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**UNITED STATES — TARIFF MEASURES ON CERTAIN GOODS FROM CHINA**

REPORT OF THE PANEL

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**TABLE OF CONTENTS**

<b>1 INTRODUCTION .....</b>	<b>11</b>
1.1 Complaint by China.....	11
1.2 Panel establishment and composition .....	11
1.3 Panel proceedings.....	12
<b>2 FACTUAL ASPECTS AND MEASURES AT ISSUE .....</b>	<b>13</b>
<b>3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS .....</b>	<b>14</b>
<b>4 ARGUMENTS OF THE PARTIES .....</b>	<b>14</b>
<b>5 ARGUMENTS OF THE THIRD PARTIES .....</b>	<b>14</b>
<b>6 INTERIM REVIEW.....</b>	<b>15</b>
<b>7 FINDINGS .....</b>	<b>16</b>
7.1 Preliminary issues.....	16
7.1.1 Whether the parties have reached a solution within the meaning of Article 12.7 of the DSU.....	16
7.1.1.1 Parties' arguments .....	16
7.1.1.2 Panel's findings.....	17
7.1.2 The measures covered by the Panel's terms of reference.....	20
7.1.2.1 Introduction .....	20
7.1.2.2 Overview of applicable principles .....	22
7.1.2.3 The measures covered by China's panel request .....	23
7.1.2.4 Conclusion on the measures covered by the Panel's terms of reference.....	27
7.1.3 China's request that the Panel reject Exhibit US-35.....	28
7.2 Whether the measures at issue are inconsistent with Articles I:1 and II:1(a) and (b) of the GATT 1994 .....	29
7.2.1 Introduction.....	29
7.2.2 Whether the measures at issue are inconsistent with Article I:1 of the GATT 1994.....	30
7.2.3 Whether the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994 .....	32
7.2.4 Conclusion.....	33
7.3 The United States' defence under Article XX of the GATT 1994 .....	34
7.3.1 Introduction – the nature and purpose of Article XX of the GATT 1994.....	34
7.3.2 Whether the measures are provisionally justified under Article XX(a) of the GATT 1994 ...	35
7.3.2.1 Introduction .....	35
7.3.2.2 Whether the measures concern a <i>public morals objective</i> within the meaning of Article XX(a) of the GATT 1994 .....	36
7.3.2.2.1 The concept of "public morals" under Article XX(a).....	36
7.3.2.2.2 Whether an explicit reference to public morals in the legal instruments implementing the measures is required .....	38
7.3.2.2.3 The public morals objective invoked by the United States.....	39
7.3.2.3 Whether the measures are <i>designed</i> to protect the public morals objective as invoked by the United States.....	42
7.3.2.4 Whether the measures are <i>necessary</i> to protect the public morals objective as invoked by the United States.....	45

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7.3.2.4.1	Introduction – the nature and purpose of the <i>necessity</i> requirement .....	45
7.3.2.4.2	The Panel's assessment on whether the United States has demonstrated the <i>necessity</i> of the measures at issue .....	47
7.3.2.4.2.1	Importance of the pursued policy objective .....	48
7.3.2.4.2.2	Restrictive impact of the challenged measures on trade.....	49
7.3.2.4.2.3	Contribution of the measures to the pursued public morals objective as invoked by the United States.....	49
	Contribution of the imposition of additional duties on List 1 products to the pursued public morals objective as invoked by the United States .....	52
	Products covered by List 1 .....	52
	The initial narrowing of the range of products covered by List 1 .....	55
	The exclusion of particular products from the scope of the additional duties .....	57
	Contribution of the imposition of additional duties on List 2 products to the pursued public morals objective as invoked by the United States .....	60
7.3.2.4.2.4	Preliminary conclusion on <i>necessity</i> after the initial "weighing and balancing" of three factors .....	62
7.3.2.4.2.5	Comparison with reasonably available alternative measures.....	63
7.3.2.5	Conclusion on whether the measures are provisionally justified under subparagraph (a) of Article XX of the GATT 1994.....	63
7.3.3	Whether the United States has demonstrated that the measures satisfy the requirements of the <i>chapeau</i> of Article XX of the GATT 1994 .....	64
<b>8</b>	<b>CONCLUSIONS AND RECOMMENDATION(S) .....</b>	<b>65</b>
<b>9</b>	<b>CONCLUDING COMMENTS.....</b>	<b>65</b>

**LIST OF ANNEXES****ANNEX A**

## WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	4

**ANNEX B**

## ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of China	12
Annex B-2	Integrated executive summary of the arguments of the United States	20

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Australia	42
Annex C-2	Integrated executive summary of the arguments of Brazil	44
Annex C-3	Integrated executive summary of the arguments of the European Union	46
Annex C-4	Integrated executive summary of the arguments of Japan	49
Annex C-5	Integrated executive summary of the arguments of New Zealand	51
Annex C-6	Integrated executive summary of the arguments of Singapore	52
Annex C-7	Integrated executive summary of the arguments of Chinese Taipei	57

### CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/RW</a> , adopted 31 August 2009, upheld by Appellate Body Report <a href="#">WT/DS322/AB/RW</a> , DSR 2009:VIII, p. 3553
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/AB/RW</a> , adopted 31 August 2009, DSR 2009:VIII, p. 3441
<i>US – Zeroing (Korea)</i>	Panel Report, <i>United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea</i> , <a href="#">WT/DS402/R</a> , adopted 24 February 2011, DSR 2011:X, p. 5239



## EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short title (if applicable)	Title
CHN-1		United States Schedule of Concessions and Commitments
CHN-2	Notice of 20 June 2018	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, Federal Register, Vol. 83, No. 119 (20 June 2018), p. 28710
CHN-3	Notice of 21 September 2018	Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 83, No. 184 (21 September 2018), p. 47974
CHN-4	Notice of 9 May 2019	Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 84, No. 90 (9 May 2019), p. 20459
CHN-10		Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, vol. 83, No. 67 (6 April 2018), p. 14906
CHN-13		Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 83, No. 243 (19 December 2018), p. 65198
CHN-14		Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 84, No. 43 (5 March 2019), p. 7966
CHN-15		Harmonized Tariff Schedule of the United States
CHN-17		Current US Section 301 Tariff Lists
CHN-20	Procedures for Exclusion	Procedures To Consider Requests for Exclusion of Particular Products From the Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, vol. 83, No. 133 (11 July 2018), p. 32181
CHN-21	Procedures for exclusion for List 2 products	Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301, Federal Register, Vol. 84, No. 121 (24 June 2019), p. 29576
US-1	Section 301 Report	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, 22 March 2018
US-2	Update to Section 301 Report	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, 20 November 20
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		18 U.S.C. Chapter 31 (Embezzlement and Theft)
US-16		Computer Fraud and Abuse Act (18 U.S.C. § 1030)
US-17		Economic Espionage Act of 1996 (18 U.S.C. §§ 1831-1832)
US-18		Uniform Trade Secrets Act (1985)
US-20		Federal Trade Commission Act 5 U.S.C § 45
US-21		35 U.S.C. §200 (Patents Policy and objective)
US-22		Restatement (Second) of Contracts, § 205
US-30		18 U.S.C. Chapter 41
US-31		Federal Trade Commission Act 5 U.S.C § 45 (Exhibit US-20) and Sherman Act, 15 U.S.C. § 1
US-32		<i>Northern Pacific Railway Co. v. United States</i> , 356 U.S. 1, 4-5 (1958)
US-33	Phase One Agreement	Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China
US-34		USTR, <i>Letters RE: Product Exclusion Requests</i>
US-35		Notice of the Office of the People's Government of Guangdong Province on the Issuance of Certain Recommendations of Guangdong Province on Accelerating the Development of the Semiconductor and Integrated Circuit Industries, 3 February 2020

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
USTR	United States Trade Representative
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## 1 INTRODUCTION

1.1. This dispute concerns China's challenge to United States' measures, imposing additional *ad valorem* duties on certain products imported from China, pursuant to the findings of an investigation the United States Trade Representative (USTR) carried out into China's acts, policies, and practices related to technology transfer, intellectual property, and innovation under Section 301 of the Trade Act of 1974 (Section 301 Report)<sup>1</sup>, and the arguments raised by the United States in defence to China's claims.

### 1.1 Complaint by China

1.2. On 4 April 2018, China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.<sup>2</sup>

1.3. On 6 July 2018<sup>3</sup>, 16 July 2018<sup>4</sup>, and 18 September 2018<sup>5</sup>, in *addenda* to its initial request for consultations, China requested further consultations with the United States on subsequent related legal instruments.

1.4. Consultations were held on 28 August 2018 and 22 October 2018 but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.5. On 6 December 2018, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII of the GATT 1994 with standard terms of reference.<sup>6</sup> At its meeting on 28 January 2019, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China in document WT/DS543/7, in accordance with Article 6 of the DSU.<sup>7</sup>

1.6. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS543/7 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>8</sup>

1.7. On 24 May 2019, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.<sup>9</sup> On 3 June 2019, the Director-General accordingly composed the Panel as follows<sup>10</sup>:

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<sup>1</sup> 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, 22 March 2018, (Exhibit US-1) (Section 301 Report).

<sup>2</sup> WT/DS543/1-G/L/1219 (China's consultations request).

<sup>3</sup> *Addendum* to China's consultations request, WT/DS543/1/Add.1-G/L/1219/Add.1. China specifies that "[t]his addendum supplements and does not replace China's request for consultations with the United States dated 4 April 2018." (Ibid. p. 1)

<sup>4</sup> *Second addendum* to China's consultations request, WT/DS543/1/Add.2 – G/L/1219/Add.2. China specifies that "[t]his addendum supplements and does not replace China's request for consultations dated 4 April 2018 and the supplemental request for consultations dated 6 July 2018." (Ibid. p. 1)

<sup>5</sup> *Third addendum* to China's consultations request, WT/DS543/1/Add.3 – G/L/1219/Add.3. China specifies that "[t]his addendum supplements and does not replace China's request for consultations dated 4 April 2018, the supplemental request for consultations dated 6 July 2018 and the supplemental request for consultations dated 16 July 2018." (Ibid. p. 1)

<sup>6</sup> Request for the establishment of a panel by China, WT/DS543/7 (China's panel request).

<sup>7</sup> Dispute Settlement Body, Minutes of Meeting held on 28 January 2019, WT/DSB/M/425, para. 5.5.

<sup>8</sup> Constitution Note of the Panel, WT/DS543/8, para. 2.

<sup>9</sup> Constitution Note of the Panel, WT/DS543/8, para. 3.

<sup>10</sup> Constitution Note of the Panel, WT/DS543/8, para. 4.

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Chairperson: Mr Alberto Juan Dumont

Members: Mr Álvaro Espinoza  
Ms Claudia Uribe

1.8. Following the resignation of Ms Claudia Uribe on 25 September 2019, China requested the Director-General to appoint a replacement. The United States agreed to accept as a replacement panelist a person named by the Director-General "in the limited circumstances of this dispute".<sup>11</sup> On 17 October 2019, the Director-General appointed Ms Athaliah Lesiba Molokomme as a member of the Panel. Accordingly, the composition of the Panel is as follows<sup>12</sup>:

Chairperson: Mr Alberto Juan Dumont

Members: Mr Álvaro Espinoza  
Ms Athaliah Lesiba Molokomme

1.9. Australia, Brazil, Canada, the European Union, India, Indonesia, Japan, Kazakhstan, the Republic of Korea, New Zealand, Norway, the Russian Federation, Singapore, Chinese Taipei, Turkey, and Ukraine notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

1.10. After consultation with the parties, the Panel adopted its Working Procedures<sup>13</sup> and timetable on 21 June 2019. On 18 October 2019, the day after the Director-General appointed Ms Athaliah Lesiba Molokomme to replace Ms Claudia Uribe as a member of the Panel, the United States suggested a delay in the date for the first substantive meeting in order to allow Ms Molokomme to become acquainted with the matters at issue in advance of the first substantive meeting and to allow her to meaningfully participate in the preparation for the first substantive meeting. The Panel modified the timetable so as not to issue advance questions to the Parties on 17 October 2019, but decided to maintain the scheduled date of the first substantive meeting. Following a request from the United States, and in light of China's comments thereon, the Panel revised its timetable on 12 December 2019, to provide both parties with additional time to submit their second written submissions. The Panel further revised its timetable on 2 March 2020, following consultations with the parties, in order to specify the dates for the final stages of the proceedings.

1.11. China and the United States submitted their first written submissions on 23 July 2019 and 27 August 2019, respectively. On 10 September 2019, the Panel received third-party submissions from Brazil and the European Union.

1.12. The Panel held a first substantive meeting with the parties from 29-31 October 2019. A session with the third parties took place on 30 October 2019, during which Australia, the European Union, New Zealand, Japan, Singapore and Chinese Taipei made oral statements. Prior to this meeting, on 28 October 2019, the Panel sent the parties a list of questions for preliminary oral responses at the meeting. After the first day of the meeting, on 30 October 2019, the Panel sent the parties a list of additional questions for preliminary oral responses on the second day of the meeting. Following the meeting, on 1 November 2019, the Panel sent a revised and combined list of written questions to the parties. On the same date, the Panel also sent written questions to the third parties. The Panel received responses to these questions on 20 November 2019. The third parties submitted their integrated executive summaries on the same day.<sup>14</sup>

1.13. On 8 January 2020, the parties filed their second written submissions to the Panel.

1.14. The Panel held a second substantive meeting with the parties on 25 and 26 February 2020. Prior to this meeting, on 12 February 2020, the Panel sent the parties a list of questions for preliminary oral responses at the meeting. After the first day of the meeting, on 25 February 2020,

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<sup>11</sup> United States' comments on the draft descriptive part of the Panel Report, para. 3.

<sup>12</sup> *Addendum* to the Constitution Note of the Panel, WT/DS543/8/Add.1.

<sup>13</sup> See the Panel's Working Procedures in Annex A-1.

<sup>14</sup> Specifically, the Panel received integrated executive summaries from Australia, Brazil, the European Union, Japan, New Zealand, and Singapore. Chinese Taipei informed the Panel that its third-party oral statement should serve as its executive summary.

the Panel sent the parties an additional question for preliminary oral response on the second day of the meeting. Following the meeting, on 28 February 2020, the Panel sent a revised and combined list of written questions to the parties. The Panel received responses to these questions on 17 March 2020. The Panel received parties' comments on each other's responses on 31 March 2020. The parties submitted their integrated executive summaries on 7 April 2020. On the same day, China requested the Panel to reject, as untimely filed, Exhibit US-35, which the United States submitted with its comments on China's responses to the Panel's questions after the second substantive meeting. The Panel invited the United States to comment on China's request. The Panel received the United States' comments on China's request on 9 April 2020.

1.15. On 15 April 2020, the Panel issued the descriptive part of its Report to the parties. On 29 April 2020, the Panel received the parties' comments on the descriptive part of its Report. The Panel issued its Interim Report to the parties on 19 May 2020. The parties submitted written requests for the Panel to review precise aspects of the Interim Report on 2 June 2020. Neither party requested that an interim review meeting be held. The Panel provided the parties with an opportunity to comment on each other's requests for review. The parties submitted their comments on 9 June 2020. The Panel issued its Final Report to the parties on 19 June 2020.

## 2 FACTUAL ASPECTS AND MEASURES AT ISSUE

2.1. This section of the Report provides a descriptive overview of the factual aspects of the measures at issue in this dispute. The precise scope of the second measure at issue in this dispute is subject to disagreement between the parties in the context of a discussion of the Panel's terms of reference. The Panel will, therefore, address the scope of the second measure in more detail as part of its findings in Section 7 of this Report.

2.2. China challenges the following measures adopted by the United States<sup>15</sup>:

- Additional *ad valorem* duties of 25%, imposed on 20 June 2018 on a list of 818 tariff subheadings with an approximate annual trade value of USD 34 billion of products imported from China, as of 6 July 2018 (List 1).<sup>16</sup>
- Additional *ad valorem* duties, imposed on 21 September 2018 on a list of 5,745 tariff subheadings with an approximate annual trade value of USD 200 billion of products imported from China, as of 24 September 2018 (List 2).<sup>17</sup> The Notice of 21 September 2018 set the rate of additional *ad valorem* duties at 10% until the end of the year, and announced that the rate of additional duties would increase to 25% on 1 January 2019.<sup>18</sup> The increase in the rate

<sup>15</sup> China's panel request reads as follows:

The measures at issue in this request include the actions taken by the United States, based on the USTR's 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 and pursuant to sections 301(b), 301(c), and 304(a) of the Trade Act of 1974 and the direction made in the President's statement to impose an additional *ad valorem* duty upon certain imported products of Chinese origin. The above-mentioned actions include:

1. An additional 25% duty *ad valorem* on approximately \$34 billion worth of imports from China announced by the USTR on 15 June 2018 and implemented by the Federal Register notice of 20 June 2018 (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, (83 Fed. Reg. 28,710)); and

2. An additional 10% duty *ad valorem* on approximately \$200 billion worth of imports from China implemented on 24 September 2018, and the rate of additional duty will increase to 25% *ad valorem* on 1 January 2019, according to the announcement by the USTR on 21 September 2018 (Notice of Modification of Section 301 Action: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, (83 Fed. Reg. 47,974)). (WT/DS543/7, p. 2).

<sup>16</sup> 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, Federal Register, Vol. 83, No. 119 (20 June 2018), p. 28710 (Notice of 20 June 2018) (Exhibit CHN-2).

<sup>17</sup> Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 83, No. 184 (21 September 2018), p. 47974, (Notice of 21 September 2018) (Exhibit CHN-3).

<sup>18</sup> Notice of 21 September 2018, (Exhibit CHN-3), p. 47975.

of additional duties was postponed twice.<sup>19</sup> On 9 May 2019, the United States increased the rate of additional duties on List 2 products from 10% to 25%, as of 10 May 2019.<sup>20</sup>

2.3. In its panel request, China lists 16 legal instruments through which, *inter alia*, the measures at issue were adopted.<sup>21</sup>

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests that:

- The Panel find that the United States has violated Article I:1 of the GATT 1994 through its application of additional tariffs that apply only to products originating from China; and
- The Panel find that the United States has violated Articles II:1(a) and (b) of the GATT 1994 through its application of additional tariffs in excess of those contained in its Schedule.<sup>22</sup>

3.2. China further requests that the Panel recommend that the United States bring its measures into conformity with its obligations under the GATT 1994.<sup>23</sup>

3.3. The United States 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, and, instead, 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.<sup>24</sup>
- If the Panel examines China's contentions:
  - The Panel find that the measures at issue are justified under Article XX(a) of the GATT 1994; and
  - The Panel find that the increase of the additional duties on List 2 products from 10% to 25% falls outside the Panel's terms of reference.<sup>25</sup>

### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, the European Union, Japan, New Zealand, Singapore and Chinese Taipei are reflected in their executive summaries, provided in accordance with paragraphs 22 and 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7).

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<sup>19</sup> Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 83, No. 243 (19 December 2018), p. 65198 (Exhibit CHN-13); and Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 84, No. 43 (5 March 2019), p. 7966 (Exhibit CHN-14).

<sup>20</sup> Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 84, No. 90 (9 May 2019), p. 20459 (Notice of 9 May 2019) (Exhibit CHN-4).

<sup>21</sup> China's panel request, pp. 2-4.

<sup>22</sup> China's first written submission, para. 79.

<sup>23</sup> China's first written submission, para. 6.

<sup>24</sup> United States' first written submission, para. 113.

<sup>25</sup> United States' first written submission, para. 114.

5.2. Canada, India, Indonesia, Kazakhstan, the Republic of Korea, Norway, the Russian Federation, Turkey, and Ukraine did not submit written or oral arguments to the Panel.

## 6 INTERIM REVIEW

6.1. On 19 May 2020, the Panel issued its Interim Report to the parties. On 2 June 2020, the parties submitted written requests for the Panel to review precise aspects of the Interim Report. On 9 June 2020, the parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report describes the parties' requests for review at the interim review stage and the Panel's response to them. The numbering of some paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. Unless otherwise specifically indicated, the references to paragraph numbers in this section refer to the paragraph and footnote numbers in this Final Report, and not the numbering in the Interim Report. This section of the Panel's Report constitutes an integral part of the Panel's findings.

6.3. The Panel corrected typographical, stylistic and other non-substantive aspects of the Report, including those identified by the parties.

6.4. Both parties requested that the Panel revise its depiction of the parties' and third parties' arguments in a number of paragraphs. In response to these requests, and on its own review of the Report, the Panel adjusted the following paragraphs: 7.4, 7.113, 7.130, 7.138, 7.148, 7.149, 7.164; and footnotes: 33, 71, 72, 73, 75, 204, 219, 245, 247, 248, 250, 251, 269, 272, 278, 279, 315, 363, and 379. The Panel inserted footnotes 34, 246, 270, 271, and 296.

6.5. The United States requested the Panel to amend the wording of paragraph 7.156 to reflect more accurately the Panel's functions with respect to treaty interpretation. China encouraged the Panel to reject the proposed addition. The Panel has made textual modifications to this paragraph.

6.6. With respect to paragraphs 7.177, 7.178, 7.179, 7.180, and 7.185 of the Interim Report, the United States requested that the Panel further consider its conclusions and further explain the underlying logic of its reasoning, in light of the United States' argument that "a measure does not have to only apply to products that are inherently morally offensive to be justified under Article XX(a)".<sup>26</sup> The United States argues that the Panel "determined, contrary to the U.S. position, that a connection between the public morals objective and the products specifically affected by a measure is the only means of proving necessity under Article XX(a) in this dispute".<sup>27</sup> China opposed the United States' request.

6.7. The Panel considers that the United States' request, as referred to in the preceding paragraph, mischaracterizes the Panel's approach in this area. The aim of the Panel's enquiry was to locate an appropriate nexus between the measures the United States adopted and the invoked public morals concerns in order to inform the examination of the question of whether and how the measures could be shown or demonstrated to be "necessary" to protect public morals. The Panel, for its part, did not find it necessary to make any finding on the abstract issue of the extent to which Article XX(a) may allow for the application of measures on products that did not embody morally offensive conduct.

6.8. The Panel observes that even assuming, *arguendo*, that a measure does not have to only apply to products that are considered to be inherently morally offensive to be justified under Article XX(a), it remained for the United States to explain how its chosen measures were apt to contribute to its public morals objectives, and how it ensured that any WTO-inconsistent duties did not apply beyond what was necessary within the meaning of Article XX(a) of the GATT 1994. While the United States asserted that any measures it adopted were necessary, the Panel considers that the United States did not offer the requisite explanation that Article XX envisages to substantiate and justify this assertion. The Panel has, however, in response to the United States' request in this area, introduced some modifications and inconsequential changes to further clarify its reasoning in paragraphs 7.178,

<sup>26</sup> United States' request for review of precise aspects of the Interim Report of the Panel, para. 13.

<sup>27</sup> United States' request for review of precise aspects of the Interim Report of the Panel, para. 13.



7.179, 7.180, 7.185, 7.191, 7.193, 7.206, 7.222, and 7.236 and in the heading of the first subsection of the section "Contribution of the imposition of additional duties on List 1 products to the pursued public morals objective as invoked by the United States" in Section 7.3.2.4.2.3. The Panel also added paragraph 7.214 and footnote 365.

6.9. With respect to paragraphs 7.231, 7.232, 7.233, and 7.234 of the Interim Report, the United States requested that the Panel "explain what other alternatives are available to the United States to protect its public morals, and what effect China's failure to identify any other reasonably available alternative has on the Panel's necessity analysis".<sup>28</sup> China opposed the United States' request.

6.10. The Panel notes that it had reached the preliminary conclusion that the United States had not met its burden of demonstrating that its measures were provisionally justified under Article XX(a). In particular, the United States had not met its burden of demonstrating how its restrictions contributed to protecting its public morals and did not extend beyond what was necessary. Consequently, the Panel was not required to reach any conclusion on the consequences of China's refusal to suggest less trade restrictive or WTO-consistent reasonably available alternative measure. The Panel has introduced some modifications to clarify its reasoning in paragraphs 7.232 and 7.235. The Panel also added footnotes 461 and 462.

## **7 FINDINGS**

7.1. In this dispute, China claims that the United States has violated Articles I:1, II:1(a) and II:1(b) of the GATT 1994. In response to China's challenge, the United States raises three sets of arguments: (i) that the parties have reached a solution within the meaning of the last sentence of Article 12.7 of the DSU and the Panel should confine its report to a brief statement of the facts and a notation that a settlement has been reached; (ii) that the increase of the rate of additional duties on List 2 products from 10% to 25% falls outside the Panel's terms of reference; and (iii) that in any case, the measures at issue are justified under Article XX(a) of the GATT 1994.

7.2. Accordingly, the Panel will begin by addressing the preliminary issues raised by the United States' first two series of arguments (i.e. whether the parties have reached a solution within the meaning of Article 12.7 of the DSU and whether the increase of the additional duties on List 2 products from 10% to 25% falls within the Panel's terms of reference), as well as China's request that the Panel reject an exhibit submitted by the United States. The Panel will then proceed to examine whether the measures at issue are inconsistent with Articles I:1 and II:1(a) and (b) of the GATT 1994, and then, following this, will examine whether any inconsistency of the challenged measures with these provisions is justified as necessary to protect the US public morals, pursuant to Article XX(a) of the GATT 1994.

### **7.1 Preliminary issues**

#### **7.1.1 Whether the parties have reached a solution within the meaning of Article 12.7 of the DSU**

##### **7.1.1.1 Parties' arguments**

7.3. The first set of arguments the United States raised relates to the legal implications of the ongoing bilateral negotiations between China and the United States to address several trade concerns – including some matters covered by the current WTO dispute.

7.4. According to the United States, "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".<sup>29</sup> Accordingly, the United States argues that, consistent with the requirements of Article 12.7 of the DSU, 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.<sup>30</sup> The United States recalls that "[w]here a

<sup>28</sup> United States' request for review of precise aspects of the Interim Report of the Panel, para. 16.

<sup>29</sup> United States' second written submission, para. 1.

<sup>30</sup> United States' second written submission, para. 5.



settlement of the matter among the parties to the dispute has been found", Article 12.7 of the DSU requires 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".<sup>31</sup> The United States asserts that the parties have agreed to "settle this matter outside the WTO system"<sup>32</sup>, noting that China has already "imposed retaliatory tariffs" "without first obtaining the authorization from the DSB pursuant to the DSU".<sup>33</sup> However, the Panel observes that the Government of the United States has not, up to the present time, initiated action under the DSU with respect to these tariffs. Instead, the United States claims that the parties have undertaken a bilateral negotiation process that amounts to a solution within the meaning of Article 12.7 of the DSU.<sup>34</sup>

7.5. In support of its argument, during the Panel's second substantive meeting with the parties, the United States pointed to the Economic and Trade Agreement between the two countries (Phase One Agreement)<sup>35</sup> as evidence that a bilateral negotiation process is ongoing and has been fruitful. According to the United States, Article 12.7 of the DSU simply refers to circumstances where a "settlement of the matter among the parties to the dispute has been found" and does not specify or delimit the evidence that a panel may consult to discern the existence of a "settlement". The United States asserts that Article 12.7 of the DSU covers the present situation. For these reasons, the United States considers that the Panel should not issue any of the findings or recommendations China requested but should instead issue a brief report stating that the parties have reached their own solution, in accordance with the third sentence of Article 12.7 of the DSU.

7.6. China raises a series of arguments on the scope of any mutually agreed solution and on the need to notify such a MAS to the DSB pursuant to Article 3.6 of the DSU. China insists that the parties have not developed a mutually satisfactory solution and that "the matter set forth in China's Panel Request remains unresolved and subject to adjudication by the Panel."<sup>36</sup> China expressly states that the Phase One Agreement is not legally relevant in the current dispute, because (i) it does not address the measures at issue, and (ii) the additional duties subject to this dispute remain in effect.<sup>37</sup> Accordingly, China asserts that it has never agreed to any process or other solution that would constrain the Panel from issuing the findings and recommendations it has requested. China argues that the parties have not settled the matter within the meaning of Article 12.7 (last sentence) of the DSU, because the parties have not found a "*mutually agreed solution*" within the meaning of Article 3.6 of the DSU, or notified such a solution to the DSB.<sup>38</sup>

#### 7.1.1.2 Panel's findings

7.7. Under the DSU, a WTO Member has the right to initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member (Article 3.3 of the DSU). In *EC – Bananas III*, the United States argued successfully that WTO Members do not have to demonstrate their legal interest to initiate a WTO dispute, and have a broad discretion to

<sup>31</sup> Article 12.7 of the DSU reads as follows:

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)

<sup>32</sup> United States' second written submission, para. 6.

<sup>33</sup> United States' first written submission, para. 25; and second written submission, paras. 7-10.

<sup>34</sup> To the Panel, it appears that the United States considers that an agreed bilateral negotiation process outside the WTO constitutes a "solution" within the meaning of Article 12.7 of the DSU, even if the bilateral negotiations do not yield any results, and even if the issues remain unresolved.

<sup>35</sup> Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, signed on 15 January 2020, entered into force on 14 February 2020 (Exhibit US-33).

<sup>36</sup> China's response to Panel question No. 9(a), para. 11. See also China's response to Panel question No. 18, para. 2.

<sup>37</sup> China's response to Panel question No. 18, paras. 1 and 3. China explains that since the Phase One Agreement "does not address the duties which are the basis for this dispute before the Panel", and "says nothing about resolving this pending dispute before the Panel", the Phase One Agreement "does not support the United States' argument that it constitutes a 'mutually satisfactory solution' under Article 12.7 of the DSU". (China's response to Panel question No. 18, para. 4)

<sup>38</sup> See China's response to Panel question No. 9(c), para. 14; and China's second written submission, para. 11. (emphasis added)

decide whether to bring a case whenever they consider that such proceedings would be "fruitful" in terms of "securing a positive solution" to the dispute (Article 3.7 of the DSU).<sup>39</sup> In addition, the WTO dispute settlement process is compulsory and automatic, so WTO Members are "entitled to a ruling by a WTO panel".<sup>40</sup>

7.8. Therefore, the initiation of the WTO dispute settlement process should, in principle, result in a decision by an adjudicating body<sup>41</sup>, with findings on the claims raised, unless the complaining Member withdraws its complaint or requests a suspension of the proceedings that allows for the Panel's jurisdiction to lapse, or unless the parties reach a mutually agreed solution. A panel is thus required to discharge its adjudicative responsibilities under the DSU, unless the parties relinquish their rights under DSU.

7.9. Previous panels and the Appellate Body have traditionally adopted a high threshold when analysing whether WTO Members have relinquished their rights under the DSU, including through mutually agreed solutions.<sup>42</sup> The Appellate Body has cautioned against assuming "lightly" any relinquishment of the rights granted by the DSU: "in order to ascertain whether a Member has relinquished, by virtue of a mutually agreed solution in a particular dispute, its right to have recourse to WTO dispute settlement in respect of that dispute, greater scrutiny by a panel or the Appellate Body may be necessary."<sup>43</sup>

7.10. The United States argues that the parties have reached "their own *solution*"<sup>44</sup> consisting of an agreement to resolve their dispute outside of the WTO system. In its response to a Panel question, the United States clarified its argument by specifying that a *solution* within the meaning of Article 12.7 of the DSU could include a process of bilateral negotiations.<sup>45</sup>

7.11. The United States' argument raises the question whether an engagement to pursue a bilateral negotiations process aimed at resolving a disagreement between the parties can be characterized as a mutually satisfactory solution within the meaning of Article 12.7 of the DSU.

7.12. Following the United States' logic, a solution within the meaning of Article 12.7 of the DSU could exist even if the bilateral negotiations in which the parties have engaged do not yield any results, and the issue remains unresolved. Yet, this situation would, to quote the opening words of Article 12.7 of the DSU, appear to be one in which the parties have "failed to develop a mutually satisfactory solution" and as a result "the panel shall submit its findings in the form of a written report to the DSB". The Panel also notes that the United States' arguments appear to place stronger emphasis on the more general reference to "solution" in the last sentence of Article 12.7 of the DSU, rather than the more specific term "mutually satisfactory solution" in the first sentence of Article 12.7 of the DSU. That said, read in the context of the paragraph as a whole, it seems that the "solution" referred to in the final sentence is intended to reflect the same concept as the term "mutually satisfactory solution" referred to in the first sentence. This reinforces the conclusion that for any "solution" to exist in terms of Article 12.7 of the DSU, it has to be a "mutually satisfactory" one, rather than one based on one party's unilateral assertion that may be satisfactory to it, but not to the other party. We also note that the term "solution" refers to "the act of solving a problem".<sup>46</sup> Logically, when a solution is found, the problem is solved and does not exist anymore. As the panel

<sup>39</sup> Appellate Body Report, *EC – Bananas III*, paras. 132 and 135.

<sup>40</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis original)

<sup>41</sup> A panel report, an Appellate Body report (if the Appellate Body is able to adjudicate the matter), or an arbitration award.

<sup>42</sup> Since "the relinquishment of rights granted by the DSU cannot be lightly assumed", the Appellate Body insists that "any such relinquishment must be made clearly." (Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217; and *Peru – Agricultural Products*, para. 5.25)

<sup>43</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.19.

<sup>44</sup> United States' first written submission, para. 38. (emphasis added)

<sup>45</sup> United States' response to Panel question No. 8, para. 37.

<sup>46</sup> See Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 212 and footnote 272 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2917).

in *India – Autos* noted, "agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings".<sup>47</sup>

7.13. More importantly, and setting aside whether a mutually agreed solution could include a "process", panels have systematically put an emphasis on the parties' *shared* assessment that they have reached a solution. In that respect, panels have traditionally found relevant the parties' characterization of their shared views on the substantive matter before the panel as a "mutually agreed solution".<sup>48</sup>

7.14. China insists that it has never agreed to terminate the dispute, and that it has never agreed with the United States that the matter has been, or should be, resolved outside the WTO. China also insists that "[t]he matter set forth in China's Panel Request remains unresolved and subject to adjudication by the Panel".<sup>49</sup> In sum, one of the parties to this dispute (China) clearly disagrees that the parties have reached a mutually satisfactory solution.

7.15. While the Panel recognizes that an ongoing process of bilateral negotiations is currently taking place, such bilateral negotiations seem to be parallel to the ongoing panel proceedings and not intended, by China at least, to replace them.<sup>50</sup> They cannot be understood to deprive China of its right to claim that the measures at issue are inconsistent with Articles I and II of the GATT 1994, nor of its entitlement to a ruling by a WTO panel.

7.16. The Panel also notes that WTO Members often pursue bilateral negotiations – with or without informing the panel – in parallel with an ongoing panel proceeding. In such circumstances, if a complainant considers that ongoing negotiations with the respondent should lead to a suspension of the work of the panel, the complainant could also avail itself of its right to request the suspension of the proceedings under Article 12.12 of the DSU. China has not requested such a suspension, nor has it withdrawn its complaint.

7.17. We also note that the pursuit of negotiations between the parties in parallel to an initiated, or an ongoing dispute, is usually not an alternative to the dispute process, but rather an additional path towards solving the parties' disagreement, encouraged by the DSU. Accordingly, it is important that this situation is not interpreted in a manner that results in denying the complainant's entitlement to findings by the panel.

7.18. That negotiations aimed at settlement can be pursued in parallel with panel proceedings is further underlined by Article 11 of the DSU which requires the Panel to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution". Moreover, Article 5 of the DSU on "good offices, conciliation and mediation" refers specifically to a series of "soft" dispute settlement procedures that "may continue while the panel process proceeds" (Article 5.5 of the DSU).

7.19. In the Panel's view, China's responses to the United States' arguments confirm that China has not relinquished any of its rights under the DSU to pursue proceedings against the United States in the current dispute. China's strong opposition to the existence of a mutually satisfactory solution within the meaning of Article 12.7 serves to further underline that there is no mutually agreed resolution of the matter before the Panel.

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<sup>47</sup> Panel Report, *India – Autos*, para. 7.113. (emphasis added) This point is confirmed by the Appellate Body's observation, albeit in a different context, that "consultations are by definition a process, the results of which are uncertain." (Appellate Body Report, *US – Gambling*, para. 317)

<sup>48</sup> Panel Reports, *US – Shrimp (Ecuador)*, para. 7.1; and *US – Zeroing (Korea)*, para. 7.14.

<sup>49</sup> China's response to Panel question No. 9(a), para. 11. Moreover, the Panel notes that the initial negotiations between the parties, materialized in the Phase One Agreement, do not appear to have brought a resolution to the issues that are before the Panel (see United States' opening statement at the second substantive meeting of the Panel with the parties, para. 6: "[...] what does the Phase One Agreement say about this dispute, or the U.S. additional duties that China challenges in this dispute? Nothing.").

<sup>50</sup> The Panel also notes that at the initial stage of the ongoing bilateral negotiations, materialized in the Phase One Agreement, the parties made no specific reference to the current dispute. Moreover, the Phase One Agreement includes provisions that specifically provide for WTO rights and obligations to be preserved (Article 7.6, para. 1 of the Phase One Agreement: "The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party.").

7.20. Additionally, there is no written document that might otherwise serve as evidence of the existence of a mutually agreed solution to the matters raised in this dispute, merely an assertion by the United States that the conduct of the parties in pursuing various bilateral discussions or dialogues on trade issues should be sufficient in this regard.

7.21. Without ruling on the implications of the absence of notifying the DSB of any such mutually agreed solution or settlement, we also note that no mutually agreed solution has been notified to the DSB under Article 3.6 of the DSU.

7.22. Against this background, the Panel concludes that the parties have not reached a mutually agreed solution that would deprive China of its right to adjudication and entitlement to recommendations and rulings by the Panel.

### 7.1.2 The measures covered by the Panel's terms of reference in this dispute

#### 7.1.2.1 Introduction

7.23. China's challenge concerns the United States' imposition of additional *ad valorem* duties (additional duties) on two sets of products:

- List 1 products, on which the United States imposed additional duties of 25% on 20 June 2018<sup>51</sup>; and
- List 2 products, on which the United States initially imposed additional duties of 10% on 21 September 2018, announcing that the rate of additional duties would increase to 25% on 1 January 2019.<sup>52</sup> After two postponements<sup>53</sup>, the United States increased the rate of additional duties on List 2 products from 10% to 25% on 9 May 2019.<sup>54</sup>

7.24. China requested the establishment of this Panel on 6 December 2018<sup>55</sup> and the Panel was established on 28 January 2019.<sup>56</sup> The Panel was thus established after the imposition of additional duties of 25% on List 1 products (20 June 2018) and the imposition of additional duties of 10% on List 2 products (21 September 2018), but before the increase of the rate of additional duties on List 2 products from 10% to 25% (9 May 2019).

7.25. The parties disagree on the scope of the Panel's terms of reference, specifically whether the Panel is entitled to and should make findings on the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019.

7.26. The United States asserts that the Panel's terms of reference are limited to two measures: the additional duties on List 1 products imposed on 20 June 2018; and the additional duties of 10% imposed on List 2 on 21 September 2018. For the United States, the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 is a third and separate measure<sup>57</sup>, which is outside the Panel's terms of reference.<sup>58</sup> The United States asserts that "there is no legal basis for the Panel to issue findings or recommendations" with respect to the Notice of 9 May 2019.<sup>59</sup> The United States points to the fact that the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 "did not exist when the Panel was established"<sup>60</sup> and was not

<sup>51</sup> Notice of 20 June 2018, (Exhibit CHN-2).

<sup>52</sup> Notice of 21 September 2018, (Exhibit CHN-3).

<sup>53</sup> Notice of 19 December 2018, (Exhibit CHN-13); and Notice of 5 March 2019, (Exhibit CHN-14).

<sup>54</sup> Notice of 9 May 2019, (Exhibit CHN-4).

<sup>55</sup> China's panel request, WT/DS543/7.

<sup>56</sup> Dispute Settlement Body, Minutes of Meeting held on 28 January 2019, WT/DSB/M/425, para. 5.5.

<sup>57</sup> United States' first written submission, para. 33. See also United States' response to Panel question No. 1, para. 4.

<sup>58</sup> United States' first written submission, paras. 93-112.

<sup>59</sup> United States' first written submission, para. 98. See also United States' first written submission, paras. 14 and 94.

<sup>60</sup> United States' first written submission, paras. 97-98. See also United States' response to Panel question No. 1, para. 4.

among the "specific measures" identified in China's panel request.<sup>61</sup> For the United States "measures enacted after the date of establishment [...] are not within a panel's terms of reference".<sup>62</sup> The United States argues that the DSU does not allow panels to assert jurisdiction over a measure that otherwise falls outside of their terms of reference.<sup>63</sup>

7.27. China asserts that the Panel's terms of reference cover two measures: the additional duties of 25% imposed on List 1 products on 20 June 2018; and the additional duties on List 2 products, imposed initially at a rate of 10% on 21 September 2018, which was increased to 25% on 9 May 2019, as envisaged by the Notice of 21 September 2018.<sup>64</sup> China argues that the increase of the additional duties on List 2 products from 10% to 25% of 9 May 2019 is "clearly a modification"<sup>65</sup> of the second measure and is covered by the Panel's terms of reference. In support of its argument, China notes that (i) the Notice of 21 September anticipated a planned increase of the rate of additional duties on List 2 products from 10% to 25%; (ii) the United States "labelled the increase in additional import duties as a modification"<sup>66</sup>; (iii) China's panel request expressly referred to the anticipated modification of the second measure and specifically identified the planned increase of the rate of additional duties on List 2 products<sup>67</sup>; and (iv) China's panel request referred to "any modification, replacement or amendment to the measures identified above".<sup>68</sup>

7.28. China also argues that if the Panel were to find the additional duties of 25% to be outside of its terms of reference, China would be denied due process because it would be required to "adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'".<sup>69</sup> Conversely, China considers that the United States' due process rights would not be denied if the Panel were to find the additional duties of 25% to be within its terms of reference, because China's panel request "provided the United States with precisely the information it needed to respond to China's case".<sup>70</sup>

7.29. Several third parties also express views on this point. Australia recalls that "measures must be listed in the panel request"<sup>71</sup>, but warns against an "overly formalistic approach"<sup>72</sup>, reminding that "[l]itigation is lengthy and resource-intensive" and "[d]uring the litigation process, laws and regulations may expire, or be renewed, or enacted in a different form".<sup>73</sup> The European Union relies on the Appellate Body's finding in *EC – Selected Customs Matters* that "a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure"<sup>74</sup>, to invite the Panel to ascertain "whether [the increase of the duty] 'changes the essence' of Measure 2".<sup>75</sup>

<sup>61</sup> United States' first written submission, paras. 95 and 98. The United States points out that in *EC – Chicken Cuts* the Appellate Body held that the measures at issue in a dispute "must be measures that are in existence at the time of the establishment of the panel". (United States' first written submission, para. 97 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156))

<sup>62</sup> United States' first written submission, para. 106.

<sup>63</sup> United States' first written submission, paras. 101 and 110.

<sup>64</sup> China argues that "the imposition of 25 percent additional ad valorem duties on an approximate \$200 billion of imports from China – despite the fact that the additional duties in place on this \$200 billion of imports at the time of China's panel request was only 10 percent additional *ad valorem* duties – is included in the terms of reference." (China's first written submission, para. 26. See also China's second written submission, para. 15)

<sup>65</sup> China's first written submission, para. 26.

<sup>66</sup> China's second written submission, para. 21.

<sup>67</sup> China's second written submission, para. 15. See also China's response to Panel question No. 2, para. 2.

<sup>68</sup> China's first written submission, para. 26. China also argues that a failure to reach a decision by the Panel on the additional duties that are currently in effect, at a rate of 25%, would preclude a "positive solution" to this dispute (China's response to Panel question No. 5, para. 6).

<sup>69</sup> China's second written submission, para. 17 (quoting Appellate Body Report, *Chile – Price Band System*, para. 144).

<sup>70</sup> China's second written submission, para. 16.

<sup>71</sup> Australia's third-party statement, para. 18 and integrated executive summary, para. 15.

<sup>72</sup> Australia's third-party statement, para. 18 and integrated executive summary, para. 15.

<sup>73</sup> Australia's third-party statement, para. 18 and integrated executive summary, para. 15.

<sup>74</sup> European Unions' third-party submission, para. 58 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 184).

<sup>75</sup> European Union's third-party submission, para. 61. See also European Union's integrated executive summary, para. 15.

### 7.1.2.2 Overview of applicable principles

7.30. The Panel recalls that Article 6.2 of the DSU reads, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. [...]

7.31. In accordance with Article 7.1 of the DSU, the Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS543/7 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>76</sup>

7.32. While the parties agree that the imposition of additional duties of 25% on List 1 products (first measure) and the imposition of additional duties of 10% on List 2 products (second measure) are within the Panel's terms of reference, they disagree whether the increase in the additional duty on List 2 products from 10% to 25% is also within the Panel's terms of reference.

7.33. At this stage, the issue before the Panel is whether the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 is covered by the Panel's terms of reference.

7.34. It is well established by WTO adjudicators that a panel's mandate or terms of reference is to examine the measures and related claims the complainant has raised in its panel request.<sup>77</sup> This is in conformity with the aim of the WTO dispute settlement system, which, *inter alia*, is to achieve a satisfactory settlement of the matter in accordance with the parties' rights and obligations (Article 3.4 of the DSU) and to secure a positive solution to a dispute (Article 3.7 of the DSU).<sup>78</sup>

7.35. Prior panels and the Appellate Body have observed that, as a general rule, "the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".<sup>79</sup> However, Article 6.2 of the DSU does not set out an express temporal condition or limitation on the measures that can be identified in a panel request.<sup>80</sup> Measures enacted subsequent to the establishment of the panel "may, in certain limited circumstances, fall within a panel's terms of reference".<sup>81</sup> More specifically,

[A] panel may examine a legal instrument enacted after the date of the panel's establishment, which amends one of the challenged measures at issue, provided that

<sup>76</sup> Constitution Note of the Panel, WT/DS543/8, para. 2.

<sup>77</sup> See e.g. Appellate Body Report, *EC – Selected Customs Matters*, para. 131 ("the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings"); and *Australia – Salmon*, para. 223. See also Panel Report, *EC – Selected Customs Matters*, para. 7.43.

<sup>78</sup> As prior WTO adjudicators have consistently held, a panel's terms of reference are important because they "fulfil an important due process objective" – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case (Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186. See also Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.39; *EC – Selected Customs Matters*, para. 143; and *Thailand – H-Beams*, para. 85; and Panel Reports *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.104; and *EC – Selected Customs Matters*, para. 7.49). Moreover, the terms of reference establish the jurisdiction of the panel by defining the precise claims at issue in the dispute. Clearly, "due process and adequate notice would not be served if a complaining party were free to add new measures or new claims to its original complaint as reflected in its panel request at a later stage of a panel proceeding (Panel Report, *Argentina – Footwear (EC)*, para. 8.45. See also Panel Report, *Canada – Wheat Exports and Grain Imports*, fn 14).

<sup>79</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 156. See also Panel Reports, *US – Renewable Energy*, para. 7.8 (currently under appeal).

<sup>80</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121 and Panel Report, *US – Renewable Energy*, para. 7.8 (currently under appeal).

<sup>81</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 156. See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121; and Panel Report, *US – Renewable Energy*, para. 7.8 (currently under appeal).

the panel request is broad enough to encompass such an amendment and the amendment does not change the "essence" of the measure.<sup>82</sup>

7.36. In other words, where a measure identified in the panel request has merely been amended by a subsequent measure and the amendment did not, in any way, change the "essence" of the original measure, prior WTO adjudicators have deemed it appropriate to consider the measure as *amended* in coming to a decision in a dispute.<sup>83</sup>

### 7.1.2.3 The measures covered by China's panel request

7.37. China's panel request reads, in relevant parts:

The measures at issue in this request include the actions taken by the United States, based on the USTR's 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 and pursuant to sections 301(b), 301(c), and 304(a) of the Trade Act of 1974 and the direction made in the President's statement to impose an additional *ad valorem* duty upon certain imported products of Chinese origin. The above mentioned actions include:

1. An additional 25% duty *ad valorem* on approximately \$34 billion worth of imports from China announced by the USTR on 15 June 2018 and implemented by the Federal Register notice of 20 June 2018 (*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*, (83 Fed. Reg. 28,710)); and

2. An additional 10% duty *ad valorem* on approximately \$200 billion worth of imports from China implemented on 24 September 2018, and the rate of additional duty will increase to 25% *ad valorem* on 1 January 2019,<sup>[13]</sup> according to the announcement by the USTR on 21 September 2018 (*Notice of Modification of Section 301 Action: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation*, (83 Fed. Reg. 47,974)).<sup>84</sup>

<sup>13</sup> The application of this additional 25% tariff for \$200 billion imported products of Chinese origin may be postponed as per the statement by the United States after the bilateral meeting between China and the United States on 1 December 2018 in Argentina. [...]

7.38. This statement is followed by a list of legal instruments through which, among others, "[t]he measures at issue are adopted and implemented".<sup>85</sup>

7.39. China's panel request also states that it "also concerns any modification, replacement or amendment to the measures identified above, and any closely connected, subsequent measures."<sup>86</sup> Importantly, attached to this clause is the following footnote 29:

Especially according to *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 FR 47,974 (Sept. 21, 2018), the present 10% additional tariffs imposed upon \$200 billion worth of imports of Chinese origin shall be increased to 25% starting from 1 January 2019. China notes that the implementing date of 1 January 2019 may

<sup>82</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.808 (currently under appeal). See also Appellate Body Reports, *Chile – Price Band System*, paras. 136-144; and *EC – Selected Customs Matters*, para. 184; and Panel Reports, *Russia – Pigs*, para. 7.130; *Colombia – Textiles*, para. 7.35; *EC – IT Products*, para. 7.139; *India – Additional Duties*, para. 7.56; and *US – Renewable Energy*, para. 7.10 (currently under appeal).

<sup>83</sup> See Appellate Body Report, *Chile – Price Band System*, para. 144. See also Appellate Body Report, *EC – Chicken Cuts*, paras. 156-157.

<sup>84</sup> China's panel request, p. 2. (emphasis original)

<sup>85</sup> China's panel request, p. 2.

<sup>86</sup> China's panel request, p. 4.

be postponed as per the statement by the United States after the bilateral meeting between China and the United States on 1 December 2018 in Argentina.

7.40. China argues that its panel request "stated clearly and explicitly"<sup>87</sup> that it also concerns any modification, replacement or amendment to the measures identified therein.<sup>88</sup> Moreover, China explains that it specifically referenced the planned increase of the rate of additional duties on List 2 products from 10% to 25% in its panel request and indicated that this increase might be postponed.<sup>89</sup>

7.41. The United States insists that the Notice of 9 May 2019, which increased the rate of additional duties on List 2 products from 10% to 25%, was a third, separate measure<sup>90</sup>. In support of this contention, the United States notes that the increase of the rate of additional duties on List 2 products from 10% to 25% was implemented through a different legal instrument and that it "had its own, particular rationale".<sup>91</sup> The United States explains that (i) the 10% additional duty on List 2 products was imposed "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'"<sup>92</sup>; while (ii) developments in the bilateral negotiations in May 2019, in particular China's retreat from specific commitments agreed to in earlier rounds, resulted in the United States adopting a new measure, which definitively set a duty level of 25% on List 2 products.<sup>93</sup>

7.42. China considers the United States' argument that the increase of the rate of additional duties on List 2 products from 10% to 25% had its own, particular rationale to be "irrelevant to the issue of whether the List 2 tariffs raised from 10 percent to 25 percent are within the Panel's 'terms of reference'".<sup>94</sup> For China, the essence of the measure remained the same and "the United States' 'particular rationale' does not inform the Panel's analysis and should be disregarded".<sup>95</sup>

7.43. The Panel notes that China's panel request anticipates, on three occasions, the increase of the rate of additional duties on List 2 products:

- The description of the second measure refers to an announcement that "the rate of additional duty will increase to 25% *ad valorem* on 1 January 2019"<sup>96</sup>;
- Footnote 13 refers to a statement by the United States after the bilateral meeting between China and the United States on 1 December 2018 in Argentina, according to which "[t]he application of this additional 25% tariff for \$200 billion imported products of Chinese origin may be postponed"<sup>97</sup>; and
- Footnote 29 repeats that the additional duty of 10% on List 2 products "shall be increased to 25% starting from 1 January 2019" and notes that "the implementing date of 1 January 2019 may be postponed as per the statement by the United States after the bilateral meeting between China and the United States on 1 December 2018 in Argentina".<sup>98</sup>

7.44. Further, the legal instrument implementing the initial additional duty on List 2 products anticipated the increase of the rate of additional duty from 10% to 25%. The Notice of

<sup>87</sup> China's first written submission, para. 26.

<sup>88</sup> China's panel request, p. 4.

<sup>89</sup> China's second written submission, para. 15 (referring to China's panel request).

<sup>90</sup> United States' first written submission, para. 33. See also United States' response to Panel question No. 1, para. 4.

<sup>91</sup> United States' response to Panel question No. 4, paras. 30-31.

<sup>92</sup> United States' response to Panel question No. 4, para. 27 (quoting the Notice of 21 September 2018 (Exhibit CHN-3)).

<sup>93</sup> United States' response to Panel question No. 4, para. 30.

<sup>94</sup> China's response to Panel question No. 19, para. 6.

<sup>95</sup> China's response to Panel question No. 19, para. 7.

<sup>96</sup> China's panel request, p. 2 (referring to the Notice of 21 September 2018, (Exhibit CHN-3)).

<sup>97</sup> China's panel request, p. 2, fn 13.

<sup>98</sup> China's panel request, p. 4, fn 29.



21 September 2018 stated that "the rate of additional duty will increase to 25 percent *ad valorem* on January 1, 2019".<sup>99</sup>

7.45. Moreover, the legal instrument implementing the increase of the rate of additional duties on List 2 products from 10% to 25% (Notice of 9 May 2019) explicitly refers to the legal instrument through which the initial additional duties of 10% were imposed on List 2 products (Notice of 21 September 2018) on multiple occasions. Moreover, on at least three occasions, the Notice of 9 May 2019 specifically states that it is adopted pursuant to a decision to modify the Notice of 21 September 2018:

- The Notice of 9 May 2019 recalls that, according to the Notice of 21 September 2018, "the rate of additional duty was set to increase to 25 percent on January 1, 2019"<sup>100</sup>, and refers to the two occasions on which this increase was postponed<sup>101</sup>;
- The Notice of 9 May 2019 explains that USTR "has determined to modify the action being taken in this Section 301 investigation by increasing the rate of additional duty from 10 percent to 25 percent".<sup>102</sup>
- The Notice of 9 May also refers to USTR's "decision to modify the September 2018 action" and reads further that USTR "has determined that it is appropriate for the rate of additional duty under the September 2018 action to increase to 25%".<sup>103</sup> These references appear to corroborate the proposition that the increase of the duty rate from 10% to 25% is a modification, an amendment of the original measure rather than a different measure.

7.46. These cross-references between the legal instruments implementing the initial additional duties on List 2 products of 21 September 2018 and the increase of these additional duties on List 2 products from 10% to 25% of 9 May 2019 point towards the existence of only one (albeit composite) action.

7.47. The parties disagree on the meaning and implications of the Appellate Body's finding in *Chile – Price Band System* that an amendment of a measure identified in a panel request may be considered within the panel's terms of reference, even if this amendment was enacted after the panel establishment, as long as it does not change the essence of the measure.<sup>104</sup> The Appellate Body concluded in this case that in these circumstances, "it is appropriate to consider the measure *as amended*".<sup>105</sup>

7.48. In the Panel's view, the examination whether an amendment changes the essence of a measure identified in a panel request must remain circumscribed by the specific circumstances of the case at hand and cannot rely on pre-established factors. Prior WTO adjudicators have considered various factors, including the type of trade-restrictive effect sought (ban/additional duties)<sup>106</sup>; the range of products subject to duties<sup>107</sup>; the operation of the measure and the amendment<sup>108</sup>; their legal implications<sup>109</sup>; the identity of their regulatory purpose<sup>110</sup>; the proximity of design, structure and impact<sup>111</sup>; the existence of an explicit reference in the amendment to the original measure<sup>112</sup>; the title of the amendment<sup>113</sup>; the authority that issued the measure and the amendment<sup>114</sup> and the

<sup>99</sup> Notice of 21 September 2018, (Exhibit CHN-3), p. 47975.

<sup>100</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20459.

<sup>101</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20459.

<sup>102</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20459.

<sup>103</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20460.

<sup>104</sup> Appellate Body Report, *Chile – Price Band System*, para. 136.

<sup>105</sup> Appellate Body Report, *Chile – Price Band System*, para. 144. (emphasis original)

<sup>106</sup> See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.

<sup>107</sup> See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; and *India – Additional Import Duties*, para. 7.63; and Appellate Body Report, *EC – Chicken Cuts*, para. 158. See also Panel Report, *Argentina – Financial Services*, para. 7.32.

<sup>108</sup> See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; and *EC – IT Products*, para. 7.186.

<sup>109</sup> See e.g. Appellate Body Report, *EC – Chicken Cuts*, para. 158; and Panel Reports, *EC – IT Products*, para. 7.186; and *India – Additional Import Duties*, para. 7.63.

<sup>110</sup> See e.g. Panel Report, *Russia – Pigs*, para. 7.156.

<sup>111</sup> See e.g. Panel Report, *Russia – Pigs*, para. 7.156.

<sup>112</sup> See e.g. Appellate Body Report, *EC – Chicken Cuts*, para. 158.

<sup>113</sup> See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.

<sup>114</sup> See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.

legal basis cited<sup>115</sup>, as well as whether the original measure remained in force "in substance".<sup>116</sup> Prior WTO adjudicators have also put emphasis on the question whether the complaining party has requested findings on the measure as amended.<sup>117</sup> In contrast, they have considered that facts such as the "apparent" consistency or inconsistency of a measure<sup>118</sup>, have limited bearing in this examination.

7.49. In this case, the increase of the rate of additional duties covers the same products (List 2 products) as the second measure identified in China's panel request. The Annex of the Notice of 9 May 2019 amends the Harmonized Tariff Schedule of the United States "to provide that the rate of additional duties *for the September 2018 action* will increase to 25 percent on May 10, 2019"<sup>119</sup>, and envisages the establishment of a process "by which interested persons may request that *particular products classified within an HTSUS subheading covered by the September 2018 action* be excluded from the additional duties".<sup>120</sup>

7.50. Further, the increase of the additional duties on List 2 products from 10% to 25% of 9 May 2019 has the same alleged legal implications as the second measure identified in China's panel request, namely an increase of the additional duties allegedly above bindings that, according to China, has nullified or impaired China's benefits arising from Articles I:1 and II:1 of the GATT 1994.<sup>121</sup> The only element that changed was the *rate* of the additional duty. On this point, the Panel recalls the Appellate Body's observation in *China – Raw Materials* that "the fact that one measure imposes a lesser export duty rate than another measure might mean that the former is consistent while the latter is inconsistent with a WTO Member's obligations under Article II of the GATT 1994", but that "[i]t is not clear, however, why this fact, taken alone, would necessarily mean that the two measures are not of the 'same essence'".<sup>122</sup>

7.51. The increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 was implemented through the same type of legal instrument (Notice published in the Federal Register), issued by the same authority (USTR) on the same legal basis in US domestic legislation (Section 307(a)(1) of the Trade Act of 1974) as the imposition of the initial additional duties of 10% on List 2 products. The Panel also recalls its earlier observation that the two Notices appear to be two subsequent parts of one composite action.<sup>123</sup>

7.52. In that context, the Panel notes the United States' argument that the increase of the rate of additional duties on List 2 products from 10% to 25% had its "own, particular rationale"<sup>124</sup>, different from the rationale behind the adoption of the additional duties of 10% on List 2 products. The United States insists that "the 'fundamental or underlying' reason (*i.e.* the 'rationale') behind a Member's decision to adopt a measure"<sup>125</sup> cannot be disentangled from the measure's "essence".

7.53. The Panel is of the view that the rationale (or the policy justification) behind the increase of the rate of additional duties on List 2 products from 10% to 25% does not alter the nature or the essence of the measure. The new policy explanation invoked by the United States – that China retreated from specific commitments agreed to in earlier rounds of negotiation – would, to the contrary, seem to confirm that the increase of the additional duties is intrinsically linked to the original measure imposing additional duties of 10% on List 2 products.<sup>126</sup>

<sup>115</sup> See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.

<sup>116</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.45.

<sup>117</sup> See e.g. Panel Report, *Russia – Tariff Treatment*, para. 7.84.

<sup>118</sup> Appellate Body Report, *China – Raw Materials*, fn 524.

<sup>119</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20460. (emphasis added)

<sup>120</sup> Notice of 9 May 2019, (Exhibit CHN-4), p. 20460. (emphasis added)

<sup>121</sup> On this point, the Panel recalls the Appellate Body's observation in *US – Gambling* that "[t]he DSU provides for the 'prompt settlement' of situations where Members consider that their benefits under the covered agreements 'are being impaired by measures taken by another Member'" and "the 'measure' must be the *source* of the alleged impairment, which is in turn the *effect* resulting from the existence or operation of the 'measure'." (Appellate Body Report, *US – Gambling*, para. 121 (emphasis original))

<sup>122</sup> Appellate Body Report, *China – Raw Materials*, fn 524.

<sup>123</sup> See para. 7.46 above.

<sup>124</sup> United States' response to Panel question No. 4, para. 31.

<sup>125</sup> United States comment on China's response to Panel question No. 22, para. 18.

<sup>126</sup> However, it is hard to see how a difference in rationale, even if proven, would change the essence of the second measure, which still remains an imposition of additional duties above bindings.

7.54. Finally, the Panel recalls that China's panel request explicitly refers to "any modification, replacement or amendment" of the listed measures. In other words, China's panel request anticipates the possibility that the measures listed would be amended, and pre-emptively refers to any such modification.

7.55. The parties disagree on the implication of the inclusion of this clause included in China's panel request. The United States insists that the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 took effect after the Panel was established and can therefore not be part of the Panel's terms of reference. For the United States, the phrase "any modification, replacement or amendment to the measures identified [in the Panel request] and any closely connected, subsequent measures"<sup>127</sup>, does not and cannot "serve as a net for capturing future measures of possible interest to China".<sup>128</sup> According to the United States, the utility of this phrase is to capture measures that came into existence before the date of panel establishment but were perhaps unknown to China.<sup>129</sup> The United States argues that even in the presence of such clauses, a panel's terms of reference cannot cover any post-panel establishment changes.<sup>130</sup>

7.56. China asserts that the clause in its panel request referring to "any modification, replacement or amendment" covers the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 precisely because this increase was "clearly a modification of a measure that China identified in both its request for consultations and panel request".<sup>131</sup>

7.57. The Panel agrees with the consistent practice of prior WTO adjudicators in considering that broad references in panel requests – such as the phrase "any modification, replacement or amendment" in China's panel request – authorize panels to consider within their terms of reference legal instruments enacted after the panels' establishment.<sup>132</sup> This is so because, otherwise, as noted by prior WTO adjudicators, respondents could easily shield measures from scrutiny by a panel by amending minor aspects during dispute settlement proceedings.<sup>133</sup>

7.58. In the panel's view, the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 is an amendment that did not change the essence of the second measure identified in China's panel request.

7.59. Therefore, the Panel considers that the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 is covered by the Panel's terms of reference, especially since China's panel request included (i) an express reference to the anticipated increase of the rate of additional duties on List 2 products; and (ii) a reference to "any modification, replacement or amende".

#### **7.1.2.4 Conclusion on the measures covered by the Panel's terms of reference**

7.60. In the Panel's view, it is appropriate to consider the increase of the rate of additional duties on List 2 products from 10% to 25% of 9 May 2019 as an amendment of the additional duties of 10% imposed on List 2 products on 21 September 2018.

7.61. For these reasons, the Panel considers that the measures covered by its terms of reference are:

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<sup>127</sup> China's panel request, p. 4.

<sup>128</sup> United States' response to Panel question No. 2, para. 8.

<sup>129</sup> United States' response to Panel question No. 2, para. 8.

<sup>130</sup> United States' response to Panel question No. 2, para. 9. For the United States, the Appellate Body's finding in *Chile – Price Band System* "at most, suggests that a measure enacted after the date of panel establishment can serve as interpretive guidance for measures identified in a panel request, *not* that a panel is authorized to render findings on such a measure". (United States' first written submission, para. 107)

<sup>131</sup> China's first written submission, para. 26.

<sup>132</sup> See e.g. Panel Reports, *China – Raw Materials*, para. 7.12; and *EC – IT Products*, para. 7.140. See also Appellate Body Report, *Chile – Price Band System*, para. 135.

<sup>133</sup> Appellate Body Report, *Chile – Price Band System*, para. 144. See also Panel Reports, *China – Raw Materials*, para. 7.13; and *Russia – Tariff Treatment*, para. 7.83. As the Appellate Body observed in *Chile – Price Band System*, "a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'." (Appellate Body Report, *Chile – Price Band System*, para. 144)

- a. The additional duties of 25% imposed on List 1 products on 20 June 2018; and
- b. The additional duties imposed on List 2 products, at the initial rate of 10%, as imposed by the Notice of 21 September 2018, and at the rate of 25%, as imposed by the amendment of this measure in the Notice of 9 May 2019.

7.62. For these reasons, the Panel considers that it is appropriate for it to make findings and recommendations with respect to the above-mentioned measures, i.e. the first measure as identified in China's panel request (additional duties of 25% on List 1 products), and the second measure as amended on 9 May 2019 (additional duties of 25% on List 2 products).

### 7.1.3 China's request that the Panel reject Exhibit US-35

7.63. On 31 March 2020, along with its comments on China's responses to the Panel questions following the second substantive meeting, the United States filed Exhibit US-35 – a Notice issued by the Guangdong Provincial Government on 3 February 2020, containing recommendations on accelerating the development of the semiconductor and integrated circuit industries.<sup>134</sup> The United States referred to Exhibit US-35 in support of its argument that "China continues to engage in the unfair and immoral practices documented in the Section 301 Report".<sup>135</sup>

7.64. In a letter of 7 April 2020, China requested the Panel to reject, as untimely filed, Exhibit US-35, submitted by the United States with its comments on China's responses to the Panel's questions after the second substantive meeting. China argues that the submission of new evidence or new factual assertions with a party's last submission raises due process concerns that the Panel needs to address. China considers that the United States could have provided Exhibit US-35 earlier in the proceedings, providing an opportunity for China to comment on it. In its letter of 7 April 2020, China also comments that Exhibit US-35 has no legal relevance for the dispute and does not support the United States' argument because it "fails to demonstrate the existence of *any* public morals concern, let alone establish any relationship between the products targeted and public morals".<sup>136</sup>

7.65. The United States provided comments on China's request in a letter of 9 April 2020. The United States argues that the submission of Exhibit US-35 falls within the terms of the Panel's Working Procedures. Specifically, the United States explains that Exhibit US-35 is an element of the United States' comments on China's response to Panel question No 23, and of the United States' rebuttal of the specific argument presented by China in this response. The United States points out that China has not made any assertion that the measure reflected in Exhibit US-35 does not exist, or that the United States has mis-described the content of the measure.

7.66. The Panel recalls that, in principle, panel proceedings should progress in two stages. During the first stage, the complaining party "should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence".<sup>137</sup> The second stage is "generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties"<sup>138</sup>. Whereas parties should, in principle, submit evidence before the first meeting, prior WTO adjudicators have observed, however, that the submission of evidence may not always fall neatly into one or the other of these categories.<sup>139</sup> There is no absolute bar against the submission of new evidence after the first substantive meeting.<sup>140</sup>

7.67. Indeed, pursuant to paragraph 5(1) of the Panel's Working Procedures,

Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence

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<sup>134</sup> Exhibit US-35, p. 1.

<sup>135</sup> United States' comments on China's response to Panel question No. 23, para. 23 and fn 40.

<sup>136</sup> China's letter of 7 April 2020. (emphasis original)

<sup>137</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

<sup>138</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79. See also Appellate Body Reports, *US – FSC (Article 21.5 – EC)*, para. 240; and *Thailand – Cigarettes (Philippines)*, para. 149.

<sup>139</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149.

<sup>140</sup> See Panel Reports, *China – Rare Earths*, para. 7.17; and *Canada – Aircraft*, para. 9.73.

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necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

7.68. The United States submitted Exhibit US-35 at a late stage of the proceedings on 31 March 2020 (with its comments on China's responses to the Panel's questions after the second substantive meeting). Given the date of adoption of the measure reflected in Exhibit US-35 (3 February 2020), the Panel notes that the United States could have submitted Exhibit US-35 at an earlier stage of the proceedings.

7.69. The Panel's Working Procedures allow, however, for submission of "evidence necessary for purposes of rebuttal". The United States asserts that it submitted Exhibit US-35 in support of its rebuttal of China's views of the facts of the dispute. The United States explains that Exhibit US-35 "is particularly helpful in supporting that the measures at issue are 'necessary' within the meaning of Article XX(a)", because it "demonstrates that China continues to adopt new measures in order to unfairly acquire the technology of other WTO Members".<sup>141</sup>

7.70. The Panel's Working Procedures do not bar the submission of evidence such as Exhibit US-35 "for purposes of rebuttal". Moreover, the Panel is of the view that Exhibit US-35 could potentially be relevant for its analysis of the United States' defence under Article XX(a) of the GATT 1994. The Panel also notes that China has not expressed concerns with respect to the existence of the measure reflected in Exhibit US-35, or with the accuracy of the United States' comments describing this measure. China has rather expressed its concerns with the moment at which the United States submitted Exhibit US-35. China has also explained why it considers that Exhibit US-35 does not support the United States' arguments under Article XX(a).

7.71. The Panel agrees with the observation of the panel in *China – Rare Earths* that "with respect to questions regarding the admission of evidence challenged by one party for lateness, due process is the vitally important general principle by which panels must be guided".<sup>142</sup> The Panel considers that the due process rights of both parties have been respected. China provided its comment on the relevance of Exhibit US-35 in its letter of 7 April 2020, where China not only expressed its concerns with the procedural aspects of the timing of the United States' submission of Exhibit US-35, but also commented on the substance of Exhibit US-35. The United States provided its comments on China's request in its letter of 9 April 2020.

7.72. In sum, the Panel notes that Exhibit US-35 was submitted at a late stage in the proceedings and could have been submitted earlier. However, the Panel considers that (i) its Working Procedures do not prohibit the submission of evidence necessary for the purposes of rebuttal after the first meeting; (ii) Exhibit US-35 could potentially be relevant for the Panel's analysis; and (iii) the due process rights of both parties have been respected. For these reasons, the Panel will consider Exhibit US-35, to the extent that it finds it relevant for its analysis of the United States' defence under Article XX(a) of the GATT 1994.

## **7.2 Whether the measures at issue are inconsistent with Articles I:1 and II:1(a) and (b) of the GATT 1994**

### **7.2.1 Introduction**

7.73. China argues that the measures are inconsistent with the United States' obligations under Article I:1 of the GATT 1994 because they fail to accord immediately and unconditionally to certain products originating in China and imported into the United States the advantage, favour, privilege or immunity granted by the United States "[w]ith respect to customs duties and charges of any kind imposed on or in connection with" the importation of like products originating in the territories of other WTO Members.<sup>143</sup> China further argues that the measures are inconsistent with the United States' obligations under Article II:1(a) and (b) of the GATT 1994 because they impose additional duties on certain imported products originating in China in excess of the United States' bound rates set forth in its Schedule.<sup>144</sup>

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<sup>141</sup> United States' letter of 9 April 2020.

<sup>142</sup> Panel Reports, *China – Rare Earths*, para. 7.19.

<sup>143</sup> China's first written submission, para. 25.

<sup>144</sup> China's first written submission, para. 25.

7.74. The United States asserts that the measures at issue are "legally justified because they are measures 'necessary to protect public morals' within the meaning of Article XX(a) of the *General Agreement on Tariffs and Trade 1994* ('GATT 1994')".<sup>145</sup>

7.75. The Panel notes that the United States has not raised arguments directly pertaining to the alleged inconsistency of the measures with Articles I:1 and II:1(a) and (b) of the GATT 1994. The United States' arguments pertaining to the consistency of the measures with the United States' obligations under the GATT 1994 are focused on the justification of the measures under Article XX(a) of the GATT 1994.

7.76. As prior WTO adjudicators have consistently observed, the initial burden in a dispute lies on the complaining party to establish a *prima facie* case of inconsistency with a provision of the covered agreements on the part of the defending party.<sup>146</sup> A *prima facie* case must be based on evidence and legal argument put forward by the complaining party in relation to each of the elements of the claim.<sup>147</sup> The evidence and legal argument must be "sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".<sup>148</sup> When that *prima facie* case is made, "the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency".<sup>149</sup> A *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".<sup>150</sup>

7.77. The United States has not presented to the Panel any refutation of China's assertion that the measures are inconsistent with Articles I:1 and II:1 (a) and (b) of the GATT 1994. Thus, if the Panel finds that China has established a *prima facie* case of inconsistency of the measures with Articles I:1 and II:1(a) and (b) of the GATT 1994, the Panel will be required, as a matter of law, to find that the measures are inconsistent with these provisions.

7.78. Therefore, the Panel will assess whether China has established a *prima facie* case of inconsistency of the measures with Articles I:1 and II:1(a) and (b) of the GATT 1994.

## 7.2.2 Whether the measures at issue are inconsistent with Article I:1 of the GATT 1994

7.79. China argues that the measures are inconsistent with Article I:1 of the GATT 1994, because the United States "fails to extend an advantage to China that it has granted to all other Members and thereby denies China the same competitive opportunities it extends to all other Members".<sup>151</sup> According to China, the measures "are facially discriminatory and deny China equal competitive conditions with respect to the like products of other Members, and thus, are in violation of Article I:1".<sup>152</sup>

7.80. Article I:1 of the GATT 1994 reads, in relevant part:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded

<sup>145</sup> United States' first written submission, para. 13.

<sup>146</sup> See e.g. Appellate Body Reports, *EC – Hormones*, para. 98; *Japan – Apples*, para. 157; *US – Gambling*, para. 141; and *US – Zeroing (EC)*, para. 217.

<sup>147</sup> Appellate Body Report, *US – Gambling*, para. 140 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 323, p. 16).

<sup>148</sup> Appellate Body Report, *US – Gambling*, para. 141.

<sup>149</sup> Appellate Body Report, *EC – Hormones*, para. 98.

<sup>150</sup> Appellate Body Report, *EC – Hormones*, para. 104 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 323, p. 14).

<sup>151</sup> China's first written submission, para. 60.

<sup>152</sup> China's first written submission, para. 78.

immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.81. Prior WTO adjudicators have traditionally required that the complainant demonstrate four elements to establish an inconsistency with Article I:1 of the GATT 1994.<sup>153</sup>

7.82. First, it must be demonstrated that the measures at issue fall within the scope of application of Article I:1. China asserts that this is the case, because the measures are "without dispute customs duties".<sup>154</sup> In the context of China's claim under Article II:1(b), presented before its claim under Article I:1, China argues that the additional duties are "ordinary customs duties"<sup>155</sup>, because (i) they are "additional *ad valorem* customs duties' that are calculated based on the value of the good"<sup>156</sup>; (ii) they are incorporated<sup>157</sup> and form part of the HTSUS "which identifies all OCDs [ordinary customs duties] that importers have to pay upon importation of goods into the United States"<sup>158</sup>; and (iii) they are collected by Customs and Border Protection "in the same manner as it collects other customs duties identified in Column 1 of the HTSUS".<sup>159</sup> The Panel observes that the measures consist of additional duties imposed on products from China classified under specific subheadings of the HTSUS.<sup>160</sup> Moreover, the measures modify Subchapter III of Chapter 99 of the HTSUS by inserting new headings and new notes.<sup>161</sup> The Panel is of the view that the additional duties are customs duties within the meaning of Article I:1.

7.83. Second, it must be demonstrated that the imported products at issue are "like" products within the meaning of Article I:1. China explains that "[e]ach Chinese product subject to the Section 301 tariffs is a 'like' product from other Members not subject to the additional duties within the meaning of Article I:1"<sup>162</sup>, because the measures "discriminate against Chinese products based solely on the fact that the products originate from China".<sup>163</sup> The Panel notes that prior WTO adjudicators have consistently held that where a measure provides for a distinction based exclusively on origin, there will or can be products that are the same in all respects except for origin and, accordingly, "likeness" can be presumed.<sup>164</sup> The additional duties at issue apply only to products "from China"<sup>165</sup> and, therefore, provide for a distinction based exclusively on origin. For that reason, any product from China subject to additional duties can be presumed to be "like" any product from other WTO Members that is not subject to additional duties.

7.84. Third, it must be demonstrated that the measures confer an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country. China argues that applying additional duties only to China and not to other WTO Members confers an "advantage" on the products originating in all other WTO Members except China, because the measures "deny China the advantage of equal treatment in conformity with the US bound tariffs".<sup>166</sup> The Panel observes that "advantages" in the sense of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.<sup>167</sup> The United States imposes additional duties on products from China, whereas identical products from other WTO Members are not subject to additional duties. In other words, while products from other WTO Members are subject to general rates of duty, identical products from China are subject to

<sup>153</sup> See Appellate Body Report, *EC – Seal Products*, para. 5.86.

<sup>154</sup> China's first written submission, para. 62.

<sup>155</sup> China's first written submission, para. 41.

<sup>156</sup> China's first written submission, para. 37.

<sup>157</sup> China's first written submission, para. 38.

<sup>158</sup> China's first written submission, para. 41.

<sup>159</sup> China's first written submission, para. 41.

<sup>160</sup> Notice of 20 June 2018, (Exhibit CHN-2), p. 28710; and Notice of 21 September 2018, (Exhibit CHN-3), p.47974.

<sup>161</sup> Notice of 20 June 2018, (Exhibit CHN-2), Annex A; and Notice of 21 September 2018, (Exhibit CHN-3), Annex A.

<sup>162</sup> China's first written submission, para. 66.

<sup>163</sup> China's first written submission, para. 66.

<sup>164</sup> See e.g. Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.356; and *US – Poultry (China)*, paras. 7.424-7.432. For an application of this "presumption of likeness" in the field of trade in services, see Appellate Body Report, *Argentina – Financial Services*, para. 6.38

<sup>165</sup> Notice of 20 June 2018, (Exhibit CHN-2), p. 28710; and Notice of 21 September 2018, (Exhibit CHN-3), p.47974.

<sup>166</sup> China's first written submission, para. 73.

<sup>167</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.341, quoting Panel Report, *EC – Bananas III*, para. 7.239. See also Panel Report, *US – Poultry (China)*, para. 7.415.



additional duties and to the general duty rates.<sup>168</sup> The Panel is of the view that the United States confers an "advantage" on products originating in all other WTO Members except China.

7.85. Fourth, it must be demonstrated that the advantage accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all WTO Members. China argues that "the United States has failed to confer immediately and unconditionally the advantage of MFN status on products originating in China that it confers to like products originating in all other Members after the additional duties on the products identified in List 1 and List 2 went into effect on 6 July 2018 and 24 September 2018, respectively".<sup>169</sup> The Panel observes that the United States imposes additional duties on products from China, while products from other WTO Members are not subject to additional duties. Thus, the Panel is of the view that the United States does not extend to China "immediately" or "unconditionally" the identified "advantage" accorded to other WTO Members.

7.86. The Panel concludes that China has established a *prima facie* case that the measures are inconsistent with Article I:1, because China has demonstrated that the additional duties apply only to products from China and thus fail to accord to products originating in China an advantage granted to the like product originating in all other WTO Members. The United States has not presented to the Panel any refutation of China's assertion that the measures are inconsistent with Article I:1.

7.87. For the above reasons, the Panel finds that the measures are inconsistent with Article I:1 of the GATT 1994.

### **7.2.3 Whether the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994**

7.88. China argues that the measures impose additional duties on certain products from China that are in excess of the rates to which the United States bound itself in its Schedule, and thus, "are in flagrant violation of Article II:1(a) and (b)".<sup>170</sup>

7.89. Article II:1 reads, in relevant parts:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.90. The Panel agrees with prior WTO adjudicators that Article II:1(b) prohibits a specific kind of practice "that will always be inconsistent with paragraph (a)".<sup>171</sup> For that reason, the Panel begins by assessing whether the measures are inconsistent with Article II:1(b). If the Panel finds that the United States has applied customs duties in excess of those provided for in its Schedule, inconsistent with the requirements of Article II:1(b), this would also constitute "less favourable" treatment inconsistent with the requirements of Article II:1(a).

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<sup>168</sup> Notice of 20 June 2018, (Exhibit CHN-2), Annex A, note 20; and Notice of 21 September 2018, (Exhibit CHN-3), Annex A, note 20(e).

<sup>169</sup> China's first written submission, para. 77.

<sup>170</sup> China's first written submission, para. 33.

<sup>171</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45. See also Panel Reports, *EC – Chicken Cuts*, para. 7.63; and *EC – IT Products*, para. 7.747.



7.91. First, China argues that the additional duties are "ordinary customs duties".<sup>172</sup> China further asserts that, even if the Panel were to conclude that the additional duties are not "ordinary customs duties", the measures would constitute "other duties or charges" imposed inconsistently with Article II:1(b), "because no such 'other duty or charge' was recorded in the US Schedule consistently with the Understanding on Interpretation of Article II:1(b) of the GATT 1994".<sup>173</sup>

7.92. The Panel recalls its assessment that the additional duties are customs duties within the meaning of Article I:1. The Panel is also of the view that the additional duties are "ordinary customs duties" within the meaning of Article II:1(b).

7.93. Second, China argues that the measures are "in excess" of the duties to which the United States bound itself in its Schedule of Concessions and Commitments (Schedule)<sup>174</sup>, because the duties are imposed "in addition to any other duties, fees or charges that may also be due".<sup>175</sup> China asserts that the United States' bound rates in its Schedule are "virtually the same" as the MFN rates identified in Column 1 of the HSUS<sup>176</sup>, and for that reason "any additional duties imposed in addition to the duties identified in Column 1 of the HTSUS will result in applied duties above the rate notified in its Schedule".<sup>177</sup>

7.94. The Panel notes that the tariff binding in the United States' Schedule provides an upper limit on the amount of duty that may be imposed.<sup>178</sup> China has provided evidence that "duties assessed on every Chinese product identified in Lists [*sic*] 1 and List 2 as a result of the imposition of the Section 301 tariffs are, with regard to every product, in excess of the rates provided for in the US Schedule".<sup>179</sup> The United States has not provided any evidence or argument to rebut China's *prima facie* case on that point. The Panel, therefore, is of the view that the additional duties composing the measures at issue are in excess of the duties to which the United States bound itself in its Schedule, inconsistent with Article II:1(b).

7.95. China further argues that, because the measures accord imports from China "less favourable" treatment than that provided for in the United States' Schedule, they are also inconsistent with Article II:1(a).<sup>180</sup> The Panel recalls its observation that a practice prohibited under Article II:1(b) will always be inconsistent with Article II:1(a).<sup>181</sup> The application by the United States of customs duties in excess of those provided for in the United States' Schedule, inconsistent with Article II:1(b), constitutes "less favourable" treatment in the sense of Article II:1(a). Therefore, the Panel is of the view that the additional duties accord imports from China "less favourable treatment" than that provided in the United States' Schedule, inconsistent with Article II.

7.96. In sum, China has established a *prima facie* case that the measures are inconsistent with Article II:1(b), because China has demonstrated that the additional duties are ordinary customs duties applied in excess of the rates to which the United States bound itself in its Schedule. China has also established a *prima facie* case that the measures are inconsistent with Article II:1(a), because China has demonstrated that the additional duties accord imports from China "less favourable treatment" than that provided in the United States' Schedule. The United States has not refuted China's assertion that the measures are inconsistent with Articles II:1(a) and II:1(b).

7.97. For the above reasons, the Panel finds that the measures are *prima facie* inconsistent with Articles II:1(a) and (b) of the GATT 1994.

#### 7.2.4 Conclusion

7.98. In sum, the Panel concludes that the measures at issue are *prima facie* inconsistent with Article I:1, because the additional duties apply only to products from China and thus fail to accord

<sup>172</sup> China's first written submission, para. 41. See para. 7.82 above.

<sup>173</sup> China's first written submission, para. 45.

<sup>174</sup> China's first written submission, paras. 48-50, referring to United States Schedule of Concessions and Commitments (Exhibit CHN-1).

<sup>175</sup> China's first written submission, para. 50.

<sup>176</sup> China's first written submission, para. 51.

<sup>177</sup> China's first written submission, para. 52, referring to Exhibits CHN-15 and CHN-17.

<sup>178</sup> See Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46.

<sup>179</sup> China's first written submission, para. 53, referring to Exhibit CHN-17.

<sup>180</sup> China's first written submission, para. 56.

<sup>181</sup> See para. 7.90 above.

to products originating in China an advantage granted to the like product originating in all other WTO Members. The measures at issue are also *prima facie* inconsistent with Articles II:1(a) and (b), because the additional duties are ordinary customs duties applied in excess of the rates to which the United States bound itself in its Schedule and accord imports from China "less favourable treatment" than that provided in the United States' Schedule.

7.99. The Panel will now assess the United States' argument that any inconsistency of the measures with provisions of the GATT 1994 is justified as necessary to protect US public morals pursuant to Article XX(a) of the GATT 1994.

### 7.3 The United States' defence under Article XX of the GATT 1994

#### 7.3.1 Introduction – the nature and purpose of Article XX of the GATT 1994

7.100. The United States asserts that any inconsistency of the measures at issue with provisions of the GATT 1994 is justified as necessary to protect US public morals pursuant to Article XX(a) of the GATT 1994. This is because, according to the United States, China's acts, policies, and practices addressed in the relevant Section 301 Report amount to "state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets"<sup>182</sup> which violates the public morals prevailing in the United States.<sup>183</sup>

7.101. China considers that the United States has failed to establish the existence of a public morals objective<sup>184</sup>, as the measures at issue "have nothing to do with protecting alleged 'public morals' in the United States".<sup>185</sup> According to China, the United States "seeks to stretch the narrow parameters of Article XX(a) to encompass blatantly coercive economic objectives".<sup>186</sup>

7.102. Article XX(a), together with the introductory clause (*chapeau*) of Article XX, reads as follows:

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

(a) necessary to protect public morals; ...

7.103. WTO Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with their GATT 1994 obligations. Specifically, the subparagraphs of Article XX list various categories of policies that WTO Members may invoke to justify the potential inconsistency of their (challenged) measures with the substantive obligations of the GATT 1994.<sup>187</sup>

7.104. As prior WTO adjudicators have consistently noted, the exceptions of Article XX may be invoked "as a matter of legal right".<sup>188</sup> In other words, WTO Members have the legal right to invoke the policies listed in the subparagraphs of Article XX to justify inconsistencies with their obligations under the GATT 1994, precisely because these policies have been recognized as important and legitimate in character.<sup>189</sup> Thus, Article XX allows WTO Members to adopt measures, which are *a priori* WTO-inconsistent if they do so in order to *protect* certain values or provide for certain policies. This legal right is subject to the challenged WTO-inconsistent measures complying with the requirements of the relevant provisions of Article XX. Because of the importance that WTO Members

<sup>182</sup> United States' second written submission, para. 22.

<sup>183</sup> United States' second written submission, para. 22. See also United States' first written submission, para. 74.

<sup>184</sup> China's second written submission, para. 25.

<sup>185</sup> China's opening statement at the first meeting, para. 6.

<sup>186</sup> China's second written submission, para. 77.

<sup>187</sup> See Appellate Body Reports, *US – Gasoline*, p. 17 (DSR 1996:I, 3); and *Indonesia – Import Licensing Regimes*, para. 5.94.

<sup>188</sup> See, e.g. Appellate Body Report, *US – Gasoline*, p. 22 (DSR 1996:I, 3). See also Appellate Body Report, *US – Shrimp*, para. 156.

<sup>189</sup> Appellate Body Report, *US – Shrimp*, para. 121.

accord to this protection, the Panel recalls that the right to invoke the exceptions of Article XX is "not to be rendered illusory".<sup>190</sup>

7.105. At the same time, the exercise by a WTO Member of its right to invoke the exceptions of Article XX, if abused or misused, will erode or render naught the substantive treaty rights of other WTO Members. For that reason, each of the subparagraphs of Article XX should be seen as a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994.<sup>191</sup> Thus, the burden lies on the respondent invoking the defence of Article XX to prove that its challenged measure falls within the scope of the invoked subparagraph(s), and meets the requirements of the *chapeau*.<sup>192</sup>

7.106. It is generally accepted that the interpretation and application of Article XX should be informed by the need to maintain a balance between the *right* of a WTO Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other WTO Members.<sup>193</sup> In other words, while the respondent may invoke the exceptions of Article XX as a matter of legal right, they should not be applied so as to frustrate or defeat the legal obligations of the holder of the right under the GATT's substantive rules.<sup>194</sup> The balance between the right of a WTO Member to invoke the Article XX exceptions and its obligation to respect the rights of other WTO Members under the substantive provisions of the GATT 1994 is not fixed and unchanging but moves depending on the type and shape of the challenged measures and the facts in each case.<sup>195</sup>

7.107. Traditionally, panels have analysed claims of justification under Article XX using a two-tiered analysis: panels have first examined whether the measure at issue provisionally falls under one of the exceptions listed in the subparagraphs of Article XX, before considering whether the application of the challenged measure satisfies the requirements of the *chapeau* of Article XX.<sup>196</sup>

7.108. The Panel will therefore first assess if the United States' measures, found to be inconsistent with the GATT 1994, are provisionally justified under subparagraph (a). If it finds that this is the case, the Panel will consider whether the United States has applied the measures consistently with the requirements of the *chapeau* of Article XX.

### **7.3.2 Whether the measures are provisionally justified under Article XX(a) of the GATT 1994**

#### **7.3.2.1 Introduction**

7.109. To provisionally justify a challenged measure under one of the Article XX subparagraphs, a responding Member must establish that the challenged measure addresses the interest specified in that paragraph, and that there is "a sufficient nexus between the measure and the interest protected".<sup>197</sup>

7.110. Prior WTO adjudicators have considered that the first step under Article XX(a) is to determine whether the claimed policy is a "public morals" objective within the meaning of Article XX(a). They have then assessed whether the measure is "designed" to protect that public morals objective.<sup>198</sup> Finally, the text of Article XX(a) refers to measures "necessary" to protect public morals, which

<sup>190</sup> Appellate Body Report, *US – Shrimp*, para. 156.

<sup>191</sup> Appellate Body Report, *US – Shrimp*, para. 157.

<sup>192</sup> See, e.g. Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14 (DSR 1997:I, 323); and *US – Gasoline*, p. 22 (DSR 1996:I, 3); and Panel Report, *EC – Asbestos*, paras. 8.177-8.178.

<sup>193</sup> See Appellate Body Report, *US – Shrimp*, para. 156; and Panel Report, *US – Gambling*, paras. 6.452 and 6.575.

<sup>194</sup> Appellate Body Report, *US – Gasoline*, p. 22 (DSR 1996:I, 3).

<sup>195</sup> See Appellate Body Report, *US – Shrimp*, para. 159; and Panel Report, *Colombia – Textiles*, para. 7.286.

<sup>196</sup> See e.g. Appellate Body Reports, *US – Gasoline*, p. 22 (DSR 1996:I, p. 3); *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras. 118-120; *Brazil – Retreaded Tyres*, para. 139; and *Colombia – Textiles*, para. 5.67; and Panel Reports, *Colombia – Textiles*, para. 7.288; *Brazil – Taxation*, para. 7.857; and *India – Solar Cells*, para. 7.383.

<sup>197</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 292).

<sup>198</sup> Panel Report, *Brazil – Taxation*, para. 7.519.

envisages a process of "weighing and balancing" of a series of factors and, in most cases, a comparison between the challenged measure and reasonably available WTO-consistent alternative measures.<sup>199</sup>

7.111. The Panel considers that its analysis under subparagraph (a) of Article XX is a *holistic* exercise, which involves an overall assessment of whether the United States has demonstrated that the challenged measures are necessary to protect its invoked public morals, although this overall assessment will be based on the Panel's interpretation of each element of Article XX(a) and on its application to the specific facts of this dispute. Using this holistic approach, the Panel will analyse the elements and requirements of subparagraph (a) together, before reaching its ultimate conclusion on whether the United States has demonstrated that the WTO-inconsistent measures are necessary to protect its invoked public morals. The Panel will refrain from reaching any intermediate conclusion before completing the entire analysis.<sup>200</sup> Only such a holistic approach guarantees that the nature and purpose of Article XX(a) are not frustrated.

7.112. In the following sections, we will therefore assess (i) whether the United States has raised a *public morals objective* within the meaning of Article XX(a) of the GATT 1994; (ii) whether the measures are *designed* to protect the public morals objective as invoked by the United States; and (iii) whether the measures are *necessary* to protect this objective. Each step of this analysis will allow us to continue our assessment towards an overall conclusion whether the challenged measures are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994.

### **7.3.2.2 Whether the measures concern a *public morals objective* within the meaning of Article XX(a) of the GATT 1994**

#### **7.3.2.2.1 The concept of "public morals" under Article XX(a)**

7.113. The United States asserts that the measures at issue protect public morals within the meaning of Article XX(a) because they have been adopted to "'obtain the elimination' of conduct that violates U.S. standards of rights and wrong, namely China's unfair trade acts, policies, and practices".<sup>201</sup> In support of its argument, the United States has submitted evidence of several domestic instruments that reflect prevailing US "standards of right and wrong" and outlaw some (although not all) of the Chinese practices documented in the Section 301 Report.<sup>202</sup> The United States contends that acts, policies, and practices of China referred to in the Section 301 Report violate US "standards of right and wrong", in particular the prohibition of theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage and the misappropriation of trade secrets, anti-competitive behaviour, as well as the regulation of governmental takings of property (hereafter referred to as "the public morals as invoked by the United States").

7.114. China rejects the characterization of the United States' concerns as "public morals" within the meaning of Article XX(a) and argues that the United States has failed to establish the existence of a valid "public morals" objective.<sup>203</sup> According to China, the United States' reference to public morals is "nothing but a *post hoc* attempt to justify a purely economic objective"<sup>204</sup> and that the

<sup>199</sup> See e.g. Appellate Body Reports, *Colombia – Textiles*, paras. 5.71-5.73 and 5.77; *India – Solar Cells*, para. 5.59; and *Korea – Various Measures on Beef*, paras. 162-164.

<sup>200</sup> The Panel does not consider itself obliged, in every instance, to make an explicit intermediate finding that a party has met its burden to establish a *prima facie* case in respect of each element of a particular claim or defence (see e.g. Appellate Body Reports, *Thailand – H-Beams*, para. 134; *Korea – Dairy*, para. 145; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 135; and *China – Rare Earths*, para. 5.141).

<sup>201</sup> United States' first written submission, para. 69 (fn omitted). See also United States' second written submission, para. 20.

<sup>202</sup> United States' first written submission, paras. 74 and 75; United States' second written submission, paras. 22-31; and United States' response to Panel question No. 16(a) and (b), paras. 71-72.

<sup>203</sup> China's second written submission, Section V(A)(2)(a) and para. 33.

<sup>204</sup> China's second written submission, para. 28. With respect to China's argument that the justification raised by the United States is *post hoc*, the United States argues that the reasoning behind these measures was not adopted only at the time of these proceedings. Instead, the United States submits that the Section 301 investigation – including public notice of the issues under investigation, a full notice and comment period, and public hearings – the Section 301 Report itself, as well as the notices imposing the measures, state that "the tariff measures were adopted to obtain the elimination of the unfair policies identified in the report." (United States' comments on China's response to Panel question No. 18, para. 12) The United States also argues that there is no rule or concept that the factual and legal argumentation provided by a party asserting an Article XX justification during a dispute is *post hoc* and inadmissible. According to the United States, "(i)f

objective of the measures at issue is not to protect public morals, but to reduce China's exports to the United States and address the US trade deficit.<sup>205</sup>

7.115. The Panel begins by noting that the text of Article XX(a) does not provide a definition for the term "public morals". Dictionary definitions refer to the word "public" as "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation"<sup>206</sup> and to the word "morals" as "habits of life with regard to right and wrong conduct".<sup>207</sup> Therefore, the ordinary meaning of the term "public morals" refers to a set of habits of life relating to right and wrong conduct (i.e. societal values) that belong to, affect or concern a community or a nation. This understanding accords with prior panels which have considered that the term "public morals" denotes "standards of right and wrong conduct maintained by or on behalf of a community or nation".<sup>208</sup>

7.116. To the extent that the concept of public morals pertains to a group of individuals (a community or nation), the content and scope of this concept may vary from one WTO Member to another, influenced by each Member's systems and scales of values. Prior WTO adjudicators have similarly observed that the content of the concept of public morals for WTO Members can vary in time and space, depending on a range of factors, including prevailing social, cultural, ethical and religious values.<sup>209</sup>

7.117. Although the Panel must take into account how the responding Member articulates the measure's objective, the Panel is not bound by that characterization but must make an objective and independent assessment of the measure's objective, taking into account all the evidence available to it.<sup>210</sup> The panel in *EC – Seal Products* explained its task of determining whether the challenged measures addressed a public morals concern in the following manner:

[T]he question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires, in our view, an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of "public morals" as "defined and applied" by a regulating Member "in its territory, according to its own systems and scales of values".<sup>211</sup>

7.118. Prior WTO adjudicators have found the following policies as pertaining to public morals: prevention of underage gambling and the protection of pathological gamblers<sup>212</sup>; restricting prohibited content in cultural goods, such as violence or pornographic content, as well as protection of Chinese culture and traditional values<sup>213</sup>; protecting animal welfare<sup>214</sup>; combatting money laundering<sup>215</sup>; or bridging the digital divide within society and promoting social inclusion.<sup>216</sup>

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this were the case, no Member could meet a burden of establishing a justification under any Article XX exception." (United States' comments on China's response to Panel question No. 18, para. 13)

<sup>205</sup> China's opening statement at the first meeting of the Panel, paras. 23-27; China's second written submission, para. 28; and China's comment on the United States' response to Panel question No. 21, para. 2. In support of this contention, China refers to a series of statements by United States' officials "regarding the economic objectives of the measures at issue". (China's second written submission, para. 28, referring to China's opening statement at the first meeting of the Panel, paras. 23-31)

<sup>206</sup> *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), p. 2393.

<sup>207</sup> *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), p. 1829.

<sup>208</sup> Panel Reports, *US – Gambling*, paras. 6.465; *China – Publications and Audiovisual Products*, para. 7.759; *EC – Seal Products*, para. 7.380; *Colombia – Textiles*, para. 7.299; and *Brazil – Taxation*, para. 7.520.

<sup>209</sup> Panel Reports, *US – Gambling*, para. 6.461; *China – Publications and Audiovisual Products*, para. 7.763; *EC – Seal Products*, para. 7.380; *Colombia – Textiles*, para. 7.299; and *Brazil – Taxation*, para. 7.520.

<sup>210</sup> See in this respect Panel Report, *Colombia – Textiles*, para. 7.480.

<sup>211</sup> Panel Report, *EC – Seal Products*, para. 7.383.

<sup>212</sup> Panel Report, *US – Gambling*, para. 6.469.

<sup>213</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.763.

<sup>214</sup> Panel Report, *EC – Seal Products*, para. 7.410.

<sup>215</sup> Panel Report, *Colombia – Textiles*, paras. 7.338-7.339.

<sup>216</sup> Panel Report, *Brazil – Taxation*, paras. 7.521 and 7.568.

7.119. It is against this background that the Panel will analyse the extent to which the United States has raised a public morals objective within the meaning of Article XX(a).

### **7.3.2.2.2 Whether an explicit reference to public morals in the legal instruments implementing the measures is required**

7.120. At the outset, the Panel notes that China argues that the absence of a reference to public morals in the measures at issue is relevant evidence proving that the measures at issue do not have a public morals objective.<sup>217</sup>

7.121. The United States considers that a measure need not include an explicit reference to public morals to be justifiable under Article XX(a), but that in any event the measures at issue "expressly mention an objective falling within the scope of 'public morals' in the United States – namely, the elimination of the unfair trade acts, policies, and practices documented in the Section 301 Report".<sup>218</sup>

7.122. Several third parties have also expressed views on this issue. Brazil considers that "while express mention of public morals objectives may be significant", the Panel should engage in an "assessment of the content, structure and expected operation of the measure itself" to determine whether it is designed to protect public morals.<sup>219</sup> The European Union also notes that "whether or not the text of the statute that provides for the measure, or its legislative history, mention[s] the invoked public moral, while not dispositive, is directly relevant in order to identify the genuine objective of the measure".<sup>220</sup>

7.123. The Panel acknowledges that the measures do not contain specific references to the societal concerns underlying the United States' decision to impose additional *ad valorem* duties (additional duties) on imports from China. The measures refer, however, to the United States Trade Representative's determination in the Section 301 Report that certain Chinese acts, policies and practices are "unreasonable or discriminatory and burden or restrict U.S. commerce".<sup>221</sup> The United States' submissions also refer to China's "conduct" documented in the Section 301 Report and the determinations of the Section 301 Report indicating US concern with China's documented conduct.<sup>222</sup>

7.124. The Panel observes that the Section 301 investigation, and the resulting Section 301 Report, are said to relate to "longstanding"<sup>223</sup> concerns in the United States about "a wide range of unfair practices of the Chinese government [...] related to technology transfer, intellectual property, and innovation".<sup>224</sup>

7.125. The Panel does not consider that for a measure to fall within the scope of the public morals exception of Article XX(a), the legal instruments implementing the measure must expressly mention a public morals objective. The Panel agrees with prior WTO adjudicators that measures that do not expressly refer to "public morals" may nevertheless be found to have a relationship with public

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<sup>217</sup> China's response to Panel question No. 13(a), para. 27.

<sup>218</sup> United States response to Panel question No. 13(a), para. 55.

<sup>219</sup> Brazil's response to Panel question No. 1 to the third parties, para. 3. See also Brazil's integrated executive summary, para. 8.

<sup>220</sup> European Union's response to Panel question No. 1 to the third parties, para. 3.

<sup>221</sup> See Notice of 20 June 2018 (Exhibit CHN-2), p. 28711; and Notice of 21 September 2018 (Exhibit CHN-3), p. 49794.

<sup>222</sup> United States' first written submission, paras. 70-77 and United States' second written submission, paras. 20-31. The Section 301 Report is the result of a US domestic investigation that preceded the adoption of the measures. The Panel observes that the Section 301 Report does not specifically refer to an objective related to "public morals". The Section 301 Report also addresses issues not related to the United States' invoked public morals objective. In particular, the Section 301 Report covers aspects of China's industrial policy that do not seem to be directly related to the norms of "right and wrong" invoked by the United States. These include China's outbound investment (Part IV of the Section 301 Report), China's alleged talent acquisition efforts (part VI.5 of the Section 301 Report), or China's Anti-Monopoly Law (part VI.5.3 of the Section 301 Report, in which part the United States appears to take issue with provisions on intellectual property rights that are not specific to China – see USTR, *Special 301 Report* (April 2019)). In addition, the Section 301 Report mentions practices by China that concern countries other than the United States, such as "acquisition of mineral deposits and other natural resource assets [in] Africa and Latin America" and "technology-focused investments [in] the United States and Europe". (Section 301 Report, p. 62)

<sup>223</sup> Section 301 Report (Exhibit US-1), p. 4.

<sup>224</sup> Section 301 Report (Exhibit US-1), p. 4.



morals following an assessment of their design, their content, structure and expected operation.<sup>225</sup> For that reason, the Panel does not consider the absence of a reference to public morals in the US measures at issue to be determinative to the outcome of the United States' defence.

7.126. The Panel will therefore assess the United States' invocation of a public morals objective.

### 7.3.2.2.3 The public morals objective invoked by the United States

7.127. The United States asserts that China's actions documented in the Section 301 Report violate prevailing US "standards of right and wrong" as reflected in US domestic legislation.<sup>226</sup> The United States has submitted as evidence several domestic instruments that reflect prevailing US "standards of right and wrong" and that outlaw some (although not all) of the Chinese practices documented in the Section 301 Report.<sup>227</sup> Specifically, the United States refers to:

- state and federal laws, under which the act of "theft" is universally deemed a criminal offence<sup>228</sup>;
- US laws that generally prohibit extortion<sup>229</sup>;
- US laws that criminalize cyber-enabled theft and cyber-hacking<sup>230</sup>;
- US laws that criminalize economic espionage and the misappropriation of trade secrets (including though acts of "bribery" or "extortion")<sup>231</sup>;
- US laws against anti-competitive behaviour (in particular the prohibition and criminalization of monopolization)<sup>232</sup>, which reflect "fundamental concepts of fair competition and fair play"<sup>233</sup>, and the breach of which the United States views as "a threat to the 'preservation of our democratic political and social institutions'"<sup>234</sup>;
- US laws on contracts and torts<sup>235</sup>;
- US laws on patents<sup>236</sup>; and
- civil and criminal laws on, and governmental takings, of property.<sup>237</sup>

7.128. The United States explains that the economic concerns underlying some of these legal instruments are related to notions of fair competition and fair play<sup>238</sup>, and that the United States does not view unfair competitive practices merely as a detriment to business and innovation, but also as a threat to the preservation of its democratic political and social institutions.<sup>239</sup> The

<sup>225</sup> See Appellate Body Reports, *Colombia – Textiles*, para. 5.69; and *EC – Seal Products*, para. 5.144.

<sup>226</sup> United States' first written submission, para. 74; and United States' second written submission, para. 22.

<sup>227</sup> United States' first written submission, para. 74; United States' second written submission, paras. 22-31; and United States' to Panel's question No. 16(a) and (b), paras. 71-72.

<sup>228</sup> 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.C. Chapter 31 (Embezzlement and Theft) (Exhibit US-14).

<sup>229</sup> 18 U.S.C Chapter 41 (Extortion and threats) (Exhibit US-30).

<sup>230</sup> Computer Fraud and Abuse Act (18 U.S.C. § 1030) (Exhibit US-16), in particular 18 U.S.C. § 1030 (a)(4).

<sup>231</sup> Economic Espionage Act of 1996 (18 U.S.C. §§ 1831-1832) (Exhibit US-17), Uniform Trade Secrets Act (1985) (Exhibit US-18).

<sup>232</sup> Federal Trade Commission Act, Section 5 U.S.C § 45 (Exhibit US-20); and Sherman Act, 15 U.S.C. § 1 (Exhibit US-31).

<sup>233</sup> United States' second written submission, para. 31.

<sup>234</sup> United States' second written submission, para. 25 (quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958) (Justice Hugo Black) (Exhibit US-32)).

<sup>235</sup> Restatement (Second) of Contracts, § 205 (Exhibit US-22); Restatement (Second) of Torts § 766A.

<sup>236</sup> 35 U.S.C. § 200 (Patents Policy and objective) (Exhibit US-21).

<sup>237</sup> United States Constitution, Fifth Amendment.

<sup>238</sup> United States' second written submission, para. 31.

<sup>239</sup> United States' second written submission, para. 25.

United States also explains that it "imposes constraints on behavior based on national concepts of right and wrong to ensure market-oriented outcomes".<sup>240</sup> According to the United States, China "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."<sup>241</sup> The United States, considers that these acts, policies, and practices relating to intellectual property and technology transfer violate these US standards of right and wrong and thus implicate US public morals within the meaning of Article XX(a).<sup>242</sup>

7.129. China dismisses the United States' reference to its domestic legal instruments stating that "the fact that a Member has criminalized certain conduct does not, by itself, provide sufficient evidence of a public morals objective".<sup>243</sup> China also considers that the United States has not demonstrated that each of the referenced domestic laws embody alleged public morals that are implicated by China's practices at issue.<sup>244</sup>

7.130. Several third parties have expressed views on what can constitute a public morals policy for WTO Members. Australia underlines that the discretion accorded to WTO Members in determining what constitutes public morals "is not without some limitations".<sup>245</sup> Singapore states that "Members must be afforded a certain degree of domestic policy space to define their own public morals objectives, having regard to their specific cultural, religious and other social contexts"<sup>246</sup>, a discretion that is limited by the requirements set out in the design and the necessity tests.<sup>247</sup> The European Union does not take a position on whether the standards of conduct invoked by the United States may, in the abstract, qualify as "public morals" within the meaning of Article XX(a)<sup>248</sup>, but recalls "the broad deference accorded to each Member in view of defining its own public moral standards".<sup>249</sup> Japan asserts that each WTO Member may have its own concepts of public morals and Members must be afforded a degree of policy space to define their own public moral objectives.<sup>250</sup> Japan also confirms that "a Member's domestic criminal law provides relevant evidence for evaluating what might constitute a 'public moral' in that Member".<sup>251</sup> Chinese Taipei warns the Panel against using "an overly restrictive interpretive approach when reviewing a Member's invocation of Article XX(a)".<sup>252</sup>

7.131. The Panel agrees with prior WTO adjudicators that "ascertaining the precise content and scope of morality in a given society may not be an easy task".<sup>253</sup> WTO Members should have some scope to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values, and the right to determine the level of protection that they consider appropriate.<sup>254</sup> WTO Members are thus afforded a certain degree of deference in defining the scope of public morals with respect to the values prevailing in their societies at a given time.<sup>255</sup> Nevertheless, it remains for each WTO Member invoking an Article XX(a) defence

<sup>240</sup> United States' second written submission, para. 26.

<sup>241</sup> United States' first written submission, para. 74. (emphasis original)

<sup>242</sup> United States' first written submission, para. 77. The United States asserts that, even after the adoption of the measures, China continues to engage in the practices documented in the Section 301 Report. (United States' comments on China's response to Panel question No. 23, para. 23; and Exhibit US-35).

<sup>243</sup> China's second written submission, para. 32. See also China's response to Panel question No. 11, para. 22.

<sup>244</sup> China's second written submission, para. 27.

<sup>245</sup> Australia's third-party statement, para. 15; and integrated executive summary, para. 12.

<sup>246</sup> Singapore's third-party statement, para. 7; and integrated executive summary, para. 7.

<sup>247</sup> Singapore's third-party statement, para. 8; and integrated executive summary, para. 8.

<sup>248</sup> European Union's third-party statement, para. 12; and integrated executive summary, para. 10.

<sup>249</sup> European Union's integrated executive summary, para. 13

<sup>250</sup> Japan's third-party response to Panel question No. 1 to the third parties, para. 8. See also Japan's integrated executive summary, para. 3.

<sup>251</sup> Japan's third-party statement, para. 10 and integrated executive summary, para. 4.

<sup>252</sup> Chinese Taipei's third-party statement and integrated executive summary, para. 2.

<sup>253</sup> Panel Report, *EC – Seal Products*, para. 7.409.

<sup>254</sup> See Panel Reports, *US – Gambling*, para. 6.461; *China – Publications and Audiovisual Products*, para. 7.759; *EC – Seal Products*, para. 7.381; *Colombia – Textiles*, para. 7.299; and *Brazil – Taxation*, para. 7.520.

<sup>255</sup> Panel Reports, *EC – Seal Products*, para. 7.380; *Colombia – Textiles*, paras. 7.301 and 7.338; and *Brazil – Taxation*, para. 7.520. See also Appellate Body Reports, *EC – Seal Products*, para. 5.199.



to establish that the invoked policy objective at issue is a public morals objective *according to its value system*.<sup>256</sup>

7.132. The Panel notes that the parties have engaged in discussions on whether the Article XX exceptions, and specifically the concept of public morals in Article XX(a), could encompass economic concerns.

7.133. China argues that the public morals objectives asserted by the United States, "as a matter of law, do not fall within the scope of Article XX(a)"<sup>257</sup>. This is because, according to China, the scope of Article XX(a) is limited to non-economic concerns.<sup>258</sup> Generally, China considers that "interests within the realm of trade liberalization are not covered by Article XX".<sup>259</sup> Specifically, China argues that the term "public morals" in Article XX(a) does not encompass economic policy concerns.<sup>260</sup> According to China, "a concern for so-called 'unfair conduct', including a lack of respect for fair competition and innovation" does not constitute a matter of public morals<sup>261</sup> and Article XX(a) does not allow WTO Members to "circumvent their WTO obligations by interpreting Article XX(a) to encompass so-called 'unfair' trade, a topic which is addressed by several of the covered agreements".<sup>262</sup>

7.134. The United States considers that the concept of public morals in Article XX(a) could relate to issues of economic concern<sup>263</sup>, and the phrase "public morals" cannot be read to exclude any concerns that are economic in nature.<sup>264</sup> According to the United States, a measure can have both moral and economic features<sup>265</sup> and "some types of conduct or behaviour would appear to be immoral precisely because of the economic harms that result from such conduct".<sup>266</sup>

7.135. The Panel understands the parties' disagreement in this respect to be twofold: first, the parties disagree whether the exceptions set out in Article XX can pertain to economic interests and concerns; second, the parties disagree whether the term "public morals" can encompass economic concerns, and in particular concerns pertaining to unfair competition.

7.136. On the first point, the Panel observes that several of the subparagraphs in Article XX refer to the protection of interests that involve, directly or indirectly, a clear economic dimension, including the importation or exportation of gold or silver (Article XX(c)), the protection of intellectual property rights (Article XX(d))<sup>267</sup>, price stabilization efforts (Article XX(i)) and products in short supply (Article XX(j)).

7.137. On the second point, public morals objectives may frequently have inseparable economic aspects. For example, prior panels have recognized that measures targeting money laundering, bridging the digital divide or promoting social inclusion and fraud prevention were measures related to public morals. In the Panel's view, a measure may be found to pursue a public morals objective even if it has economic aspects.<sup>268</sup> Moreover, often the pursuit of non-economic concerns might lead to the adoption of measures that have economic effects – for instance, a restriction of imports so as to protect against, for example, risks to health has a clear economic effect and directly affects trade.

<sup>256</sup> See Panel Reports, *Brazil – Taxation*, para. 7.558.

<sup>257</sup> China's second written submission, para. 29.

<sup>258</sup> China's second written submission, para. 31.

<sup>259</sup> China's second written submission, para. 30.

<sup>260</sup> China's second written submission, paras. 30-31.

<sup>261</sup> China's response to Panel question No. 11, para. 21. See also China's second written submission, para. 27.

<sup>262</sup> China's response to Panel question No. 11, para. 21.

<sup>263</sup> United States' opening statement at the second meeting of the Panel, para. 27.

<sup>264</sup> United States' opening statement at the second meeting of the Panel, para. 29.

<sup>265</sup> United States' response to Panel question No. 13(a), para. 56.

<sup>266</sup> United States' opening statement at the second meeting of the Panel, para. 31.

<sup>267</sup> See also GATT Panel Report, *US – Section 337 Tariff Act*, paras. 5.22-5.35, which considered the relevance of United States' laws protecting intellectual property rights in relation to the exception in Article XX(d) of the GATT 1947.

<sup>268</sup> The Panel recalls, on that point, the example the United States presented at the second meeting of the act of stealing money from a bank which brings about economic harm and can, at the same time, be considered immoral, because it is contrary to standards of wrong (see United States' opening statement at the second meeting of the Panel, para. 31).

7.138. The United States has pointed to several domestic legal instruments that reflect prevailing US "standards of right and wrong" and outlaw some (although not all) of the Chinese practices documented in the Section 301 Report. In this connection, the Panel also recalls that prior WTO adjudicators have highlighted that WTO Members must be afforded a certain degree of deference in defining the scope of public morals with respect to various values prevailing in their societies at a given time. Further, the Panel notes that most third parties confirm that broad deference should be accorded to WTO Members in defining their own public moral standards.<sup>269</sup> In addition, certain third parties express views on the specific kinds of acts, policies, and practices at issue in this dispute. According to Japan, "no country should require or pressure technology transfer from foreign companies to domestic companies".<sup>270</sup> Chinese Taipei "share[s] the same concerns as the United States, and believe[s] it is important for these issues to be taken into account by the Panel".<sup>271</sup>

7.139. The Panel takes note of the concerns expressed by certain third parties and by China that the discretion accorded to WTO Members to define the scope of "public morals" with respect to various values in their societies should not be "without its limits"<sup>272</sup> and that Article XX(a) "does not allow [WTO Members] to circumvent their WTO obligations by interpreting Article XX(a) to encompass so-called 'unfair' trade".<sup>273</sup> The Panel reaffirms its view that, in the present dispute, only a holistic approach to the various elements of Article XX(a) would allow it to strike the necessary balance between the right to invoke the Article XX(a) exception and the rights of other WTO Members under the substantive rules of the GATT.

7.140. The Panel also emphasizes that at this stage of its analysis it is considering the issue of the public morals objectives invoked by the United States, and not the further questions that need to be answered under Article XX of the relationship of such public morals to the measures challenged in this dispute. Against this background, the Panel concludes that the "standards of right and wrong" invoked by the United States (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term "public morals" within the meaning of Article XX(a) of the GATT 1994.

7.141. Accordingly, in continuing its analysis, the Panel will now consider whether the challenged measures are *designed* to protect the public morals objective as invoked by the United States.

### **7.3.2.3 Whether the measures are *designed* to protect the public morals objective as invoked by the United States**

7.142. The United States considers that Article XX(a) does not contain any textual requirement to show that a measure is "designed to" protect public morals.<sup>274</sup> The United States asserts, however, that, in any event, "there is a clear relationship between the U.S. measures at issue and the objective of protecting public morals"<sup>275</sup>, and that the measures at issue satisfy the "design" requirement of Article XX(a).

7.143. China considers that the measures are not designed to protect public morals, mainly because they are not designed to apply to "goods that embody content or conduct offensive to public morals in the United States".<sup>276</sup> According to China, the measures at issue are "underpinned by economic concerns and are not designed to shield U.S. public morals from imported goods that contain offensive content or embody offensive conduct".<sup>277</sup>

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<sup>269</sup> See Australia's third-party statement, para. 15; Australia's integrated executive summary, para. 12; European Union's integrated executive summary, para. 13; Japan's third-party response to Panel question No. 1, para. 8; Japan's integrated executive summary, para. 3; Singapore's third-party statement, para. 7; and Singapore's integrated executive summary, para. 7.

<sup>270</sup> Japan's third-party statement, para. 4. See also Japan's integrated executive summary, para. 1.

<sup>271</sup> Chinese Taipei's third-party statement and integrated executive summary, para. 4.

<sup>272</sup> Singapore's third-party statement, para. 8 and integrated executive summary, para. 8. See also Australia's third-party statement, para. 15; and integrated executive summary, para. 12.

<sup>273</sup> China's response to Panel question No. 11, para. 21.

<sup>274</sup> United States' second written submission, para. 43.

<sup>275</sup> United States' second written submission, para. 50.

<sup>276</sup> China's response to Panel question No. 11, para. 21.

<sup>277</sup> China's second written submission, para. 46.

7.144. Several third parties also express views on the Panel's approach to the "design" requirement of Article XX(a). Brazil, Japan and Singapore invite the Panel to follow the approach prior WTO adjudicators have used in determining the existence of a relationship between the measures and the protection of public morals through an investigation of the measures' design, including their content, structure, and expected operation.<sup>278</sup> The European Union – similarly to China – considers that the measures do not appear to be designed to protect public morals<sup>279</sup>, because they "seem not to seek to restrict specifically imports into the US territory of Chinese goods that offend the US public morals".<sup>280</sup> According to the European Union, Article XX(a) requires that the risk to public morals, against which the measures are meant to protect, manifests itself either in the content of the goods or the methods in which they were obtained or produced.<sup>281</sup>

7.145. In past cases, the Appellate Body considered the phrase "to protect public morals" requires the adjudicator to examine "the design of the challenged measure, including its content, structure and expected operation"<sup>282</sup>, with a view to ensuring that the measure is "not incapable of" protecting public morals.<sup>283</sup> Following this approach, if a panel finds that a measure is incapable of protecting the values considered by the responding Member as public morals, there is no relationship between the measure and the protection of public morals that would meet the requirements of the "design" step. If, on the other hand, a panel finds the measure to be "not incapable of protecting public morals, this indicates the existence of a relationship between the measure and the protection of public morals"<sup>284</sup> that would meet the requirement of the design test.<sup>285</sup>

7.146. Against this background, the Panel will seek to assess whether the measures are designed to protect the "standards of right or wrong" invoked by the United States (the public morals objective as invoked by the United States).

7.147. The United States argues that the measures are not "incapable" of addressing the acts, policies, and practices documented in the Section 301 Report, because (i) 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"<sup>286</sup>; (ii) the measures are "structured so as to target particular types of goods that benefit from the unfair and immoral Chinese technology transfer policies"<sup>287</sup>; (iii) the 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"<sup>288</sup>; and (iv) the same measures "raise the economic cost that China will incur so long as it maintains the unfair trade acts, policies, and practices document in the Section 301 Report".<sup>289</sup> The United States concludes that its measures create a disincentive for China to continue its conduct found to be morally objectionable, and thus meet the minimal threshold of being "designed to" protect public morals for the purposes of Article XX(a).<sup>290</sup>

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<sup>278</sup> Brazil's integrated executive summary, para. 8; Japan's third-party statement, para. 12; Japan's integrated executive summary, para. 6; Singapore's third-party statement, para. 9; and Singapore's integrated executive summary, para. 16.

<sup>279</sup> European Union's third-party submission, para. 41; and integrated executive summary, para. 10.

<sup>280</sup> European Union's third-party submission, para. 46.

<sup>281</sup> European Union's third-party submission, para. 43. On that point, the Panel recalls that prior WTO adjudicators have rejected arguments that Article XX(a) requires the identification of a *risk* to the public moral concerns identified. (See Appellate Body Report, *EC – Seal Products*, para. 5.198; and Panel Report, *Colombia – Textiles*, para. 7.302)

<sup>282</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.69.

<sup>283</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.68.

<sup>284</sup> Appellate Body Report, *Colombia – Textiles*, para. 5.68.

<sup>285</sup> In fact, the use of a double negative in the articulation of the standard ("not incapable") suggests that, in practice, it would be rather the complainant's task to demonstrate that the measures at issue would be incapable of protecting the values considered by the responding Member as public morals. See also Panel Reports, *Brazil – Taxation*, para. 7.522; and *Indonesia – Import Licensing Regimes*, para. 7.680.

<sup>286</sup> United States' second written submission, para. 47.

<sup>287</sup> United States' response to Panel question Nos. 10 and 11, para. 46. See also United States' second written submission, para. 48.

<sup>288</sup> United States' response to Panel question Nos. 10 and 11, para. 46. See also United States' second written submission, para. 48.

<sup>289</sup> United States' response to Panel question Nos. 10 and 11, para. 46. See also United States' second written submission, para. 49.

<sup>290</sup> United States' response to Panel question Nos. 10 and 11, para. 47.

7.148. As noted earlier, China questions, however, "whether the standard 'not incapable of protecting' is properly based on the text of Article XX(a)".<sup>291</sup> Moreover, China asserts that for a measure to have a sufficient nexus to the public morals objective and so to be provisionally justified under Article XX(a), it must be designed to apply to products that embody the morally offensive conduct or content.<sup>292</sup> China concludes that the measures are incapable of protecting public morals because "there is no evidence that the additional import duties imposed by the United States are designed to apply to goods that embody content or conduct offensive to public morals in the United States".<sup>293</sup>

7.149. While the United States asserts that there is no textual requirement in Article XX(a) to show that a measure is "designed to" protect public morals<sup>294</sup>, China appears to consider that there is such a requirement, but questions whether the legal standard suggested by the Appellate Body (i.e. "not incapable") is "properly based" on the text of Article XX(a) of the GATT 1994.<sup>295</sup> China also indicates that "even if the phrase 'to protect public morals' requires the measure at issue to be 'not incapable of' protecting public morals, the U.S. measures are incapable of protecting public morals".<sup>296</sup>

7.150. The Panel considers that every case must be assessed on its own merits. The Panel observes that the design test is a preliminary step aimed at assisting and informing the further analysis of whether a measure is provisionally justified under subparagraph (a) of Article XX. That said, it will sometimes be the case that the application of this test at a general level will not necessarily provide useful information that informs this further analysis.

7.151. In the present case, the Panel does not consider that the "design test", if there is one, is an undemanding task to perform.<sup>297</sup> Having said this, the Panel is not convinced that, in the absolute, the imposition of additional duties would always be incapable of protecting public morals or would never be incapable of protecting public morals. In the circumstances of this case, the Panel finds it difficult to assess at any general level whether the measures at issue are "designed" to protect public morals and is therefore not convinced that the intermediate step of such a design test is helpful for its analysis. The more detailed design aspects and consequential understanding of measures may only become apparent once an analysis of the necessity of the measures is advanced further. In this regard the Panel agrees with the Appellate Body that it must not structure its analysis of the "design" step in such a way as to lead it to truncate its investigation prematurely and thereby foreclose consideration of crucial aspects of the "necessity" analysis.<sup>298</sup>

7.152. The Panel recalls its preference for a holistic approach to determining whether the measures at issue are "necessary to protect public morals" within the meaning of Article XX(a).<sup>299</sup> In the process of this holistic analysis, the Panel considers that whether an appropriate nexus exists between the products subject to the additional duties and the public morals objective as invoked by the United States pertains rather to the assessment of the line or balance between the trade-restrictive measures that are acceptable as necessary to protect public morals, and those that are not. For this reason, the Panel will address the parties' (and third parties') arguments related to the nexus between the products subject to additional duties and the public morals objective as invoked by the United States, in the context of the necessity analysis.

7.153. The Panel will therefore continue its holistic examination of the challenged measures to determine whether they are necessary to protect the invoked public morals objective, consistent with Article XX(a).

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<sup>291</sup> China's response to Panel question No. 11, para. 19.

<sup>292</sup> China's response to Panel question No. 11, para. 19.

<sup>293</sup> China's response to Panel question No. 11, para. 21.

<sup>294</sup> United States' second written submission, para. 43.

<sup>295</sup> China's response to Panel question No. 11, para. 19.

<sup>296</sup> China's response to Panel question No. 11, para. 20.

<sup>297</sup> The Appellate Body in *Colombia – Textiles* observed that the "design step" of an analysis under Article XX(a) is not "particularly demanding". (Appellate Body Report, *Colombia – Textiles*, para. 5.70)

<sup>298</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.203. See also Appellate Body Report, *Colombia – Textiles*, para. 5.77.

<sup>299</sup> See para. 7.111 and fn 200 above.

### 7.3.2.4 Whether the measures are *necessary* to protect the public morals objective as invoked by the United States

7.154. After having analysed the public morals objective raised by the United States and whether the measures at issue are designed to protect this public morals objective, the Panel now turns to assess whether the measures are *necessary* to protect the invoked public morals objective.

#### 7.3.2.4.1 Introduction – the nature and purpose of the *necessity* requirement

7.155. The Panel recalls that its interpretation of each element of the subparagraphs of Article XX is informed by the overall need to maintain a balance between the *right* of the United States to invoke the exception of Article XX(a) and the *duty* of the United States to respect the market access rights of China under the GATT 1994.<sup>300</sup> It is clear from the text of Article XX(a) that the mere invocation of a public morals objective under Article XX(a) does not automatically render any WTO-inconsistent action acceptable.

7.156. Pursuant to Article 11 of the DSU, one of a panel's functions is to "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". When carrying out this function, a panel will clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law, as set out in Article 3.2 of the DSU.<sup>301</sup> The Panel's duty as treaty interpreter is thus to examine the words of the covered agreements to determine the parties' intentions.<sup>302</sup> Article 31(1) of the Vienna Convention on the Law of Treaties directs the Panel to interpret the GATT 1994 in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose.<sup>303</sup> One of the corollaries of this general rule of treaty interpretation is the principle of effective treaty interpretation, according to which an interpretation must give meaning and effect to all the terms of a treaty. In effect, an interpreter is "not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>304</sup>

7.157. With these considerations in mind, the Panel begins by focusing on the ordinary meaning of the terms of Article XX(a). The word "necessary" in Articles XX(a), XX(b) and XX(d) of the GATT 1994 regulates and defines the circumstances in which these provisions can be invoked. This is reflected in the requirement that there be a *nexus* between the challenged measures and the values protected, in order for the measures to be shown as necessary.<sup>305</sup> The intensity of this nexus can vary, as the Appellate Body explained in *Korea – Various Measures on Beef* (in the context of Article XX(d)):

Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term

<sup>300</sup> See para. 7.106 above. See also Appellate Body Report, *US – Shrimp*, para. 156; and Panel Report, *US – Gambling*, paras. 6.452 and 6.575.

<sup>301</sup> The text of Article 3.2 of the DSU reads as follows:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

<sup>302</sup> See Appellate Body Reports, *India – Patents (US)*, paras. 45-46; and *India – Quantitative Restrictions*, footnote 23 to para. 94.

<sup>303</sup> Article 31 of the Vienna Convention reads, in relevant parts:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. [...]

<sup>304</sup> See Appellate Body Reports, *US – Gasoline*, p. 23 (DSR 1996:I, 3); and *Korea – Dairy*, para. 80.

<sup>305</sup> See Appellate Body Reports, *US – Gasoline*, p. 16; *US – Gambling*, para. 292; *EC – Seal Products*, para. 5.169; and *Colombia – Textiles*, para. 5.67; and Panel Reports, *Brazil – Taxation*, para. 7.516.

"necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".<sup>306</sup>

7.158. Prior WTO adjudicators have kept this general function of the necessity requirement in mind when "weighing and balancing" factors to assess whether WTO-inconsistent measures are justified under Articles XX(a), (b) or (d).<sup>307</sup>

7.159. This weighing and balancing approach requires an assessment of a series of factors, including (i) the relative importance of the pursued policy objective<sup>308</sup>; (ii) the restrictive impact of the challenged measures on trade<sup>309</sup>; and (iii) the contribution of these measures to the realization of the objective pursued<sup>310</sup> (manifested in the existence of a "genuine relationship of ends and means between the objective pursued and the measure at issue"<sup>311</sup>), followed by an assessment of whether potential WTO-consistent or less trade-restrictive alternatives, suggested by the complainant, are reasonably available to the responding Member.<sup>312</sup> Prior WTO adjudicators have traditionally seen this analysis as a holistic one "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement".<sup>313</sup>

7.160. The Panel also notes that the context of Article XX(a) includes the third recital of the Preamble of the WTO Agreement, which refers to the desire of WTO Members to contribute to "reciprocal and mutually advantageous arrangements directed to the *substantial reduction of tariffs and other barriers to trade* and to the *elimination of discriminatory treatment in international trade relations*".<sup>314</sup> Further, the object and purpose of the covered agreements are focused on the principle of liberalization of trade flows between WTO Members. Accordingly, an interpretation of Article XX(a) allowing any type or range of restrictive trade measures that may otherwise breach a complainant's WTO rights, simply on the basis of an assertion that they were necessary, rather than a demonstration by a respondent of the necessity of the measures, would be contrary both to the text of the Preamble of the WTO Agreement, and to the spirit of the WTO covered agreements. Such an interpretation would reduce the word "necessary" used in Article XX(a) to redundancy and inutility, running counter to the principle of effectiveness in treaty interpretation.

7.161. Against this background, the Panel will examine each of these factors to assess whether the measures at issue are *necessary* to protect the "standards of right or wrong" invoked by the United States (the public morals objective as invoked by the United States).

<sup>306</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161. See also Appellate Body Report, *India – Solar Cells*, para. 5.62.

<sup>307</sup> See e.g. Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; *China – Publications and Audiovisual Products*, para. 242; and *EC – Seal Products*, para. 5.214.

<sup>308</sup> The more important the societal value pursued by the measure at issue, the more easily the measure may be considered to be "necessary". (See Appellate Body Reports, *EC – Asbestos*, para. 172; and *Korea – Various Measures on Beef*, para. 162; and Panel Reports, *Brazil – Taxation*, para. 7.525)

<sup>309</sup> The less restrictive the effects of the measure, the more likely it is to be characterized as "necessary". (See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310)

<sup>310</sup> The greater the contribution, the more easily a measure might be considered to be "necessary". (See Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

<sup>311</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also e.g. Panel Reports, *Brazil – Taxation*, para. 7.526; *EU – Energy Package*, para. 7.1360 (currently under appeal); *Colombia – Textiles*, para. 7.315; and *India – Solar Cells*, para. 7.361; and Appellate Body Reports, *EC – Seal Products*, para. 5.210.

<sup>312</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.215; *China – Publications and Audiovisual Products*, para. 242; and *US – Gambling*, para. 307; and Panel Reports, *Brazil – Taxation*, para. 7.531.

<sup>313</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

<sup>314</sup> Emphasis added. The Panel agrees with prior WTO adjudicators that the text of the preamble is useful for providing interpretative context for the operative provisions being interpreted. (See e.g. Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.749 (currently under appeal))

7.162. The Panel notes that the disputing parties and the third parties agree with the legal test consistently applied in previous disputes, as described above.<sup>315</sup> For this reason, in the next section, the Panel will proceed directly to assess the application of this legal test to the present dispute after briefly noting parties' and third parties' main arguments.

#### **7.3.2.4.2 The Panel's assessment on whether the United States has demonstrated the necessity of the measures at issue**

7.163. The United States argues that the additional duties at issue are "necessary" to protect public morals because they "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".<sup>316</sup> According to the United States, "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"<sup>317</sup>, and for that reason, "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".<sup>318</sup> The United States also asserts that the measures are necessary to achieve the public morals objective as invoked by the United States because it was only after their adoption that China agreed to enter into negotiations with the United States to address the concerns documented in the Section 301 Report.<sup>319</sup> Finally, the United States asserts that so long as a WTO Member can establish that a measure that aims to influence the policies or practices of another Member is necessary to protect public morals, that measure can be justified under Article XX(a).<sup>320</sup>

7.164. According to China, the United States' arguments asserting that the measures are *necessary* are unrelated to the necessity analysis usually conducted under Article XX(a) of the GATT 1994.<sup>321</sup> China considers that the interpretation of the term "necessary", as suggested by the United States, would render the necessity analysis meaningless in practice, because it would allow WTO Members to "ratchet up duties on any product to any level for any length of time that the Member deems appropriate, regardless of whether the products contain or embody morally offensive content or conduct".<sup>322</sup> China further considers that the measures at issue are not "necessary to protect public morals" within the meaning of Article XX(a) because "the importance of any interest in combatting particular criminal conduct that the United States may theoretically possess is significantly outweighed by the lack of contribution of the U.S. measures to the achievement of that objective and their severe trade restrictiveness".<sup>323</sup> In China's view, the measures do not contribute to any "public morals" objective within the meaning of Article XX(a) because they are applied to products on the basis of economic objectives and not on the basis of the morally offensive content of the products themselves.<sup>324</sup> China asserts that, even if the Panel were to find that certain products covered by the measures embody morally offensive conduct, which is a position China does not

<sup>315</sup> See United States' second written submission, paras. 51-56; China's second written submission, paras. 53-61; Australia's third-party statement, paras. 14-15; Australia's integrated executive summary, paras. 11-12; Brazil's third-party submission, paras. 11-12; Brazil's integrated executive summary, para. 11; European Union's third-party submission, paras. 49-55; Singapore's third-party statement, paras. 11-12; and Singapore's integrated executive summary, paras. 11-12.

<sup>316</sup> United States' second written submission, para. 53.

<sup>317</sup> United States' first written submission, para. 78. See also United States' second written submission, paras. 38 and 60; United States' response to Panel question No. 12, para. 49; United States' response to Panel question No. 15, para. 65; and United States' response to Panel question No. 21, para. 2.

<sup>318</sup> United States second written submission, paras. 38 and 60. See also United States' response to Panel question No. 12, para. 49; and United States' response to Panel question No. 21, para. 2.

<sup>319</sup> United States second written submission, para. 40. The United States contends that it has made significant efforts to change China's conduct, among others through "dialogue, admonishment, multilateral forums, bilateral mechanisms, and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government". According to the United States, because none of these efforts "have proven to be durably effective", imposition of the tariffs was necessary. (United States' first written submission, para. 80. (footnotes omitted)) However, the United States also notes that even after the adoption of the measures, "China continues to engage in the unfair and immoral practices documented in the Section 301 Report." (United States' comment on China's response to Panel question No. 23, para. 23; and Exhibit US-35)

<sup>320</sup> United States' second written submission, para. 64.

<sup>321</sup> China's second written submission, para. 53.

<sup>322</sup> China's second written submission, para. 54.

<sup>323</sup> China's second written submission, para. 55.

<sup>324</sup> China's second written submission, para. 56.



concede, a "genuine ends-means relationship would still not exist".<sup>325</sup> Finally, China asserts that "the United States believes that a measure can be 'necessary' within the meaning of Article XX(a) whenever it is designed to coerce another Member into adopting a particular policy"<sup>326</sup>; China continues that coercing another Member to change policies cannot be a matter of necessity under Article XX(a).

7.165. Several third parties have also discussed the necessity analysis under Article XX(a). Australia, Brazil and Singapore emphasize that under the "necessity test", as developed by prior WTO adjudicators, only measures that are *necessary* are permitted under Article XX(a). The European Union agrees that the necessity test involves an assessment of the contribution of the challenged measure to the policy goal pursued. According to the European Union, in the present case, the contribution of the measures at issue to the objective invoked by the United States is "too indirect"<sup>327</sup> and their trade restrictiveness exceeds that of measures found provisionally justified under Article XX(a) in previous cases, because in the present case the measures "apply indiscriminately to all imports of a very large category of products, regardless of whether they have been identified as morally tainted".<sup>328</sup>

7.166. The Panel now examines the factors traditionally assessed in the consideration whether the challenged measures (the additional duties) are necessary.

#### **7.3.2.4.2.1 Importance of the pursued policy objective**

7.167. The United States asserts that the measures pursue the vitally important objective of upholding US norms against theft and coercion, and that such values are "of tremendous importance to U.S. society and the functioning of the U.S. economy".<sup>329</sup> China accepts that "addressing problems relating to crime could, in theory, be characterized as serving a societal interest"<sup>330</sup>, but considers that "the importance of any interest in combatting particular criminal conduct that the United States may theoretically possess is significantly outweighed by the lack of contribution of the U.S. measures to the achievement of that objective and their severe trade restrictiveness".<sup>331</sup>

7.168. The Panel recalls the deference accorded to WTO Members to define the scope of the public morals they want to protect in their societies, corresponding to their own system and scales of values. The analysis of the necessity of a challenged measure includes an assessment of the importance of the pursued public policy objective not in general, but *for the responding WTO Member*, in light of the relevant public morals it has invoked as applicable in its territory. During this assessment, prior WTO adjudicators have focused on examining the protected societal interest, "rather than assuming that by virtue of its status as a 'public moral' objective the interest is *per se* vital or important to the highest degree".<sup>332</sup> For instance, in *US – Gambling*, the panel examined the interests and values protected by the challenged measure and concluded that these interests and values "serve very important societal interests that can be characterized as 'vital and important in the highest degree'".<sup>333</sup> Similarly, in *EC – Seal Products*, the panel noted the European Union's claim that the specific moral concern with regard to the protection of animals was regarded as a value of high importance in the European Union, and found that "the protection of such public moral concerns is indeed an important value or interest".<sup>334</sup>

7.169. In the circumstances of the present case, the Panel notes that the public morals objective as invoked by the United States reflects societal interests that the United States describes as highly important to it.

<sup>325</sup> China's second written submission, para. 57.

<sup>326</sup> China's second written submission, para. 54.

<sup>327</sup> European Union's third-party submission, para. 54.

<sup>328</sup> European Union's third-party submission, para. 55.

<sup>329</sup> United States' second written submission, para. 52.

<sup>330</sup> China's second written submission, para. 55.

<sup>331</sup> China's second written submission, para. 55.

<sup>332</sup> Panel Reports, *Brazil – Taxation*, para. 7.591.

<sup>333</sup> Panel Report, *US – Gambling*, para. 6.492. The Appellate Body upheld this finding.

<sup>334</sup> Panel Report, *EC – Seal Products*, para. 7.632. The Appellate Body upheld this finding.



### 7.3.2.4.2.2 Restrictive impact of the challenged measures on trade

7.170. The United States asserts that the measures at issue are not overly trade restrictive, because they "do not impose a ban on the import of any Chinese products, [but] tariffs at moderate levels, and [...] calibrated to obtain the elimination of the conduct documented in the Section 301 Report".<sup>335</sup> China argues that measures at issue are severely trade-restrictive, because they "extend to essentially all imports from China and have resulted in increases of 25 percent above the bound tariff rates"<sup>336</sup>, which "have reduced the ability of Chinese imports to compete in the U.S. market by increasing their price relative to domestically-produced products and imports from third countries not subject to the additional import duties".<sup>337</sup>

7.171. The Panel observes that the measures at issue are not an import ban, but rather additional tariff duties on a wide range of products imported from China. As the panel in *Colombia – Textiles* observed, a "tariff is less restrictive on international trade than an import ban or measure having the effects of a ban"<sup>338</sup>, but still has "definite effects on international trade, by reducing the capacity of the products concerned to compete on [the] market".<sup>339</sup> However, particularly given the wide range of products imported from China subject to the additional duties, the Panel notes that the measures have significant effects on international trade.

### 7.3.2.4.2.3 Contribution of the measures to the pursued public morals objective as invoked by the United States

7.172. The United States contends that the measures at issue make a substantial contribution to the objective of protecting US public morals, because (i) they raise the cost of China's practices and reduce China's incentive to continue engaging in such conduct<sup>340</sup>; (ii) they signal to US citizens that China's trading conduct is unacceptable and will not be rewarded in the marketplace, "and thereby reduce the incentive for U.S. actors to adopt behavior similar to China's"<sup>341</sup>; (iii) China entered into negotiations with the United States to address the concerns documented in the Section 301 Report after the adoption of the measures at issue.<sup>342</sup> The United States asserts that it "has made out a *prime facie* case that the measures at issue contribute to the protection of public morals and China has presented no arguments that would rebut this conclusion".<sup>343</sup>

7.173. China asserts that the measures do not contribute to any public morals objective within the meaning of Article XX(a) because they are applied to products on the basis of the United States' economic objectives and not on the basis of the morally offensive content of the products themselves.<sup>344</sup> In China's view, even if the United States "may also have imposed tariffs on certain products that could theoretically embody alleged morally offensive conduct"<sup>345</sup>, this "is simply a function of the overbreadth of the U.S. measures, not evidence of a genuine ends-means relationship".<sup>346</sup>

7.174. The Panel recalls that the extent to which the challenged measures contribute to the realization of the objective pursued is one of the aspects to be considered in evaluating whether they are "necessary" within the meaning of Article XX(a).<sup>347</sup> There is no generally applicable standard requiring the use of a pre-determined threshold of contribution.<sup>348</sup> For instance, in *EC – Seal Products*

<sup>335</sup> United States' second written submission, para. 55.

<sup>336</sup> China's second written submission, para. 59.

<sup>337</sup> China's second written submission, para. 59.

<sup>338</sup> Panel Report, *Colombia – Textiles*, para. 7.444.

<sup>339</sup> Panel Report, *Colombia – Textiles*, para. 7.442.

<sup>340</sup> United States' second written submission, para. 53.

<sup>341</sup> United States' second written submission, para. 54.

<sup>342</sup> United States' second written submission, para. 53.

<sup>343</sup> United States' comment on China's response to Panel question No. 23, para. 21.

<sup>344</sup> China's second written submission, para. 56.

<sup>345</sup> China's second written submission, para. 57.

<sup>346</sup> China's second written submission, para. 57.

<sup>347</sup> See e.g. Appellate Body Report *Korea – Various Measures on Beef*, para. 163. The Panel observes that in this case, the Appellate Body considered the choice of the measure and its level of trade restrictiveness to be indicative of the level of protection sought by the adopting Member: "[w]e think it unlikely that Korea intended to establish a level of protection that totally eliminates fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports." (Ibid. para. 178)

<sup>348</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.213.

the Appellate Body disagreed with the European Union's argument that a contribution ought to be "material" and specifically cautioned against the use of a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis.<sup>349</sup>

7.175. Prior WTO adjudicators have consistently held that contribution exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".<sup>350</sup> They have thus determined the *level of contribution* to be made by the challenged measures by assessing the extent to which these measures were "apt to" contribute to the objectives pursued.<sup>351</sup> This assessment can be either in quantitative or in qualitative terms<sup>352</sup> and panels generally enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize their analysis.<sup>353</sup> Therefore, as previous WTO adjudicators have done, the Panel will focus on determining the existence of a *genuine relationship of ends and means* between the public morals objective as invoked by the United States and the measures at issue.<sup>354</sup>

7.176. The Panel begins by noting the United States' assertion that the measures "make a substantial contribution"<sup>355</sup> to the objective of protecting US public morals, because they raise the cost of China's practices and reduce China's incentive to continue engaging in them, and they reduce the incentive for US actors to engage in similar practices. The United States also notes that China entered into negotiations with the United States to address the concerns documented in the Section 301 Report after the adoption of the measures at issue.<sup>356</sup> The Panel recalls, however, that the contribution of a measure cannot be resolved on the basis of assertion alone, but must be supported by evidence and explanation demonstrating the contribution of the measure to the objective pursued, that would assist the Panel in arriving at its overall conclusion on whether the necessity test is met. Accordingly, the Panel will therefore consider the further arguments that the parties make in this area.

7.177. In this connection, the Panel notes that both the United States and China appear to accept the need for there to be a sufficient nexus between the public morals objective and the chosen measures. They diverge, however in their views on how this relationship can be demonstrated and reflected in the choice of the measures and their contribution to the invoked policy goal. Responding to China, the United States asserts that the text of Article XX(a) does not require a direct correlation or "embodiment" between the products subject to the measure at issue and the "public morals" objective invoked by the defending WTO Member<sup>357</sup>, because "Article XX(a) refers to measures 'necessary to protect public morals' – full stop – not measures necessary to protect public morals from morally offensive products".<sup>358</sup> According to the United States, "[a] measure may be necessary to protect public morals without being limited to a product that itself offends public morals".<sup>359</sup> China, although in the context of its arguments on the design test rather than the necessity test under Article XX(a), argues that Article XX(a) cannot be interpreted as permitting measures that target non-morally offensive products.<sup>360</sup> According to China, such an interpretation "is incorrect as a matter of treaty interpretation, unsupported by the relevant jurisprudence, and would set a dangerous precedent".<sup>361</sup> In China's view, "a measure that targets products on grounds other than their embodiment of morally offensive content or conduct is not genuinely related to enforcing

<sup>349</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.216.

<sup>350</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also e.g. Panel Reports, *Brazil – Taxation*, para. 7.526; *EU – Energy Package*, para. 7.1360 (currently under appeal); *Colombia – Textiles*, para. 7.315; and *India – Solar Cells*, para. 7.361; and Appellate Body Reports, *EC – Seal Products*, para. 5.210.

<sup>351</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.213.

<sup>352</sup> See Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 146; and *Argentina – Financial Services*, para. 6.234.

<sup>353</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also Appellate Body Reports, *EC – Seal Products*, para. 5.210.

<sup>354</sup> See e.g. Panel Reports, *Brazil – Taxation*, para. 7.526; *EU – Energy Package*, para. 7.1360 (currently under appeal); *Colombia – Textiles*, para. 7.315; and *India – Solar Cells*, para. 7.361; and Appellate Body Reports, *EC – Seal Products*, para. 5.210.

<sup>355</sup> United States' second written submission, para. 53.

<sup>356</sup> See para. 7.172 above.

<sup>357</sup> United States' second written submission, para. 59.

<sup>358</sup> United States' response to Panel question No. 21, para. 1.

<sup>359</sup> United States' response to Panel question Nos. 10 and 11, para. 41.

<sup>360</sup> China's second written submission, paras. 37-38.

<sup>361</sup> China's second written submission, para. 43.

policies for the protection of public morals".<sup>362</sup> The European Union appears to agree with China and asserts that a "tariff increase on a very large category or products, regardless, apparently, of whether the imports of the products concerned pose, by themselves, any threat to the public morals"<sup>363</sup> makes the relationship between the measures at issue and the public policy objective pursued by the United States "too indirect".<sup>364</sup>

7.178. For the purpose of this dispute the Panel does not consider it necessary to resolve at an abstract level the debate between the parties on the above issue. Rather, the Panel seeks to understand the United States' explanation of how the specific measures that it chose to impose, i.e. additional duties on specifically selected products from China, contribute to the public morals objective invoked. The Panel considers that to demonstrate the existence of such a contribution, and in particular of a genuine relationship of ends and means between the public morals objective and the measures at issue, the United States must demonstrate how the additional duties are apt to contribute to the public morals objective as invoked by the United States. The Panel recalls that the measures in this case are additional duties applying to a very wide range of products.<sup>365</sup> The Panel considers that a genuine relationship of ends and means between the measures the United States has chosen and the public morals objective could be discerned through demonstrating the existence of a nexus between these chosen measures and the public morals objective as invoked by the United States. In this way, the United States would be able to point to or prove a genuine relationship of ends and means between the measures at issue and the invoked public morals objective that would highlight the contribution the measures make to the stated objective and assist the Panel in reaching its conclusions on the necessity test as a whole. Therefore, the Panel will direct its enquiry towards seeking to identify the nexus between the measures the United States has chosen (i.e. additional duties on a wide range of products) and the US public morals concerns, in order to inform the examination of the question of whether and how the measures contribute, and could be shown or demonstrated to be "necessary", to protect public morals within the meaning of Article XX(a).

7.179. The Panel understands the United States to argue that a WTO Member that invokes an Article XX(a) defence is not required to limit the products subject to the WTO-inconsistent measures that it wishes to justify only to products which offend public morals. The United States asserts that "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".<sup>366</sup> In the Panel's view, the scope of Article XX(a) is intrinsically limited and is circumscribed, *first*, by the determination of the specific content of the public morals that the responding Member wishes to protect, and, *second*, by the requirement that the measure a Member has chosen can be demonstrated to be *necessary* to the achievement of this public morals objective. In other words, even assuming, *arguendo*, that a measure does not have to only apply to products that are considered to embody morally offensive conduct to be justified under Article XX(a), the respondent still has to demonstrate that the measure it chose (in this case, additional duties on a wide range of products from China) is apt to contribute to protecting public morals concerns, by establishing the relevant nexus, and also that such measures do not go beyond what is necessary within the meaning of Article XX(a).

7.180. For these reasons, the Panel considers that, in its examination of the contribution of the measures to the pursued public morals objective as invoked by the United States, it must assess the explanation and evidence submitted by the United States that bears on the relationship of ends and means between the products subject to additional duties and the US public morals concerns.

7.181. Accordingly, the Panel will now analyse the contribution of each of the two challenged measures to the pursued public morals objective as invoked by the United States.

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<sup>362</sup> China's response to Panel question No. 10, para. 17.

<sup>363</sup> European Union's third-party submission, para. 44 and integrated executive summary, para. 11. The European Union also raises this issue with regard to the design of the measures.

<sup>364</sup> European Union's third-party submission, para. 44.

<sup>365</sup> This contrasts with previous cases where Article XX(a) has been invoked, in which the measures at issue were more narrowly targeted or focused on specific goods or services sectors (Panel Reports and Appellate Body Reports, *US – Gambling, China – Publications and Audiovisual Products; EC – Seal Products; Colombia – Textiles*; and *Brazil – Taxation*).

<sup>366</sup> United States' second written submission, para. 64.

***Contribution of the imposition of additional duties on List 1 products to the pursued public morals objective as invoked by the United States***

**Products covered by List 1**

7.182. The United States asserts that its argument that the measures at issue are necessary "is not contingent on the application of those measures to any particular class of morally offensive products"<sup>367</sup>, but that – in any event – List 1 covers products that embody morally offensive conduct.<sup>368</sup> The United States affirms that the products subject to additional tariffs under List 1 "were found to benefit from the trade policies documented in the Section 301 Report, including 'Made in China 2025'".<sup>369</sup> According to the United States, 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".<sup>370</sup> This is demonstrated by the significant emphasis put in the legal instruments through which the United States adopted and implemented the measures at issue on "Made in China 2025 and the Chinese industries that benefit from that initiative"<sup>371</sup>. The United States also notes that since "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, [...] 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".<sup>372</sup>

7.183. China asserts that there is no "genuine relationship of ends and means" between the measures at issue and the public morals objective as invoked by the United States, because the measures at issue "are not applied based on the morally offensive content of the products themselves".<sup>373</sup> According to China, the measures at issue do not target products "on the grounds that they contain content or embody conduct offensive to such concerns".<sup>374</sup> China notes that (i) the United States determined the value of the products that would be covered by the measures based on the "estimated harm to the U.S. economy" and selected products based on their "likely impact on U.S. consumers"<sup>375</sup>; (ii) the United States "apparently weighed whether the same products could be sourced from alternative countries"<sup>376</sup>; and (iii) the United States' approach to evaluating exclusions from the application of the additional duties reveals the economic objectives pursued by the United States.<sup>377</sup> According to China, all these elements establish that the measures at issue "are designed to punish China for alleged harm to the U.S. economy while avoiding causing economic harm to U.S. consumers".<sup>378</sup>

7.184. In its third-party submission, the European Union also asserts that the measures at issue provide for tariff increases on a "very large category of products, regardless, apparently, of whether the imports of the products concerned pose, by themselves, any threat to the public morals invoked by the United States".<sup>379</sup> The European Union notes that this makes the measures at issue "far more trade restrictive than the measures found provisionally justified under Article XX(a) of the GATT 1994 in previous cases, because they apply indiscriminately to all imports of a very large category of products, regardless of whether they have been identified as morally tainted".<sup>380</sup>

<sup>367</sup> United States' second written submission, para. 60.

<sup>368</sup> United States' second written submission, para. 62.

<sup>369</sup> United States' second written submission, para. 34. See also United States' opening statement at the first meeting of the Panel, para. 48; United States' response to Panel question No. 12, para. 51; United States' second written submission, para. 62; and United States' response to Panel question No. 21, para. 4.

<sup>370</sup> United States' response to Panel question No. 21, para. 4.

<sup>371</sup> United States' response to Panel question No. 21, para. 8.

<sup>372</sup> United States' second written submission, para. 61; and United States' response to Panel question No. 21, para. 3.

<sup>373</sup> China's second written submission, para. 56.

<sup>374</sup> China's second written submission, para. 44.

<sup>375</sup> China's second written submission, para. 46. (emphasis omitted)

<sup>376</sup> China's second written submission, para. 46. According to China, this demonstrates that "[e]vidently, the covered products are not in and of themselves offensive to the public morals of the United States, otherwise the same products from alternative countries would pose the same risk of offence." (Ibid. para. 46)

<sup>377</sup> China's second written submission, para. 48.

<sup>378</sup> China's second written submission, para. 48.

<sup>379</sup> European Union's third-party submission, para. 44 and integrated executive summary, para. 11.

<sup>380</sup> European Union's third-party submission, para. 55.

7.185. As noted previously, the Panel does not consider it necessary to resolve the debate between the parties and third parties on this issue in the abstract. Cases and disputes in which Article XX(a) is invoked will concern different public morals, measures and factual circumstances that will need to be considered by each adjudicator to determine whether the requisite nexus between the invoked public morals and the measures is demonstrated. Accordingly, the panel will focus on the choice of specific measures that a respondent has selected to determine whether such a nexus exists. Considering the evidence before it, the Panel understands that the selection process of products to be covered by List 1 began with the publication of a Notice in the Federal Register on 6 April 2018.<sup>381</sup> The Notice of 6 April 2018 summarized the findings of the Section 301 Report and proposed that "appropriate action" with regard to some of the US concerns related to Chinese acts, policies, and practices documented in the Section 301 Report, would include the imposition of additional duties on products from China. The Notice of 6 April 2018 proposed a list of products (proposed List 1) that would be subject to the additional duties.

7.186. The Notice of 6 April 2018 explained the process of selection of the products covered by this proposed List 1 as follows:

The list of products 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.

*The value of the list is approximately \$50 billion* in terms of estimated annual trade value for calendar year 2018. This level is appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China's harmful acts, policies, and practices.<sup>382</sup>

7.187. Although the Notice of 6 April 2018 indicates that the imported products subject to additional duties "benefit[ted] from Chinese industrial policies, including Made in China 2025", the United States did not provide an explanation or evidence to further substantiate this assertion.<sup>383</sup> The Panel observes that the Notice of 6 April 2018 assessed the estimated annual trade value to be covered by the proposed additional duties, with the conclusion that this level was appropriate *in light of the estimated harm to US economy and to obtain elimination of China's practices* documented in the Section 301 Report.

7.188. Following a comment period, on 20 June 2018 the United States published a second Notice in the Federal Register.<sup>384</sup> The Notice of 20 June 2018 contained the final list of 818 tariff

<sup>381</sup> Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, vol. 83, No. 67 (6 April 2018), p. 14906 (Exhibit CHN-10) (Notice of 6 April 2018).

<sup>382</sup> Notice of 6 April 2018 (Exhibit CHN-10), p. 14907. (emphasis added)

<sup>383</sup> In its response to Panel question No 16(c) ("Could you please indicate which industries are concerned by China's alleged acts, policies and practices relating to technology transfer, protection of intellectual property and innovation, explaining whether and how products made or services provided by these industries were considered in the process of the adoption of the additional import duties on List 1 and on List 2 products?"), the United States limited its response to reiterating its statement that List 1 products "were found to benefit from the Chinese policies detailed in the Section 301 Report, including Made in China 2025" without providing any further explanation or evidence. (United States' response to Panel Question 16(c), para. 73) The United States referred to a broad list of industrial sectors "that contribute to or benefit from the 'Made in China 2025' industrial policy" and asserted that "[a]ll U.S. industries are ultimately concerned and affected by China's forced technology transfer policies and practices." (United States' response to Panel Question 16(c), para. 73)

<sup>384</sup> 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, Federal Register, Vol. 83, No. 119 (20 June 2018), p. 28710 (Notice of 20 June 2018) (Exhibit CHN-2).

subheadings of Chinese imports, that were subject to an additional duty of 25% (List 1).<sup>385</sup> With respect to the selection of the products to be covered by the additional duties, the Notice of 20 June reads as follows:

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.<sup>386</sup>

7.189. The Notice of 20 June also refers to a statement by the United States President of 29 May 2018, according to which

Under Section 301 of the Trade Act of 1974, the United States will impose a 25 percent tariff on \$50 billion of goods imported from China containing industrially significant technology, including those related to the 'Made in China 2025' program.<sup>387</sup>

7.190. The Panel notes the United States' assertions that it has imposed the additional duties on products that benefitted from China's "immoral" practices documented in the Section 301 Report. The United States further reiterated that the measures at issue are "structured so as to target particular types of goods that benefit from the conduct detailed in the Section 301 Report" and, in this regard, they "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".<sup>388</sup> However, the United States has not explained how the legal instruments through which the United States adopted and implemented the measures at issue support this assertion. The most elaborate explanation of the selection process is provided in the Notice of 6 April 2018 which reads: "[t]rade analysts from several US Governmental agencies identified products that benefit from Chinese industrial policies".<sup>389</sup> Moreover, the legal instruments through which the United States adopted and implemented the measures at issue (the Notice of 20 June 2018, and by reference – the president's statement of 29 May 2018) indicate that the covered products "*contain[] industrially significant technology, including those related to the 'Made in China 2025' programme*".<sup>390</sup> The legal instruments through which the United States adopted and implemented the measures do not provide any further explanation.

7.191. In the Panel's view, the legal instruments through which the United States adopted and implemented the measures at issue do not explain the relationship between the chosen measures – additional duties applied to a range of specified products – and the public morals objective pursued by the United States. The United States has also not provided any other evidence in support of its assertion that the products on which it imposed additional duties benefitted from practices of China that the United States considered to be contrary to its public morals, nor evidence that would more generally demonstrate how the products it selected for additional duties treatment contributed to its public morals objective.

7.192. Moreover, the Panel observes that the Section 301 Report focuses on a certain number of Chinese *industrial policies*, including the "Made in China 2025" industrial policy<sup>391</sup>, and finds that China adopted the documented practices and policies "to advance China's industrial policy

<sup>385</sup> The Panel examines the process of the initial narrowing of the range of products covered by List 1 in paras. 7.196-7.201 below.

<sup>386</sup> Notice of 20 June 2018 (Exhibit CHN-2), p. 28711.

<sup>387</sup> Notice of 20 June 2018 (Exhibit CHN-2), p. 28711, quoting Statement on Steps to Protect Domestic Technology and Intellectual Property from China's Discriminatory and Burdensome Trade Practices.

<sup>388</sup> United States' second written submission, para. 48.

<sup>389</sup> Notice of 6 April 2018 (Exhibit CHN-10), p. 14907.

<sup>390</sup> Notice of 20 June 2018 (Exhibit CHN-2), p. 28711 (emphasis added).

<sup>391</sup> The Section 301 Report refers to "the National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020) (MLP), the State Council Decision on Accelerating and Cultivating the Development of Strategic Emerging Industries (SEI Decision), and, more recently, the Notice on Issuing 'Made in China 2025' (Made in China 2025 Notice)". (Section 301 Report (Exhibit US-1), p. 10, footnotes omitted)

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'<sup>392</sup>. The Section 301 Report does not seem to contain a comprehensive list of industries affected by the alleged Chinese acts, practices, or policies, that engage the public morals invoked by the United States in this dispute. Instead, the document appears to mention sectors that have allegedly been the focus of these practices, or that are illustrative of China's actions. These sectors include agriculture, automotive (including new energy vehicles), aviation and aerospace, financial services, biotechnology, chemicals, educational services, electrical generation and transmission equipment, energy (including new energies and nuclear power), environmental technology, exploration and development of oil and natural gas, information technology, integrated circuits advanced manufacturing, marine technology, medical devices, mining, pharmaceuticals, real estate and housing, robotics and automated machine tools, steel, telecommunications, transportation, water and mineral resources.<sup>393</sup> An Update to the Section 301 Report<sup>394</sup> specifies that "[i]ndustrial 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".<sup>395</sup> The United States asserts that "[a]ll U.S. industries are ultimately concerned and affected by China's forced technology transfer policies and practices".<sup>396</sup>

7.193. That said, the additional duties on List 1 products do not apply to all Chinese imports, but as noted above, only to a selection of products that the United States asserts clearly benefit from the specific policies that are the subject of the US public morals concerns.<sup>397</sup> In asserting the contribution that the additional duties on these products have to the stated US public morals objectives, the United States points to a relationship between the specific products in List 1 to this stated contribution.<sup>398</sup> Accordingly, the Panel will investigate this relationship further.

7.194. Following a preliminary review of the tariff lines subject to the additional duties, the Panel notes that certain product categories do not appear closely related to the list of affected industrial policies discussed in the Section 301 Report. List 1 products include fishery products, cosmetics (if not considered part of the chemical industry), textiles, wood, wooden products and paper, and possibly certain construction material. From the evidence presented to it, the Panel finds it unclear how the United States associated China's sectoral industrial policies with specific products within certain economic sectors that benefit from China's policies and practices considered to violate the public morals invoked by the United States.<sup>399</sup>

7.195. The Panel continues its examination of the additional duties actually imposed on List 1 products to determine the extent to which the imposition of these additional duties on List 1 products contributes to the pursued public morals objective as invoked by the United States.

### **The initial narrowing of the range of products covered by List 1**

7.196. The Panel recalls that, as described before, the selection process of products to be covered by List 1 began with the publication of a Notice in the Federal Register on 6 April 2018. The Notice of 6 April 2018 proposed a list of products with an approximate value of USD 50 billion (proposed List 1) and invited comments from interested persons on any aspect of the proposed action, including (i) the specific products to be subject to increased duties; (ii) the level of the increase, if any, in the

<sup>392</sup> United States response to Panel question No. 21, para. 7; referring to Section 301 Report (Exhibit US-1), pp. 17, 20, 27, 29, 36, 63, 149, 150, and 153; and quoting Section 301 Report (Exhibit US-1), p. 14.

<sup>393</sup> See Section 301 Report, (Exhibit US-1), pp. 11, 13, 14, 23, 26, 65, 100, 156, and Appendix D.

<sup>394</sup> 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) (Exhibit US-2) (Update to Section 301 Report).

<sup>395</sup> Update to Section 301 Report (Exhibit US-2), p. 7.

<sup>396</sup> United States' response to Panel question No. 16(c), para. 73.

<sup>397</sup> United States' second written submission, paras. 34 and 62.

<sup>398</sup> See United States' second written submission, para. 54: "[t]he 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."

<sup>399</sup> On that point, China asserts that "[m]erely listing a series of economic sectors that supposedly 'benefit from' various policies does not prove that USTR determined that *specific products within those sectors* embody the allegedly 'unfair' trade acts, policies, and practices." (China's second written submission, para. 50 (emphasis original))



rate of duty; and (iii) the appropriate aggregate level of trade to be covered by additional duties.<sup>400</sup> Following the comment period, the United States published the Notice of 20 June 2018 which contained the final list of products with an approximate value of USD 34 billion (final List 1). Compared with the proposed List 1 in the Notice of 6 April 2018, the final List 1 was narrowed down:

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.<sup>401</sup>

7.197. China has challenged the consistency of the additional duties on the final List 1 and not on the proposed List 1 with the GATT 1994. However, the Panel considers that the process of initial narrowing of the range of products covered by List 1 is an aspect of the measure at issue that may help understand the existence of a genuine relationship of ends and means between the measure at issue and the public morals objective as invoked by the United States.

7.198. The final List 1 covers some, but not all, of the products included in the proposed List 1. Following a comparative examination of the two Notices, the Panel observes that products covered by the proposed List 1 that were later excluded from the final List 1 include certain inorganic chemicals<sup>402</sup>, all organic chemicals included in the proposed List 1<sup>403</sup>, all pharmaceutical products included in the proposed List 1<sup>404</sup>, certain rubber articles<sup>405</sup>, all iron and steel included in the proposed List 1<sup>406</sup>, all articles of iron or steel included in the proposed List 1<sup>407</sup>, all aluminium and aluminium articles included in the proposed List 1<sup>408</sup>, all miscellaneous articles of base metal included in the proposed List 1<sup>409</sup>, certain nuclear reactors, boilers, machinery and mechanical appliances and parts thereof<sup>410</sup>, certain electrical machinery and equipment and parts thereof, sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles<sup>411</sup>, certain vehicles other than railway or tramway rolling stock, and parts and accessories thereof<sup>412</sup>, certain aircraft, spacecraft, and parts thereof<sup>413</sup>, certain ships, boats and floating structures<sup>414</sup>, certain optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus and parts and accessories thereof<sup>415</sup>, all clocks and watches and parts thereof included in the proposed List 1<sup>416</sup>, all arms and ammunition and parts and accessories thereof included in the proposed List 1<sup>417</sup>, and all furniture, bedding, mattresses and other related products included in the proposed List 1.<sup>418</sup>

<sup>400</sup> Notice of 6 April 2018 (Exhibit CHN-10), p. 14908.

<sup>401</sup> Notice of 20 June 2018 (Exhibit CHN-2), p. 28711. (emphasis added)

<sup>402</sup> Subheadings 28443010, 28443020, and 28443050 from the United States' Harmonized Tariff Schedule (HTSUS).

<sup>403</sup> All subheadings from Chapter 29 (Organic chemicals) of the HTSUS.

<sup>404</sup> All subheadings from Chapter 30 (Pharmaceutical products) of the HTSUS.

<sup>405</sup> Subheadings 40610000, 40091200, 40094200, 40101100, 40121980, and 40169915 of the HTSUS.

<sup>406</sup> All subheadings from Chapter 72 (Iron and steel) of the HTSUS.

<sup>407</sup> All subheadings from Chapter 73 (Articles of iron and steel) of the HTSUS.

<sup>408</sup> All subheadings from Chapter 76 (Aluminum and articles thereof) of the HTSUS.

<sup>409</sup> All subheadings from Chapter 83 (Miscellaneous articles of base metal) of the HTSUS.

<sup>410</sup> For instance, subheadings 84159040, 84159080, and others of the HTSUS.

<sup>411</sup> For instance, subheadings 85073080, 85079040, 85192000, and others of the HTSUS.

<sup>412</sup> Subheading 87141000 of the HTSUS.

<sup>413</sup> Subheading 88010000 of the HTSUS.

<sup>414</sup> Subheading 89079000 of the HTSUS.

<sup>415</sup> For instance, subheadings 90079140, 90079180, 90191060, and others of the HTSUS.

<sup>416</sup> All subheadings from Chapter 91 (Clocks and watches and parts thereof) of the HTSUS.

<sup>417</sup> All subheadings from Chapter 93 (Arms and ammunition; parts and accessories thereof) of the HTSUS.

<sup>418</sup> All subheadings from Chapter 94 (Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated sign illuminated nameplates and the like; prefabricated buildings) of the HTSUS.

7.199. This narrowing of the range of products covered by List 1, in itself, does not support a specific conclusion with respect to the relationship between the challenged measure and the public morals objective as invoked by the United States. In addition, the legal instruments through which the United States implemented this narrowing of the range of products covered by List 1 do not indicate any particular relationship between the narrowing process of List 1 and the public morals objective as invoked by the United States.

7.200. Rather, the documents the parties submitted suggest that the narrowing of the range of products covered by List 1 was based on considerations related to the likely risks of disruptions to the US economy and to the value of imports covered by the additional duties on the "estimated harm to the U.S. economy".<sup>419</sup> The elimination of certain imported products from List 1 does not appear to have considered the potential harm to the invoked public morals objective, nor the coherence of the policy goal pursued, in the process of narrowing the range of products covered by List 1.<sup>420</sup>

7.201. Therefore, the narrowing of the range of products covered by List 1 does not indicate how the United States sought to ensure, or how it would enable the United States to demonstrate, a genuine relationship of ends and means between the invoked objective of public morals and the additional duties imposed on List 1 products.

### **The exclusion of particular products from the scope of the additional duties**

7.202. The Notice of 20 June 2018 envisages the exclusion of some products from the scope of the additional duties. The Notice of 20 June 2018 refers to the following considerations that warrant the establishment of a process allowing stakeholders to request the exclusion of particular products from the additional duties: (i) specific products that were only available from China; (ii) the imposition of additional duties on the specific products would cause severe economic harm to a US interest, and (iii) the specific products were not strategically important or related to the "Made in China 2025" programme.<sup>421</sup>

7.203. On the basis of these considerations, on 11 July 2018 the United States published Procedures for requests for exclusion of particular products from the additional duties imposed on List 1 products (Procedures for exclusion).<sup>422</sup> According to these Procedures for exclusion, any request for exclusion from the additional duties of a particular product covered by List 1 must provide the rationale for the requested exclusion, addressing the following factors: (i) whether the particular product is available only from China and whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries; (ii) whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other US interests; and (iii) whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial programmes.<sup>423</sup>

7.204. The United States explained the process for granting product exclusions in the course of the proceedings.<sup>424</sup> This process appears to involve two stages. First, in the course of a "public submission process", USTR publicly posts all received requests for product exclusions. Interested parties may support or oppose any exclusion request. If a request is opposed, the requestor is given an opportunity to respond. All these additional submissions are made publicly available.<sup>425</sup> Second, in the course of a "review process", each request undergoes a "multistep review by trade and tariff experts"<sup>426</sup>. This review involves an examination of all the factors set out in the Procedures for exclusion on a case-by-case basis. At the end of this process, USTR issues a decision letter to the

<sup>419</sup> Notice of 6 April 2018 (Exhibit CHN-10), p. 14907.

<sup>420</sup> It is unclear to the Panel how this conforms with the United States' description of the contribution of the measures to the pursued public morals objective (see para. 7.172 above) or with the United States' assertion that these measures were structured so as to target particular types of goods that benefit from these practices (see para. 7.147 above).

<sup>421</sup> Notice of 20 June 2018 (Exhibit CHN-2), p. 28711.

<sup>422</sup> Procedures To Consider Requests for Exclusion of Particular Products From the Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, vol. 83, No. 133 (11 July 2018), p. 32181 (Exhibit CHN-20) (Procedures for Exclusion).

<sup>423</sup> Procedures for exclusion (Exhibit CHN-20), pp. 32182-32183.

<sup>424</sup> United States' response to Panel question No. 23, paras. 21-25.

<sup>425</sup> United States' response to Panel question No. 23, para. 23.

<sup>426</sup> United States' response to Panel question No. 23, para. 24.

initial requestor, also publicly posted.<sup>427</sup> The decision letter states whether the request has been granted or denied.<sup>428</sup> If the request has been denied, the decision letter identifies which of the factors resulted in the denial.<sup>429</sup>

7.205. These explanations are helpful for the Panel's understanding of the procedure USTR followed to grant products exclusions. However, they provide little clarity on USTR's substantive assessment of the relevant factors for granting product exclusions in each case, and specifically on whether excluded products could have benefitted from China's practices and policies that the United States considers inconsistent with its public morals.

7.206. The Panel notes the United States' argument that the Procedures for exclusion are not a measure challenged by China in this dispute.<sup>430</sup> Although China has explicitly challenged only the adoption of additional duties on List 1 and List 2 products, the Panel notes that China's panel request expressly mentions the Procedures for exclusion in the list of legal instruments through which the measures at issue are adopted and implemented.<sup>431</sup> Moreover, the Panel understands the references in China's submissions to the Procedures for exclusion to focus on the argument that the process for evaluating exclusions is "revealing of the economic objectives of the U.S. measures"<sup>432</sup>, rather than a challenge of the WTO-consistency of the Procedures for exclusion themselves. In any event, the Panel examines the Procedures for exclusion only in an attempt to better understand the rationale behind the selection by the United States of the specific measures at issue.

7.207. China argues that "the exclusion process is an integral part of the tariff measures at issue and further confirms the economic objective of the measures themselves".<sup>433</sup> According to China, the United States has failed to explain "how the criteria for granting exclusions are rationally related to the protection of public morals".<sup>434</sup> In China's view, the United States has failed to explain "how public moral concerns were taken into account in granting or denying particular exclusion request".<sup>435</sup> China asserts that the United States grants exclusions to certain products "on the basis of economic considerations that have nothing to do with 'public morals'".<sup>436</sup>

7.208. According to the United States, the factors used in the Procedures for exclusion "confirm that the U.S. tariff measures address the moral harm caused by China's unfair technology transfer policies".<sup>437</sup> The United States asserts that nothing in Article XX(a) requires WTO Members to ignore economic impacts in designing a measure necessary to protect public morals.<sup>438</sup> The United States also asserts that it "did not intend to exclude products that benefit from China's unfair and harmful industrial policies".<sup>439</sup> The Panel considers it pertinent, nevertheless, to enquire further whether the exclusion processes could potentially lead to outcomes that would undermine or run counter to the stated US public morals objective.

7.209. The Panel observes that first two of the factors listed in the Procedures for exclusion clearly pertain to economic considerations. This fact does not necessarily point towards the lack of a genuine ends and means relationship between the measures at issue and the public morals objective as invoked by the United States. However, the United States has not explained whether the excluded products benefitted (or not) from China's policies and practices considered by the United States to be inconsistent with its public morals.

7.210. It is unclear from the formulation of the third factor whether particular products could be excluded from the additional duties because they do not benefit from practices and policies that

<sup>427</sup> United States' response to Panel question No. 23, para. 24.

<sup>428</sup> United States' response to Panel question No. 23, para. 25.

<sup>429</sup> United States' response to Panel question No. 23, para. 25.

<sup>430</sup> United States' response to Panel question No. 22, para. 12.

<sup>431</sup> WT/DS543/7, p. 3.

<sup>432</sup> China's second written submission, para. 48.

<sup>433</sup> China's comments on the United States' response to Panel question No. 22, para. 8. See also China's second written submission, para. 48.

<sup>434</sup> China's second written submission, para. 70. See also China's comments on the United States' response to Panel question No. 23, para. 12.

<sup>435</sup> China's comments on the United States' response to Panel question No. 23, para. 12.

<sup>436</sup> China's second written submission, para. 70.

<sup>437</sup> United States' response to Panel question No. 22, para. 13.

<sup>438</sup> United States' response to Panel question No. 22, para. 15.

<sup>439</sup> United States' response to Panel question No. 22, para. 15.

violate the United States' invoked public morals objective, or because they are not strategically important enough to China's industrial programmes.

7.211. The United States explained in its response to a Panel question that a number of exclusions have been explicitly denied on the basis of this third factor, "because the product subject to the request was covered by China's Made in China 2025 program or other industrial programs"<sup>440</sup>, and provided a sample of three such denial letters.<sup>441</sup> The denial letters provided as evidence by the United States do not contain explanations why exclusion for these particular products was denied on the basis of the third factor. Rather, these letters contain an identical statement that reads as follows: "Based on that review, and after careful consideration, your request was denied because the request concerns a product strategically important or related to 'Made in China 2025' or other Chinese industrial programs and the request failed to show that this particular product is available only from China."<sup>442</sup>

7.212. The Panel is of the view that the United States has not sufficiently explained why products that were initially considered to benefit from China's practices and policies (which the United States claims harm its public morals) are excluded from the additional duties and how such exclusions do not undermine the achievement of the public morals objective as invoked by the United States. In other words, the United States has not explained how the Procedures for exclusion are coherent with the policy objective invoked by the United States and do not undermine the achievement of this policy objective.

7.213. Absent sufficient explanation by the United States, the Panel thus finds it difficult to see how the factors considered by the United States in the Procedures for exclusions, as well as the resulting exclusions of particular products from List 1, are coherent with the public morals objective as invoked by the United States. The Procedures for exclusion could lead to situations where two products produced in China, using similar practices and policies that the United States considers contrary to US public morals, are treated differently (one product is subject to additional punitive duties, and the other is not). This potential difference in treatment requires the United States to explain how it reconciles its public morals objective with these exclusions. It is unclear to the Panel how this conforms with the United States' description of the contribution of the measures to the pursued public morals objective<sup>443</sup> and with the United States' assertion that these measures were structured so as to target particular types of goods that benefit from these practices.<sup>444</sup>

7.214. While, as earlier explained, a key focus of the United States' arguments throughout these proceedings has been that the List 1 products subject to additional duties benefit from China's policies and practices that involve "public morals" concerns, the Panel also notes that the United States additionally argues that regardless of whether such products so benefit, all such additional duties are apt to contribute to, and are in fact necessary to protect, the invoked US public morals concerns. The Panel considers, however, that the United States has not substantiated its assertions about the nature of this contribution and how such measures can be justified as necessary through a demonstration of the requisite "ends and means" nexus or relationship envisaged by Article XX(a).

7.215. In conclusion, the Panel considers that the United States has not provided an explanation that demonstrates a genuine relationship of ends and means between the imposition of duties on List 1 products and the public morals objective as invoked by the United States.

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<sup>440</sup> United States' response to Panel question No. 22, para. 18.

<sup>441</sup> USTR, *Letters RE: Product Exclusion Requests* (Exhibit US-34). China asserts that these are "simply [...] form letter[s]" confirming "that the tariff measures are irrelevant to the public morals protection". (China's comments on the United States' response to Panel question No. 22, para. 11)

<sup>442</sup> USTR, *Letters RE: Product Exclusion Requests* (Exhibit US-34), pp. 1, 2 and 3.

<sup>443</sup> See para. 7.172 above.

<sup>444</sup> See para. 7.147 above.

***Contribution of the imposition of additional duties on List 2 products to the pursued public morals objective as invoked by the United States***

7.216. The United States adopted and implemented the additional duties on List 2 products through the Notice of 21 September 2018. This Notice explains the rationale of the imposition of additional duties on List 2 products as follows:

China's unfair acts, policies, and practices include not just its specific technology transfer and IP policies referenced in the notice of initiation in the investigation, but also China's subsequent defensive actions taken to maintain those policies. China has decided to impose approximately \$50 billion in tariffs on U.S. goods, with the goal of encouraging the United States to drop its efforts to obtain the elimination of China's unfair policies. Thus, instead of addressing the underlying problems, China has increased tariffs to further protect the unreasonable acts, policies, and practices identified in the investigation, resulting in increased harm to the U.S. economy.

[...]

The judgment during the period of investigation, based on then-available information, was that a \$50 billion action would be effective in obtaining the elimination of China's policies.

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.<sup>445</sup>

7.217. Thus, the additional duties imposed by the Notice of 21 September 2018 do not seem to concern products that have allegedly benefitted from China's practices and policies documented in the Section 301 Report.

7.218. The United States explains that "List 2 measures apply to a broader class of products than those found to directly benefit from the unfair trade acts, policies, and practices documented in the Section 301 Report".<sup>446</sup> The United States asserts that it imposed additional duties on List 2 products "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'".<sup>447</sup> According to the United States, the imposition of additional duties on List 2 products is "derivative" of the imposition of additional duties on List 1 products.<sup>448</sup> For that reason, the United States argues that the imposition of additional duties on List 2 products is "also necessary to protect public morals in part because to fail to respond to China's economic retaliation would demonstrate that the United States Government is willing to acquiesce in theft and forced transfer of U.S. technology by one of its largest trading partners".<sup>449</sup>

7.219. China emphasizes that the United States does not assert that List 2 products benefit from China's practices and policies documented in the Section 301 Report. China considers the approach the United States chose in determining the range of List 2 products to be "overtly punitive"<sup>450</sup>, and asserts that the additional duties on List 2 products "were not intended to target specific products that embody so-called 'unfair' industrial policies, let alone embody any morally offensive conduct".<sup>451</sup> According to China, "[t]here is nothing 'derivative' about the manner in which the United States selected the approximately \$200 billion worth of products. There is no reference to USTR having

<sup>445</sup> Notice of 21 September 2018 (Exhibit CHN-3), pp. 47974-47975.

<sup>446</sup> United States' response to question No. 21, para. 11.

<sup>447</sup> United States' second written submission, para. 35, quoting Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 83, No. 184 (21 September 2018), p. 47974 (Notice of 21 September 2018) (Exhibit CHN-3).

<sup>448</sup> United States' second written submission, para. 35. See also United States' response to Panel question No. 12, para. 52; and United States' response to Panel question No. 21, para. 11.

<sup>449</sup> United States' response to Panel question No. 14, para. 61.

<sup>450</sup> China's second written submission, para. 51.

<sup>451</sup> China's comment on the United States' response to Panel question No. 21, para. 6.

selected those products based on their connection to the initial \$50 billion worth of products allegedly found to have 'benefit[ed] from Chinese industrial policies'".<sup>452</sup>

7.220. The Panel notes that the Notice of 21 September 2018 does not provide any explanation on the approach followed in selecting the range of List 2 products.<sup>453</sup> In the course of the Panel's substantive meeting with the parties, the United States further stated that it adopted the additional duties on List 2 products because China had "made clear" that it would not change its policies.<sup>454</sup> The United States also explained during the Panel's substantive meetings with the parties, that List 2 products are not necessarily products that have been found to benefit from China's practices and policies considered by the United States as contrary to its public morals.

7.221. The Panel understands the United States to argue that the imposition of additional duties on List 2 products contributes to the achievement of the public morals objective pursued by the United States, because it "re-enforces" the imposition of additional duties on List 1 products, and applies stronger economic pressure on China "in a comprehensive sense".<sup>455</sup>

7.222. In the Panel's view, a genuine relationship of ends and means between the challenged measure and the public morals objective pursued could not be derived from the potential existence of such a relationship with respect to a different measure. The Panel notes that the range of List 2 products is not related to China's practices and policies allegedly harming US public morals. The Panel observes that the United States also asserts, as a general matter, that, irrespective of whether products on which additional duties are imposed benefit from China's practices and policies that involve public morals concerns, all such additional duties contributed to, and were in fact necessary to, protect the invoked US public morals concerns. In this context, the United States has not adequately explained how there is a genuine relationship of ends and means between the imposition of additional duties on List 2 products and the public morals objective as invoked by the United States.

7.223. The Panel further recalls that Article XX(a) allows WTO Members to adopt measures which would be otherwise WTO-inconsistent to *protect* their public morals. As mentioned above, the scope of Article XX(a) is limited by the specific public morals objective identified by the respondent, and by the requirement that the measures be necessary to achieve this public morals objective. While there are provisions in the WTO agreements that specifically provide for the imposition of additional tariffs above bound rates in certain defined circumstances, without any need to demonstrate any "necessity" for the measures to achieve a particular purpose, those provisions are not applicable to the current dispute.<sup>456</sup>

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<sup>452</sup> China's second written submission, para. 51.

<sup>453</sup> The Panel notes that the range of List 2 products appears to also have been narrowed from an initial proposed list. However, the Notice of 21 September 2018 does not provide any explanation as to the factors considered in this narrowing process: "USTR and the Section 301 Committee have carefully reviewed the public comments and the testimony from the six-day public hearing. Based on this review process, the Trade Representative, at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the July 17 notice, resulting in 5,745 full and partial tariff subheadings with an approximate annual trade value of \$200 billion." (Notice of 21 September 2018 (Exhibit CHN-3), p. 47975)

<sup>454</sup> United States' response to Panel question No. 4, para. 27, United States' response to Panel question No. 14, para. 61 and United States' response to Panel question No. 21, para. 11.

<sup>455</sup> United States' second written submission, para. 61. The United States also provided evidence in support of its argument that China continues to engage in the practices documented in the Section 301 Report. (Exhibit US-35).

<sup>456</sup> Specifically, in the context of retaliation pursuant to Article 22 of the DSU, WTO Members are allowed to suspend obligations and concessions on a wide range of products that they have unilaterally selected, initially from the same sectors (and, ultimately, from other sectors, under certain conditions), so long as the value of the effects of such suspension is equivalent to the value of the level of nullification of benefits. This is, however, only possible following a multilateral determination of inconsistency of the measures challenged with the covered agreements; and with authorization from the DSB. This is a situation distinct from the facts of the present dispute. In the present dispute, the United States argues that any inconsistency of the challenged additional duties with the GATT 1994 is justified because these additional duties are "necessary to protect public morals". Accordingly, in the context of Article XX(a) the adopting Member must demonstrate that there exists a genuine relationship of ends and means between the public morals objective and the measures at issue that would meet the necessity requirement.

7.224. The Panel notes that the United States has also adopted Procedures for exclusion for particular products from the additional duties on List 2 products.<sup>457</sup> According to these Procedures for exclusion for List 2 products, any request for exclusion from the additional duties of a particular product covered by List 2 must provide the rationale for the requested exclusion, addressing the following factors: (i) whether the particular product is available only from China and whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries; (ii) whether the requester has attempted to source the product from the United States or third countries; (iii) whether the imposition of additional duties on the particular product would cause severe economic harm to the requester or other US interests; and (iv) whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial programmes.<sup>458</sup>

7.225. The factors used in these Procedures for exclusion for List 2 products are similar to the factors used in the Procedures for exclusion for List 1 products. The first three factors clearly pertain to economic considerations, while the meaning of the fourth factor is unclear as to whether particular products could be excluded from the additional duties because they do not benefit from practices and policies that violate the United States' invoked public morals, or because they are not strategically important enough to China's industrial programs.

7.226. For the same reasons stated above with respect to the Procedures for exclusion for List 1 products, the Panel finds it difficult to see how the factors considered by the United States in the Procedures for exclusions for List 2 products do not undermine the achievement of the public morals objective as invoked by the United States.

7.227. In conclusion, the Panel considers that the United States has not provided an explanation that would allow the Panel to understand the relationship between the additional duties imposed on List 2 products and the public morals objective invoked by the United States.

#### **7.3.2.4.2.4 Preliminary conclusion on *necessity* after the initial "weighing and balancing" of three factors**

7.228. The Panel concludes that the public morals objective as invoked by the United States reflects societal interests and values that appear to be highly important in the United States, and that the measures at issue have significant effects on international trade.

7.229. Having assessed the measures adopted by the United States on a holistic basis, the Panel considers, however, that the United States has not provided an explanation that demonstrates how the measures contribute to the public morals objective as invoked by the United States. More specifically, the United States has not demonstrated that there is a genuine relationship of ends and means between the measures at issue and the public morals objective pursued by the United States.

7.230. With respect to the imposition of additional duties on List 1 products, the United States has not sufficiently explained how a genuine relationship of ends and means exists between the products subject to additional duties and the public morals objective as invoked by the United States. This is also the case with respect to the initial narrowing of the range of List 1 products, or the adoption of Procedures for exclusion of particular products from the additional duties on List 1 products.

7.231. With respect to the imposition of additional duties on List 2 products, the United States has clearly stated that it imposed these additional duties because China had "made clear" that it would not change its policies<sup>459</sup> and as a response to measures China had imposed on the United States following the imposition by the United States of additional duties on List 1 products. The Panel does not consider that the contribution of the imposition of additional duties on List 2 products to the achievement of the public morals objective as invoked by the United States can be "derived" from the (potential) contribution of the imposition of additional duties on List 1 products. Moreover, the United States has not provided any other evidence or explanation that would demonstrate a genuine

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<sup>457</sup> Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301, Federal Register, Vol. 84, No. 121 (24 June 2019), p. 29576 (Exhibit CHN-21) (Procedures for exclusion for List 2 products).

<sup>458</sup> Procedures for exclusion for List 2 products (Exhibit CHN-21), p. 29577.

<sup>459</sup> United States' response to Panel question No. 4, para. 27, United States' response to Panel question No. 14, para. 61; and United States' response to Panel question No. 21, para. 11.



relationship of ends and means between the measures comprising the additional duties on List 2 products and the public morals objective invoked by the United States.

#### **7.3.2.4.2.5 Comparison with reasonably available alternative measures**

7.232. In assessing whether a challenged measure is "necessary" within the meaning of Articles XX(a), XX(b) or XX(d), prior WTO adjudicators have traditionally considered the existence of reasonably available alternatives.<sup>460</sup> In particular, in *Brazil – Retreaded Tyres*, it was decided that "[i]n order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake"<sup>461</sup>, and that "[i]f this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued".<sup>462</sup>

7.233. China does not suggest any alternative measure. In China's view, the challenged measures are not about public morals, are not designed to deal with public morals and are certainly not necessary. Therefore, China considers that "there is no need for the Panel to analyse WTO-consistent alternative measures in order to confirm whether the U.S. measures are 'necessary' for the protection of public morals".<sup>463</sup> China asserts that "due to the unique facts of this dispute, there is no requirement for China to present or the Panel to examine alternative measures".<sup>464</sup>

7.234. The United States, in support of its assertion that the measures are necessary within the meaning of Article XX(a), points to its prior efforts to address its concerns with China's policies and practices "through dialogue, admonishment, engagement in multilateral forums, [and] bilateral mechanisms".<sup>465</sup> According to the United States, "[t]hat none of these prior efforts have proven durably effective further demonstrates the necessity of the measures at issue".<sup>466</sup>

7.235. The Panel recalls China's refusal to put forward reasonably available alternative measures. The Panel's preliminary conclusion, based on a weighing and balancing of the relevant factors, is that the United States has not explained how the chosen measures are apt to contribute to the public morals objective, as invoked by the United States, and how they could therefore be "necessary". For all those reasons, the Panel is not required to proceed to a comparison with reasonably available alternative measures.

#### **7.3.2.5 Conclusion on whether the measures are provisionally justified under subparagraph (a) of Article XX of the GATT 1994**

7.236. As the Panel observed above, the nature and purpose of Article XX – to allow WTO Members to adopt measures that would be otherwise WTO-inconsistent to protect their public morals – cannot be reconciled with a situation where WTO Members would be allowed to restrict any trade from any WTO Member with the mere invocation of what might, in an abstract sense, be considered a valid policy objective within the meaning of Article XX of the GATT 1994. The scope of the restrictive measures justifiable under Article XX(a) is determined by the public morals objective invoked and by the requirement that the measures be *necessary* to achieve this objective. In other words, there is a requirement that there be a nexus between the challenged measure and the interest protected by the policy objective at issue. In the case of Article XX(a), this requirement is specified by the term "necessary to protect public morals". This is especially important in the context of Article XX(a),

<sup>460</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.215; *China – Publications and Audiovisual Products*, para. 242; *US – Gambling*, para. 307; and *Korea – Various Measures on Beef*, para. 166; and Panel Reports, *Brazil – Taxation*, paras. 7.531-7.533.

<sup>461</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

<sup>462</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (emphasis added). See also Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 242 and 249; and Panel Report, *Colombia – Ports of Entry*, para. 7.611.

<sup>463</sup> China's second written submission, para. 60.

<sup>464</sup> China's response to Panel question No. 20, para. 9. China relies on a series of observations by the Appellate Body that "there may be cases in which it is not necessary for a Member to propose alternative measures." (Ibid. para. 8)

<sup>465</sup> United States' second written submission, para. 56.

<sup>466</sup> United States' second written submission, para. 56.

because the concept of "public morals" is a broad one, that may be based on considerations specific to individual WTO Members.

7.237. As the Panel has earlier emphasized, the invocation of each Article XX defence needs to be considered carefully based on the facts relating to the particular subparagraph of Article XX relied on and the challenged measures. The Panel notes that the text of Article XX(a) itself limits the range of measures that WTO Members are allowed to rely on. To fall within the limited scope of Article XX(a), the measures have to concern public morals. Moreover, the measures have to be "necessary" for the achievement of the public morals objective invoked. In other words, if the adopting WTO Member does not explain how the challenged measures contribute to the achievement of the public morals objective pursued, by showing that there is a genuine relationship of "ends and means" between these measures and the public morals objective, this is a strong indication that the challenged measures have exceeded the limits acceptable under Article XX(a) of the GATT 1994.

7.238. As elaborated in the Panel's earlier analysis, having assessed the evidence on a holistic basis in the present dispute, the Panel concludes that the United States has not provided an explanation that demonstrates how the imposition of additional duties on the selected imported products contributes to the achievement of the public morals objective as invoked by the United States. It follows that the United States has not adequately explained how the measures the United States has chosen are necessary to protect such public morals.

### **7.3.3 Whether the United States has demonstrated that the measures satisfy the requirements of the *chapeau* of Article XX of the GATT 1994**

7.239. The United States argues that it has not applied the measures in a manner that constitutes "a disguised restriction on international trade" because it has taken "no steps to conceal the reasons for adopting the measures at issue".<sup>467</sup> The United States asserts that it has not applied the measures in a manner that constitutes "arbitrary or unjustifiable discrimination" because of the "deliberate nature" in which it proceeded before adopting the measures<sup>468</sup> and because it "has explained the rationale and justification for adopting the measures at issue".<sup>469</sup> The United States also argues that it has not applied the measures 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".<sup>470</sup>

7.240. China argues that the measures are not provisionally justified under Article XX(a) and that "there is no need to proceed to evaluate whether the measures are consistent with the conditions set forth in the *chapeau* of that provision".<sup>471</sup> On an *arguendo* basis, China asserts that the measures fail to satisfy the requirements of the *chapeau*.<sup>472</sup> China argues that the "lack of a rational connection between the U.S. measures and the covered products reflects the true, coercive intent of the U.S. measures"<sup>473</sup>, and "a prohibition on unduly coercive action is tied directly to the limiting function of the *chapeau*".<sup>474</sup> China further argues that the measures "restrict international trade under the guise of a public morals measure"<sup>475</sup> and "are nothing more than barely disguised restrictions on international trade".<sup>476</sup>

7.241. The Panel recalls its conclusion that the United States has not provided sufficient evidence or explanation to substantiate its assertion that the measures are necessary to protect the "standards of right or wrong" invoked by the United States and which are considered as public morals in the United States. Prior WTO adjudicators have traditionally refrained from assessing the

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<sup>467</sup> United States' first written submission, para. 88.

<sup>468</sup> United States' first written submission, para. 84.

<sup>469</sup> United States' first written submission, para. 86.

<sup>470</sup> United States' first written submission, para. 83.

<sup>471</sup> China's second written submission, para. 62.

<sup>472</sup> China's second written submission, para. 63.

<sup>473</sup> China's second written submission, para. 67.

<sup>474</sup> China's second written submission, para. 68.

<sup>475</sup> China's second written submission, para. 74.

<sup>476</sup> China's second written submission, para. 75.

conformity with the *chapeau* of measures that they have found not to be provisionally justified under various subparagraphs of Article XX.<sup>477</sup>

7.242. In light of its conclusion that the United States has not adequately explained how the measures chosen by it are necessary to protect public morals, the United States has not met its burden of demonstrating that the measures are provisionally justified under Article XX(a). The Panel, therefore, does not consider it necessary to make findings on whether the United States has demonstrated that its measures satisfy the requirements of the *chapeau* of Article XX.

## 8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. For the reasons set forth in this Report, the Panel concludes that:

- a. the parties have not reached a mutually satisfactory solution within the meaning of Article 12.7 of the DSU, or otherwise relinquished their rights to pursue WTO dispute settlement action on the measures at issue in this dispute;
- b. all measures challenged by China fall within the Panel's terms of reference, and it is appropriate for the Panel to make findings and recommendations with respect to the first measure as identified in China's panel request (additional duties of 25% on List 1 products), and the second measure as amended on 9 May 2019 (additional duties of 25% on List 2 products);
- c. the challenged measures are *prima facie* inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994; and
- d. the United States has not met its burden of demonstrating that the measures are provisionally justified under Article XX(a) of the GATT 1994.

8.2. As a consequence, the Panel concludes that the measures at issue are inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the GATT 1994, they have nullified or impaired benefits accruing to China under that agreement within the meaning of Article XXIII:1(a) of the GATT 1994.

8.4. Pursuant to Article 19.1 of the DSU, the Panel recommends that the United States bring its measures into conformity with its obligations under the GATT 1994.

## 9 CONCLUDING COMMENTS

9.1. In conclusion, the Panel wishes to make some additional observations:

9.2. The Panel is very much aware of the wider context in which the WTO system currently operates, which is one reflecting a range of unprecedented global trade tensions.

9.3. At the same time, it is not the role of this Panel to draw any legal conclusions or make recommendations on any matters other than those it has been specifically tasked to deal with through these dispute settlement proceedings. In this connection, the Panel recalls that the Government of the United States has not, up to the present time, initiated action under the WTO Dispute Settlement Understanding with respect to any measures China has imposed in response to the United States' measures at issue in this dispute.<sup>478</sup>

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<sup>477</sup> See e.g. Panel Reports, *India – Solar Cells*, paras. 7.389-7.390; *China – Audiovisual Products*, para. 7.912; and *Colombia – Ports of Entry*, para. 7.620. See also Appellate Body Reports, *India – Solar Cells*, para. 5.155; and *China – Audiovisual Products*, fn 614.

<sup>478</sup> Para. 7.4 of the Panel Report refers.

9.4. The Panel emphasizes that pursuant to the requirements of Article 11 of the DSU, it has sought to perform diligently its adjudicatory role in relation to the matters that fall within the terms of reference of these dispute settlement proceedings. Additionally, the Panel notes that the panel process is structured in such a way that time is available for the parties to take stock as proceedings evolve and further consider opportunities for mutually agreed and satisfactory solutions.<sup>479</sup>

9.5. Accordingly, recalling Article 3.7 of the DSU that highlights that the aim of the dispute settlement system is to achieve a positive solution to a dispute, the Panel expresses its ongoing encouragement to the parties to pursue further efforts to achieve a mutually satisfactory solution to the matters that have been raised before it in this dispute.

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<sup>479</sup> The last sentence of Article 11 of the DSU refers.