the United States adopted the measures at issue in this dispute. As noted, the United States adopted the measures at issue following nearly a decade of trying to address China's unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms, and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government. Accordingly, the notion

that a finding for the United States would open the door to Member successfully invoking Article XX(a) "whenever" they want and to justify "whatever" GATT-inconsistent measures they want, is utterly unfounded.

EXECUTIVE SUMMARY OF THE UNITED STATES' RESPONSES TO QUESTIONS FROM THE PANEL

21. Please explain the relationship between the Section 301 Report and the additional duties imposed on List 1 Products and List 2 Products.

Response:

181. There is a clear and direct relationship between the "List 1 Products" and the unfair technology transfer policies, and practices described in the Section 301 Report. In particular, the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, List 1) were found to benefit from the unfair policies, and practices documented in the Section 301 Report. This is clearly shown by the record evidence in this dispute, including the U.S. legal instruments (*i.e.*, Federal Register Notices) through which the United States implemented the measures at issue and the Section 301 Report itself.

182. The Section 301 Report found that China adopted the aforementioned unfair trade acts, policies, and practices to advance China's industrial policy objectives, in particular the goals and objectives reflected in *Made in China 2025*, "China's ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development.

183. Accordingly, the legal instruments through which the United States adopted and implemented the measures at issue place significant emphasis on *Made in China 2025* and the Chinese industries that benefit from that initiative. For example, in the April 6, 2018 Federal Register Notice (Exhibit CHN – 10) that summarized the findings of the Section 301 Report and proposed certain actions in response, USTR stated the following with respect to the products to be targeted by the measures at issue:

> The list of products [*i.e.*, List 1] covered by the proposed action was developed using the following methodology: Trade analysts from several U.S. Government agencies identified products that benefit from Chinese industrial policies, including Made in China 2025. The list was refined by removing specific products identified by analysts as likely to cause disruptions to the U.S. economy, and tariff lines that are subject to legal or administrative constraints. The remaining products were ranked according to the likely impact on U.S. consumers, based on available trade data involving alternative country sources for each product. The proposed list was then compiled by selecting products from the ranked list with lowest consumer impact.

184. The United States adopted the measures at issue pertaining to "List 1" products following a notice and comment period on the tariff action proposed in the April 6 Notice. As stated in the

June 20, 2018 Notice (Exhibit CHN – 2) through which the "List 1" measures were implemented:

> 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.

185. In short, the record evidence demonstrates that (1) China adopted the unfair trade acts, policies, and practices documented in the Section 301 Report to support the industrial policy goals reflected in *Made in China 2025*; (2) the "List 1" products benefit from the *Made in China 2025* initiative; and (3) the United States adopted the "List 1" measures because the so-listed products were found to benefit from *Made in China 2025*.

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

To China

18. In your view, what is the legal value / relevance of the Economic and Trade Agreement between the United States and China (Phase One Economic and Trade Agreement) for the present dispute?

U.S. Comment on China's Response to Panel Question 18:

186. China's response completely fails to rebut that the Phase One Agreement confirms that the Parties have settled, within the meaning of Article 12.7 of the DSU, any WTO issues regarding additional duties; and that the U.S. measures at issues are justified under Article XX(a) of the GATT 1994.

187. In sum, the actual conduct of the parties demonstrates as an objective matter that the parties have reached their own mechanisms for addressing each party's additional duties, outside of any WTO framework. This is explicitly reinforced in the Phase One Agreement, where, in prescribed circumstances, either party may impose additional duties on goods of the other Party. In these circumstances, any WTO findings would do nothing to promote core objectives of the DSU, such as achieving a "satisfactory settlement of the matter" or a "positive solution to the dispute."

188. China has no answer to these fundamental realities. Instead, China presents the cursory statement that:

> The Phase One Agreement reached through bilateral negotiations is not legally relevant to the Panel's resolution of this current dispute, which involves a fundamental question of whether the unilateral imposition of discriminatory duties on imports from China by the United States is a violation of the United States' obligations under the WTO.

189. This statement does nothing to support China's position. It conflates two separate issues: the real-world dispute between the parties, and a legal issue regarding the application of the WTO Agreement to certain measures. What Article 12.7 of the DSU states is that where the parties have settled their real-world dispute, then the Panel *must not* issue a report containing legal findings on the legal issues that the DSB referred to the Panel. China in pointing out that the Panel's terms of reference include a legal issue does nothing to rebut that the parties, as an objective matter, have settled outside of the WTO system any WTO issues regarding their respective additional duties.

190. China's argument here is simply that the parties have not reached agreement on the merits of China's legal claims. As explained, however, agreement on the merits of legal claims is not required for a mutually agreed solution. Accordingly, China has failed to rebut the importance of the Phase One Agreement in confirming the existence of an agreement between the parties regarding their respective additional duties. China also fails to rebut that the Phase One Agreement confirms that the U.S. measures at issue are justified under Article XX(a) of the GATT 1994. At the second substantive meeting, the United States explained that conclusion of the Phase One Agreement further validates the United States' invocation of Article XX(a) in the following ways.

191. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The Phase One Agreement covers some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement. Second, the Phase One Agreement confirms the necessity of the U.S. tariff measures in addressing the unfair technology transfer issues identified in the Section 301 Report. The tariff measures led to the negotiations, and were the only available tool that would have enabled the parties to reach this successful outcome. Third, the Phase One Agreement confirms that forbidding forced technology transfer is a fundamental norm. The first sentence of the technology transfer chapter states that "The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern."

192. China's response to Question 18 is cursory in the extreme, presenting a single conclusory sentence containing two arguments: "… yet there has been no evidence to support this [i] *post hoc* rationalization and [ii] no demonstrated relationship between the measures imposed, the imported products, and the 'public morals' alleged to be protected." Neither of these arguments have validity. On the second argument the United States has explained at length (and without any rebuttal by China) both that Article XX(a) requires no particular relationship, and that the record shows a direct tie between China's immoral policies and the products subject to additional duties, especially with respect to Measure

193. As a factual matter, the United States adopted the measures at issue following a months-long, public investigation. The United States provided public notice of the issues under investigation, and conducted a full notice and comment procedure, including a public hearing at which many Chinese witnesses testified. The fact-finding phase of the investigation concluded with the issuance of an extensive, well-documented report, precisely explaining the U.S. concerns with China's technology transfer policies. And the notice imposing the measures clearly states that the tariff measures were adopted to obtain the elimination of the unfair policies identified in the report. Thus, the justification for the U.S. measures was anything but "*post hoc*".

194. To the extent that China is presenting a legal argument that the United States in this dispute is not entitled to explain how its measures fall within the scope of an Article XX exception, China is wrong. As China itself acknowledges, the party asserting an Article XX justification has the burden of establishing that defense. The way any party meets its burden is through the presentation of factual and legal argumentation, as the United States has done in this dispute. Contrary to China's implication, there is simply no rule or concept that such argumentation is somehow "*post hoc*" and inadmissible. If this were the case, no Member could meet a burden of establishing a justification under any Article XX exception.

195. The United States notes that the record in prior disputes shows that the Member asserting an Article XX defense presents evidence and arguments in support of its justification, and this has not been (and could not be) rejected as "*post hoc*."