UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

(DS543)

Second Substantive Meeting of the Panel with the Parties

Closing Statement of the United States

February 26, 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.

1. First, that the parties have agreed to settle this matter outside the WTO system is confirmed by objective facts on the record. China's argument that the Panel must ignore such objective facts – and accept at face value China's statement that no settlement has been reached – finds no support in the DSU.

2. China's denial that the parties have reached a settlement of the matter is simply a litigation position, unsupported by the facts on the record. Further, Articles 11 and 7.2 of the DSU collectively charge the Panel with the responsibility to make an "objective assessment of the matter" and examine the matter "in light of the relevant provisions in …covered agreement(s) cited by the parties, which in this case includes Article 12.7 of the DSU. The Panel must therefore make a finding based on the text of Article 12.7 and the substantial record evidence that points to the existence of a "settlement" within the meaning of that article.

3. Second, in its prior submissions, the United States has established that measures at issue are "necessary to protect public morals" and thus legally justified within the meaning of Article XX(a). China has made no real attempt to argue that the measures are unnecessary to achieving this objective. Instead, the entirety of China's response has been to argue that the measures at issue are categorically unjustifiable under Article XX(a) because they apply to products that are not "morally offensive" per se and because the measures address harms or concerns that are "economic" (and, therefore, supposedly not "moral") in nature. As the United States has explained, however, neither of China's arguments find support in Article XX(a), the chapeau of

Article XX, any other provision of the GATT 1994, or prior panel or Appellate Body reports (including those cited by China).

4. Further, China's insistence on a clear demarcation between "moral" versus "economic" concerns does not square with common sense given that some conduct is considered "immoral" precisely because of the economic harms that can result from it. In fact, in *Colombia – Textiles*, Colombia identified, and the Appellate Body confirmed, a valid public morals objective under Article XX(a) that also involved an economic harm. In that dispute, combatting money laundering – the process of legitimizing the proceeds of crime by disguising them in the form of a payment for an international trade transaction – was a valid public morals objective. The fact that the money laundering at issue caused economic harm which Colombia wished to prevent did not negate the moral underpinnings of the invocation of Article XX.

5. Nor is there any merit to China's argument that the measures at issue are "unjustified" under the chapeau of Article XX because the measures aimed at inducing China to adopt certain changes in policy. There is no support for this in the actual text of the Chapeau. Attempting to address a problem with tariff measures is not arbitrary, is not discriminatory, and is not a disguised restriction on trade. Further, the chapeau of Article XX provides that "nothing in the GATT 1994 shall be construed to prevent the application of *any* measure" that falls within one of the paragraphs of Article XX. Therefore, where a Member has established – as the United States has done here – that addressing certain policies and practices of another Member is "necessary to protect public morals" (or achieve another objective under Article XX), a measure that aims to do that can be justified under Article XX.

6. Indeed, in *US – Shrimp*, the Appellate Body explicitly recognized that the aim of influencing the policies of other Members is a "common aspect" of measures justified under Article XX and rejected the notion that Article XX can be read to preclude such measures, as China suggests.

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

8. In contrast, the measures at issue in this dispute are not aimed at encouraging China to adopt any particular regulatory regime, much less a regulatory regime or model prescribed by the United States. Rather, the United States adopted the measures at issue to obtain the elimination of specific policies and practices causing substantial moral and economic harm to the United States, including forced technology transfer and cyber-enabled theft of U.S. technologies. In short, nothing in the U.S. measures at issue (unlike the measures at issue in *US – Shrimp*) prescribe any particular regulatory regime that China must implement to address U.S. concerns.

9. This concludes the United States closing statement. We look forward to answering any further written questions from the Panel. Thank you.