*UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA*
**(DS543)**

**Second Substantive Meeting of the Panel with the Parties**

**Opening Statement of the United States**

**February 25, 2020**

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

## I. INTRODUCTION

1. As the United States has explained in its written and oral submissions, China's pursuit of this dispute is a profound misuse of the WTO dispute settlement system. As we describe further in this statement, perhaps the best way to view this dispute is not one between China and the United States – because the parties have resolved how the U.S. Section 301 duties and China's own duties in response are to be handled in terms of WTO rights and obligations. Rather, this dispute is best viewed as an attack by China on the legitimacy and relevance of the WTO itself in the current, real-world trading order. By pursuing the dispute, China is asking this Panel to make findings so disconnected from actual economic and trade events as to make the WTO system seem either completely irrelevant, or even worse, as standing for the proposition that the WTO favors the widespread theft of technology. Fortunately, and as we have explained, the text of the WTO Agreement contains two alternative routes for the Panel to avoid this harm to the WTO. Were the Panel to take either of these approaches, the WTO system would be safeguarded, and the parties would remain in a posture of offsetting actions that are undoubtedly contributing to a deeper and more intensive dialogue of the conditions and actions needed for fair trading conditions.

2. The irrelevance of this dispute in terms of real world of economics and trade is further confirmed by developments in the last few weeks. On January 15, 2020, the United States and China signed a historic and enforceable Phase One economic and trade agreement. The agreement entered into force less than two weeks ago, on February 14, 2020. We have included a copy of the agreement as an exhibit with this statement.[1]

3. The U.S.-China economic and trade agreement provides for structural reforms and other changes to China's economic and trade regime in the areas of intellectual property, technology

[1] Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China, signed January 15, 2020 ("Phase One Agreement"), entered into force on February 14, 2020 (Exhibit US – 33).

transfer, agriculture, financial services, and currency and foreign exchange. The United States has also agreed to address certain economic and trade concerns of China. The Phase One agreement includes a commitment by China that it will make substantial additional purchases of U.S. goods and services.

4. Covering all commitments, the agreement establishes a strong dispute resolution system that ensures prompt and effective implementation and enforcement. In connection with reaching this agreement, the United States agreed to modify its Section 301 tariff actions in a significant way. Those tariff reductions took effect on February 14, which as noted was the day of entry into force of the agreement.

5. The Phase One economic and trade agreement has seven chapters.

(1) Intellectual Property: The Intellectual Property (IP) chapter addresses numerous longstanding concerns in the areas of trade secrets, pharmaceutical-related intellectual property, geographical indications, trademarks, and enforcement against pirated and counterfeit goods.

(2) Technology Transfer: The Technology Transfer chapter sets out binding and enforceable obligations to address several of the unfair technology transfer practices of China that were identified in the Section 301 investigation. China has agreed to end its long-standing practice of forcing or pressuring foreign companies to transfer their technology to Chinese companies as a condition for obtaining market access, administrative approvals, or receiving advantages from the government. China commits to provide transparency, fairness, and due process in administrative proceedings and to have technology transfer and licensing take place on market terms. China also commits to refrain from directing or supporting outbound investments aimed at acquiring foreign technology pursuant to industrial plans that create distortion. This chapter, though important, does not fully address the acts, policies, and practices found in the Section 301 investigation. Those matters are to be addressed in a subsequent, Phase Two agreement.

(3) Agriculture: The Agriculture chapter addresses structural barriers to agricultural trade. The non-tariff barriers addressed include those involving meat, poultry, seafood, rice, dairy, infant formula, horticultural products, animal feed and feed additives, pet food, and products of agriculture biotechnology.

(4) Financial Services: The Financial Services chapter addresses a number of longstanding trade and investment barriers to U.S. providers of a wide range of financial services, including banking, insurance, securities, and credit rating services, among others. These barriers include foreign equity limitations and discriminatory regulatory requirements.

(5) Currency: The chapter on Macroeconomic Policies and Exchange Rate Matters includes policy and transparency commitments related to currency issues. The chapter addresses unfair currency practices by requiring high-standard commitments to refrain from competitive devaluations and targeting of exchange rates, while promoting transparency and providing mechanisms for accountability and enforcement.

(6) Expanding Trade: The Expanding Trade chapter includes commitments from China to import various U.S. goods and services over the next two years in a total amount that exceeds China's annual level of imports for those goods and services in 2017 by no less than $200 billion. China's increased imports of U.S. goods and services should contribute significantly to the rebalancing of the U.S.-China trade relationship.

(7) Dispute Resolution: The Dispute Resolution chapter sets forth an arrangement to ensure the effective implementation of the agreement and to allow the parties to resolve disputes in a fair and expeditious manner. This arrangement creates regular bilateral consultations at both the principal level and the working level. It also establishes strong procedures for addressing disputes related to the agreement and allows each party to take proportionate responsive actions that it deems appropriate. Those proportionate actions may include tariff increases. The Parties have agreed that any enforcement actions taken under the Agreement, including tariff increases, would not be challenged in a WTO dispute settlement proceeding.

6. Mr. Chairman, Members of the Panel, this Phase One Agreement, as well as upcoming negotiations on a Phase Two Agreement, represents the real world status of the U.S.-China economic and trade relationship, including the role that additional duties imposed by either party play in that relationship. And what does the Phase One Agreement say about this dispute, or the U.S. additional duties that China challenges in this dispute? Nothing. And why is that? Because, as we have explained throughout this dispute, both parties have decided to handle the additional duties imposed by the other side on a bilateral basis, adjusting them in accordance with the status of the bilateral negotiations. This is the real world, clearly established by objective facts. It is only in this room, here in Geneva, that China is taking the position that DSB findings addressed to the U.S. additional duties would somehow assist the parties in addressing bilateral trade and economic issues. China has never even attempted to explain how this might be so. And as the Phase One trade agreement further confirms, it is simply not true.

7. Moreover, if as China requests, the Panel were to reject the valid U.S. Article XX(a) defense, the result would go beyond making the WTO appear irrelevant. Such findings would make the WTO appear counterproductive and even harmful to furthering a fair and sustainable system of world trade. It is essentially undisputed that China has adopted the unfair and harmful

practices identified in the U.S. Section 301 report, and that these practices damage not just the United States, but every Member that relies on technology for its competitiveness. It is also undisputed that these practices cannot be addressed through challenges under existing WTO rules. And in the Phase One agreement, China has recognized that it is legitimate for one trading partner to seek a cessation by another trading partner of many forced technology practices.[2] For the WTO to issue a report stating in effect, that yes, one Member has adopted practices that are fundamentally corrosive to the fairness and sustainability of the world trading system, but no Member can or should take any action to address them, would amount to a statement that the WTO stands in the way of addressing the real problems facing the world economy.

8. And it is no answer to say that the WTO also has a negotiating function, and new rules could be developed. This answer is untenable – seeking new rules does nothing to address the harms felt today, and new rules must be adopted by consensus.

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

10. First, it confirms the relationship between the U.S. tariff measures and the technology transfer issues addressed by those measures. The U.S. tariffs led to a decision by China and the United States to engage in a broad ranging negotiation concerning their economic and trade relationship, including with respect to technology transfer. The Phase One agreement covers some of the U.S. technology transfer concerns, and the United States hopes to cover its remaining concerns in a Phase Two agreement.

11. Second, the Agreement confirms the necessity of the U.S. tariff measures in addressing the unfair technology transfer issues identified in the Section 301 report. The tariff measures led

[2] *See* Phase One Agreement, Chapter 2 (Technology Transfer), Preamble ("The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern. The Parties further recognize the importance of undertaking steps to address these issues, in light of the profound impact of technology and technological change on the world economy.") (Exhibit US – 33); *see also* Phase I Agreement, Article 2.2 ("Neither Party shall require or pressure persons of the other Party to transfer technology to its persons in relation to acquisitions, joint ventures, or other investment transactions.") (Exhibit US – 33).

to the negotiations, and it cannot reasonably be questioned that those tariff measures were the only available tool that would have enabled the parties to reach this successful outcome.

12. Third, the Phase One agreement confirms that forbidding forced technology transfer is a fundamental norm. For example, the first sentence of the technology transfer chapter states that "The Parties affirm the importance of ensuring that the transfer of technology occurs on voluntary, market-based terms and recognize that forced technology transfer is a significant concern."[3]

13. Having explained at least some of the ways the Phase One agreement is important for the issues in this dispute, we will now turn to addressing the outstanding legal issues, with a focus on the new arguments China has presented since its first submission.

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

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

[3] Phase One Agreement, p. 2-1 (Exhibit US – 33).

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

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

17. As the United States has explained, the parties have settled the matter within the meaning of Article 12.7 of the DSU. Accordingly, as required by Article 12.7, the Panel should reject China's request for legal findings on the measures at issue and confine its report to a brief statement of the facts and a notation that a settlement has been reached.

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

> (1) China's decision to decision to unilaterally impose WTO-inconsistent measures on U.S. goods for the explicit purpose of retaliating against the measures for which it now seeks legal findings,[4] and without first obtaining the authorization from the DSB pursuant to the DSU;[5]
>
> (2) the U.S. decision to, nonetheless, refrain from challenging China's retaliatory actions at the WTO; and

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

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

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

(4) the Phase One Economic and Trade Agreement, which explicitly provides that each Party may apply additional duties in order to enforce the agreement, and that the other Party may not challenge those duties in the WTO.[6]

19. In other words, the actions of both parties show that – as an objective matter – the parties have agreed to settle the matter at issue outside the WTO system. In these circumstances, Article 12.7 of the DSU commands that "the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."[7]

20. China continues to argue that the Panel must ignore these objective facts and accept at face value China's assertion that the parties have not arrived at a settlement within the meaning of Article 12.7 of the DSU. However, as the United States has explained, China's position is at odds with the clear text of Article 11 of the DSU, which provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[8]

21. Accordingly, the Panel in this dispute should objectively assess whether the facts on the record support a finding that the parties have settled the matter within the meaning of Article 12.7 of the DSU. Certainly, nothing in the text of Article 11 supports the view that the Panel is not "permitted" to make such an objective assessment, as China argues.

22. In its second written submission, China presents some new arguments; none of these new arguments find support in the DSU.

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[6] *See* Phase One Agreement, p. 7-3, para. 4(b) (Exhibit US – 33).

[7] *See* DSU Article 12.7 ("Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel *shall be confined to a brief description of the case and to reporting that a solution has been reached.*") (emphasis added).

[8] DSU Article 11.

### A. Nothing in the DSU Supports the View that an Assessment of Whether There Is a "Settlement" Within the Meaning of Article 12.7 of the DSU Is "Distinct" from "Matter Before the Panel"

23. As explained, under Article 11 of the DSU the Panel in this dispute is empowered to objectively assess whether the parties have arrived at a settlement within the meaning of Article 12.7 of the DSU. Once again, Article 11 explicitly provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." In this regard, the United States notes that the DSU itself is among the WTO "covered agreements" listed in Appendix I of the DSU. Similarly, under the terms of reference that govern this dispute pursuant to Article 7.1 of the DSU, the Panel is charged with examining the matter "in light of the relevant provisions in…the covered agreement(s) cited by the parties…"[9] The United States, of course, has cited Article 12.7 of the DSU. Accordingly, there can be no serious question that the Panel in this dispute has the authority to assess whether Article 12.7 of the DSU applies to the matter before it.

24. In its second written submission, however, China asserts panels have no authority to assess whether parties to a dispute have arrived at a "settlement" within the meaning of Article 12.7 because such a question is purportedly "distinct" from the "matter."[10] First, as explained, nothing in the DSU supports the view that panels are precluded from objectively assessing whether there is a settlement of the matter within the meaning of Article 12.7 of the DSU. Indeed, if anything, panels have an affirmative obligation to make such an objective assessment, and certainly in cases where one or both parties submit that a settlement has in fact been reached. Second, as a practical matter, the question of whether the parties have reached a "settlement of the matter" is a fundamental aspect of the "matter" before a panel.

### B. There Is No Legal Support for the View that Article 3.6 of the DSU Is the "Sole Means" for a Panel to Discern the Existence of a "Settlement" Within the Meaning of Article 12.7 of the DSU

[9] DSU Article 7.1.

[10] China's Second Written Submission, para. 10.

25. China continues to argue that no settlement has been reached because the parties have not notified a "mutually agreed solution" to the DSB pursuant to Article 3.6 of the DSU. The text of the DSU, however, does not support China's assertion that Article 3.6 of the DSU is the "sole means by which a panel can ascertain"[11] whether the parties have arrived at a settlement within the meaning of Article 12.7 of the DSU.

26. By its clear terms, Article 12.7 of the DSU (last sentence) becomes operative "[w]here a settlement among the parties to the dispute has been found."[12] While a "settlement among the parties" could be memorialized in the form of a "mutually agreed solution" and notified under Article 3.6, nothing in the text of Article 12.7 of the DSU mandates that such a notification is a precondition for the operation of Article 12.7. The text of the DSU simply does not support China's contention that the absence of a notification under Article 3.6 would somehow preclude a finding that the parties have in fact reached a "settlement" within the meaning of Article 12.7 where objective facts on the record support such finding.

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

### A. Article XX(a) Does Not Support the View that "Public Morals" Cannot Encompass "Economic Concerns"

27. China's assertion that some impermeable bright line exists between "economic" concerns, on the one hand, and "moral" concerns, on the other, finds no support in the text of Article XX. Nor, frankly does such a view comport with simple common sense.[13]

28. First, nothing in the text of Article XX(a) itself suggests that "public morals" cannot (or must not) relate to issues of economic concern. Certainly, China has not identified any textual basis in the GATT 1994 that supports the proposition that "public morals" must be exclusive of

[11] China's Second Written Submission, para. 11.

[12] *See* DSU Article 12.7 (last sentence) ("Where a settlement of the matter among the parties to the dispute has been found, the report of the panel *shall be* confined to a brief description of the case and to reporting that a solution has been reached.") (emphasis added).

[13] *See* China's Second Written Submission, paras. 30-32.

"economic concerns." For this reason alone, China's attempt to place "economic" concerns outside the scope of Article XX(a) should be rejected as legally baseless.

29. Second, the context provided by other paragraphs of Article XX affirmatively rebuts the view that the phrase "public morals" could be read to exclude any concerns that are "economic" in nature. Specifically, unlike certain other paragraphs of Article XX, Article XX(a) does not include a proviso that could be understood to narrow the scope of the core operative text. For example, while Article XX(i) provides that Members may adopt measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials", it is followed by the proviso "that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry."[14] The fact that Article XX(a) is unaccompanied by any such analogous limiting or conditional language further supports the view that "public morals" cannot be read to a priori exclude "economic concerns" as a definitive matter.

30. Third, other paragraphs of Article XX disprove China's assertion that there can be no overlap between "economic" concerns and "moral" concerns. For example, Article XX(d) covers measures "necessary to secure compliance with laws or regulations" *inter alia* "relating to the prevention of deceptive practices."[15] No one could reasonably dispute that the prevention of deceptive practices is motivated both by moral and economic concerns. Another example is Article XX(e),[16] which covers measures "relating to the products of prison labor." Members may adopt such measures for reasons of morality or to protect economic actors from unfair competition with goods produced with little or no cost of labor. Thus, there simply exists no bright line in Article XX between "moral" concerns and "economic" concerns.

31. Fourth, the idea that "economic" and "moral" concerns are definitely distinct goes against simple common sense. As the United States has argued, some types of conduct or behaviour would appear to be immoral precisely because of the economic harms that result from such conduct.[17] For example, when someone steals money from a bank, we would all agree the bank

[14] GATT Article XX(i).
[15] GATT Article XX(d).
[16] GATT Article XX(e).
[17] *See* U.S. Responses to Questions from the Panel Following the First Meeting, para. 56 ("Nothing in the text of Article XX(a) supports the view that a measure that is justified under Article XX(a) must have the *singular* objective of protecting "public morals." In any event, the issue of dual purposes does not arise in the context of the current

and its customers suffer a harm that is "economic" in nature. We would also agree that the act that brought about this economic harm – namely the act of theft – is immoral, because it is contrary to standards of wrong. In this sense, the United States posits that most people would find it somewhat odd – if not nonsensical – to say that the act of stealing money from a bank does not implicate "moral" concerns because it imposes harms that are economic in nature.

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

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

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

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

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

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proceeding. The unfair trade acts, policies, and practices documented in the Section 301 Report implicate U.S. "public morals" precisely because China's conduct in this regard gives Chinese companies an economic advantage over U.S. companies through illicit means (*e.g.*, forced technology transfer, cyber-intrusions) that are contrary to U.S standards of right and wrong.").

### 1. The phrase "to protect" – as it appears in Article XX(a) – does not suggest that measures justified under Article XX(a) must apply to products that are themselves "morally offensive"

36. There is no merit to the argument that the inclusion of the word "protect" in Article XX(a) means that measures justified under that provision may only target products that are themselves morally offensive.[18]

37. The United States agrees that the word "protect" suggests that a measure justified under Article XX(a) will "defend" or "shield" against something that endangers or threatens "public morals."[19] But nothing about the word "protect" in-and-of-itself implies that only morally offensive products are capable of posing a threat to "public morals."

38. Once again, Article XX(a) refers to measures "necessary to protect public morals" – full stop – not measures necessary to protect public morals from morally offensive *products*. And, that Article XX(a) does not specify any particular threat (or source of offence) to "public morals" suggests that the drafters recognized that threats to "public morals" could emanate from a variety of sources or circumstances, not just morally offensive products per se.

39. Accordingly, the argument that the word "protect" implies protection against morally offensive products should be rejected as contrary to the clear text of Article XX(a) and thus meritless.

### 2. The relevant limits and conditions that pertain to the "public morals" exception are reflected in the text of Article XX(a) and the chapeau of Article XX

40. Contrary to what China suggests, nothing about the limited and conditional nature of Article XX(a) supports the legal conclusion that measures justified under Article XX(a) must target products that are inherently morally offensive.

[18] *See* China's Second Written Submission, paras. 36-37.

[19] *See* China's Second Written Submission, para. 37.

41. Indeed, apart from the criteria set out in the chapeau and lettered paragraphs of Article XX, there are no other limits or conditions that govern the general exceptions under Article XX. This is clear from the chapeau of Article XX, which provides

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

42. In other words, the only cross-cutting limit or condition that pertains to the exceptions under Article XX is the "requirement" that a measure is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade."[20] Accordingly, if a measure meets the criteria specified in a paragraph at (a) through (j) of Article XX and satisfies the requirement of the chapeau of Article XX, the measure necessarily falls within the relevant conditions or limitations that govern the invocation of general exceptions under Article XX.

43. Thus, there is no merit to China's argument that unless one accepts China's unsupported assertion that measures justified under Article XX(a) must target products that are inherently morally offensive, the Panel would somehow expand the scope of Article XX(a) beyond its applicable limits and conditions. To the contrary, because China has no textual support for its position, the interpretation sought by China would impermissibly *limit* the scope of Article XX(a).

### 3. Interpreting Article XX(a) in light of its "object and purpose" does not support the view that Article XX(a) applies only to measure that target products that are themselves morally offensive

[20] *See US – Shrimp (AB)*, para. 157 ("In our view, the language of the *chapeau* makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, *the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau*.") (emphasis added).

44. China's argument that interpreting Article XX(a) in light of the object and purpose of the GATT 1994 supports the view that measures justified under Article XX(a) must target morally offensive products relies on a fundamental misunderstanding of the customary rules of treaty interpretation.

45. Under customary rules of interpretation, the text of an agreement must be interpreted in accordance with its ordinary meaning, in its context, and in light of the object and purpose of the agreement.[21] Therefore, customary rules of treaty interpretation preclude a panel from adopting an interpretation that is not supported by a plain reading of the text of an agreement.[22] And, where a plain reading of the text is amenable to one or more plausible interpretations, a Panel must adopt the interpretation that coheres with the "object and purpose" of the agreement. And under no circumstances would it be correct to adopt an interpretation that is contrary to the clear text of an agreement based the subjective view that doing so would advance the "object and purpose" of the agreement.

46. But this is precisely what China asks the panel to do – that is, to adopt a non-textual limitation on Article XX(a) simply because China believes it would somehow advance the object and purpose of the GATT 1994. As such, China's argument must be rejected.

47. Furthermore, China – aside from simple assertion – has not explained, nor can it explain, why its proposed limitation would comport with "object and purpose" of the treaty.

48. Rather, China simply asserts that the Members would not have agreed to the inclusion of Article XX(a) in the GATT 1994 but for the understanding that it could only be invoked to justify measures that apply to morally offensive products per se. The text of the agreement does

[21] *See* Vienna Convention, Article 31.1 ("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.").

[22] *See Peru — Agricultural Products (Guatemala) (AB)*, para. 5.94 ("While context is a necessary element of an interpretative analysis under Article 31 of the Vienna Convention, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered 'together with the context' and the tools mentioned in Article 32. However, we do not see how, in an interpretative exercise under Article 31, elements considered 'together with the context' can be used to reach the conclusion that the textual terms 'shall not maintain' in Article 4.2 of the Agreement on Agriculture should be read as meaning "may maintain" based on a particular provision found in the FTA.").

not support this proposition. Nor does China provide any extrinsic evidence, such as negotiating history. In sum, there is simply no support for China's proposed limitation on Article XX(a).

#### 4. Prior disputes do not support the proposition that measures justified Article XX(a) must apply to morally offensive products

49. China asserts that "all" of the prior panel and Appellate Body reports that have addressed Article XX(a) have concerned measures that targeted products considered to be morally offensive. This is not correct, and would be irrelevant at any rate.

50. First, contrary to China's characterization, in *Colombia – Textiles*, Colombia did not seek to justify its "compound tariff" measure under Article XX(a) by arguing that the textile, apparel, and footwear products at issue were themselves products that were morally problematic or offensive. And, in *Brazil – Taxation*, Brazil made no argument that the digital television equipment or other products at issue were inherently morally offensive.

51. Second, even if it were the case that past disputes involving Article XX(a) had involved measures that targeted products that were morally offensive per se, this would not stand for the proposition that Article XX(a) is so limited in scope. Rather, whether a measures falls within the scope of Article XX(a) is determined by the text of that provision. And, as the United States has explained, nothing in the text of Article XX(a), the chapeau of Article XX, or the "object and purposes" of the GATT 1994 suggest that universe of measures justifiable under Article XX(a) is limited to measures that target products that are inherently morally offensive.

### C. That the United States has Taken Reasonable Steps to Mitigate the Harms to U.S. Economy Does Not Undermine the Public Morals Objective of the Measures at Issue

52. China argues that the United States took into account certain "economic concerns" in the course of adopting and implementing the measures at issue, and that this somehow undermines the "public morals" objective of the measures.[23] This argument is without merit.

[23] *See* China's Second Written Submission, paras. 44-52.

53. First, as the United States has explained, the argument that that "moral" and "economic" concerns are mutually exclusive finds no support in the text of Article XX(a) and does not comport with simple common sense. For this reason alone, the idea that the measures at issue lack a "public morals" objective because they also happen to accommodate "economic concerns" should be rejected outright.

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

### D. A Finding That the Measures at Issue Are Justified under Article XX(d) Would Not Support the Proposition that a Member Can Adopt GATT-Inconsistent Measures "Whenever" It Believes That the Policies of Another Member Are "Unfair"

55. China argues that a finding that the measures at issue are justified under Article XX(a) would "set a dangerous precedent"[24] and signal that Members can adopt GATT-inconsistent measures "whenever"[25] they consider that the policies of another Member are "immoral"[26] or "unfair." This is nothing more than a "slippery slope" argument – which is usually one of the weakest types of arguments. And is particularly weak here, given the unique facts and circumstances.

56. First, an invocation of Article XX(a) that is as demonstrably specious and convenient as China suggests is unlikely to satisfy the requirements of the chapeau of Article XX, which provides that a measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

[24] *See* China's Opening Statement at the First Meeting, Section B.

[25] *See* China's Second Written Submission, para. 54.

[26] *See* China's Opening Statement at the First Meeting, para. 35.

a disguised restriction on international trade." Therefore, even if a panel were to find that a measure is provisionally justified under Article XX(a), the language of the chapeau serves as backstop that prevents the sort of dangerous precedents to which China alludes.

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

58. In this regard, the United States would like to, once again, remind the Panel of the historical background against which the United States adopted the measures at issue in this dispute. As noted, the United States adopted the measures at issue following nearly a decade of trying to address China's unfair trade, acts, and policies through other means, including dialogue, admonishment, multilateral forums, bilateral mechanisms,[27] and the pursuit of criminal charges against individuals and entities affiliated with the Chinese government.[28] Accordingly, the notion that a finding for the United States would open the door to a Member successfully invoking Article XX(a) "whenever" they want and to justify "whatever" GATT-inconsistent measures they want, is utterly unfounded.

## IV. CONCLUSION

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

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

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