



7 December 2018

(18-7838)

Page: 1/4

Original: English

UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

The following communication, dated 6 December 2018, from the delegation of China to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 4 April 2018,¹ the People's Republic of China ("China") requested consultations with the United States of America ("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). China filed addenda to its 4 April 2018 requests for consultations on 6 July 2018,² 16 July 2018,³ and 18 September 2018⁴ as a result of the expansion of the extraordinary tariffs being imposed on imports of Chinese goods into the United States after those subject to China's initial requests for consultations.

China and the United States held consultations on 28 August 2018 and 22 October 2018. These consultations failed to resolve the dispute.

As a result, in order to resolve the dispute, China requests the establishment of a Panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII of the GATT 1994. China further requests that the Panel have the standard terms of reference, as set forth in Article 7.1 of the DSU.

A. Background

On 18 August 2017, the United States Trade Representative ("USTR") initiated an investigation under Section 301 of the Trade Act of 1974 concerning alleged acts, policies, and practices by China related to technology transfer, intellectual property, and innovation.⁵ On 22 March 2018, the USTR released its report⁶ on the investigation under Section 301 of the Trade Act of 1974. On the same date of 22 March 2018, the United States issued a Presidential Memorandum,⁷ in which the USTR was directed to take all appropriate action under Section 301 of the Trade Act of 1974 to address the acts, policies, and practices of China, and that such action should include increasing tariffs on importing goods from China. Thereafter, the USTR published a series of notices, according to which the United States started to impose 25% additional tariffs on approximately \$34 billion of Chinese imports from 6 July 2018,⁸ and impose 10% additional tariffs on approximately \$200 billion of

¹ The request for consultations was circulated on 5 April 2018 in document G/L/1219, WT/DS543/1.

² The addendum to the request for consultations was circulated on 9 July 2018 in document G/L/1219/Add.1, WT/DS543/1/Add.1.

³ The addendum to the request for consultations was circulated on 17 July 2018 in document G/L/1219/Add.2, WT/DS543/1/Add.2.

⁴ The addendum to the request for consultations was circulated on 20 September 2018 in document G/L/1219/Add.3, WT/DS543/1/Add.3.

⁵ 82 FR 40,213 (Aug. 24, 2017).

⁶ See <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

⁷ See <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/>

⁸ *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*, 83 FR 14,906 (Apr. 6, 2018); *Notice of Action and Request for Public Comment*

Chinese imports from 24 September 2018.⁹ The latter tariff increases are scheduled to increase to 25% on 1 January 2019.¹⁰

B. Measures at Issue

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 statement¹¹ to impose an additional *ad valorem* duty¹² 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 2019,¹³ 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)).

The measures at issue are adopted and implemented through, *inter alia*, the following legal instruments:

- a. Section 301-310 of the Trade Act of 1974, as amended (19 U.S.C., paragraphs 2411-2420), and 15 Code of Federal Regulations Subtitle C, Chapter XX, Parts 2006 and 2002.3.
- b. *Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (Aug. 24, 2017).¹⁴
- c. *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* (Mar. 22, 2018) (hereinafter Section 301 report).¹⁵
- d. *Update Concerning China's Acts, Policies, and Practices Related to Technology Transfer*,

Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 FR 28,710 (June 20, 2018).

⁹ The 10% additional tariffs shall be increased to 25% starting from 1 January 2019 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).

¹⁰ *Id.* at 47,975. In addition, 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. See <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/>.

¹¹ Statement on Steps to Protect Domestic Technology and Intellectual Property from China's Discriminatory and Burdensome Trade Practices. See <https://www.whitehouse.gov/briefings-statements/statement-steps-protect-domestic-technology-intellectual-property-chinas-discriminatory-burdensome-trade-practices/>.

¹² The rates of duty applicable to products of China shall apply in addition to all other applicable duties, fees, exactions, and charges. See 83 FR 28,710 (June 20, 2018); 83 FR 47,974 (Sept. 21, 2018).

¹³ 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. See <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/>.

¹⁴ 82 FR 40,213 (Aug. 24, 2017).

¹⁵ See <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

Intellectual Property, and Innovation (Nov. 20, 2018).¹⁶

- e. Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation (Mar. 22, 2018).¹⁷
- f. *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* (Apr. 6, 2018).¹⁸
- g. USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices (June 15, 2018).¹⁹
- h. *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* (June 20, 2018) (25% duties imposed on \$34 billion worth of goods from China).²⁰
- i. Statement By U.S. Trade Representative Robert Lighthizer on Section 301 Action (July 10, 2018).²¹
- j. *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* (July 11, 2018) (product exclusion procedures for \$34 billion list).²²
- k. *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (July 17, 2018) (proposed \$200 billion list).²³
- l. *Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (Aug. 7, 2018) (extended comment period for \$200 billion list as proposed duties increased from 10% to 25%).²⁴
- m. USTR Finalizes Tariffs on \$200 Billion of Chinese Imports in Response to China's Unfair Trade Practices (Sept. 18, 2018).²⁵
- n. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (Sept. 21, 2018) (Final \$200 Billion List).²⁶
- o. *Conforming Amendment and Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (Sept. 28,

¹⁶ See

<https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf>.

¹⁷ See <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/>.

¹⁸ 83 FR 14,906 (Apr. 6, 2018).

¹⁹ See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products>.

²⁰ 83 FR 28,710 (June 20, 2018).

²¹ See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative>.

²² 83 FR 32,181 (July 11, 2018).

²³ 83 FR 33,608 (July 17, 2018).

²⁴ 83 FR 38,760 (Aug. 7, 2018).

²⁵ See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200>.

²⁶ 83 FR 47,974 (Sept. 21, 2018) (citing to Section 307(a)(1) for the authority to modify the action being taken under Section 301).

2018).²⁷

- p. Section 301 Trade Remedies to be Assessed on Certain Products from China (U.S. Customs and Border Protection).²⁸

C. Legal Basis of the Complaint

The measures at issue appear to be inconsistent with the United States' obligations under the following provisions of the GATT 1994 and the DSU:

1. Article I:1 of the GATT 1994, because the United States imposes additional tariffs on certain imported products as identified in measures 1 and 2 above that exclusively apply to Chinese products, and therefore fails to accord immediately and unconditionally to certain products originating in China and imported to 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 the like products originating in the territories of other WTO Members;
2. Article II:1(a) and (b) of the GATT 1994, because the United States imposes additional tariffs on certain imported products originated in China as identified in measures 1 and 2 above that are in excess of United States bound rates in its Schedule of Concessions and Commitments annexed to the GATT 1994, and therefore fails to accord to certain products originating in China and imported into the United States, as identified in the above-mentioned legal instruments, treatment no less favourable than that provided for in the United States' Schedule of Concessions and Commitments annexed to the GATT 1994; and
3. Article 23.1, and Article 23.2 (a), (b), and (c) of the DSU, because the United States fails to follow the required procedures and conditions set out in Article 23.1 and Article 23.2(a), (b) and (c). Specifically, when seeking the redress of the violation of obligations or other nullification or impairment of benefits under the covered agreements of WTO agreements or an impediment to the attainment of any objective of the covered agreements of WTO agreements, the United States fails to seek recourse to dispute settlement mechanism under the DSU to determine whether China's certain acts, policies, or practices identified in the Section 301 report violated a covered agreement. Instead, the United States unilaterally imposes the additional tariffs on certain imported products originated in China, which are identified in measures 1 and 2 above, based on the findings and/or determinations made in the Section 301 report.

This request for panel establishment also concerns any modification, replacement or amendment to the measures identified above, and any closely connected, subsequent measures.²⁹

China asks that this request be placed on the agenda of the DSB meeting to be held on 18 December 2018.

²⁷ 83 FR 49,153 (Sept. 28, 2018).

²⁸ See <https://www.cbp.gov/trade/programs-administration/entry-summary/section-301-trade-remedies>.

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 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. See <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/>.