



Public Comment Submission by the China General Chamber of Commerce - USA (CGCC) in Opposition to the Proposed Determination on Appropriate Action in Response to China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (the "Report")

INTRODUCTION:

China General Chamber of Commerce - USA is a non-profit organization representing Chinese enterprises in the United States. Founded in 2005, our mission is to promote Chinese investment in the U.S., to advocate policy and legislation on behalf of its members, and to enhance cooperation between the Chinese and U.S. business communities. Currently, we have offices in New York, Washington D.C., Chicago, Houston, San Francisco, and Los Angeles, servicing over 1,500 members spread throughout the U.S., including 58 of the Fortune 500 companies¹. Our members range from large public companies to small and medium enterprises across all sectors of business. As of 2017, CGCC Chinese member companies have cumulatively invested over \$120 billion, contributed billions in tax revenue in the U.S., and directly employ more than 200,000 jobs, while indirectly support over 1,000,000 jobs throughout the United States.

On behalf of Chinese enterprises in the U.S., it is our opinion that the Report made arbitrary assumptions of facts to reach a predetermined conclusion without any actual evidentiary support. We believe that the tariffs proposed in the Report will not only impede decades of progress towards global free trade, but significantly hurt the American consumers, American businesses, American jobs, and deter future foreign direct investment into the United States.

The CGCC hereby provides the following comments for consideration by the United States Trade Representative to provide a unified voice and position of those Chinese enterprises in the United States.

COMMENTS:

CGCC and its member companies are concerned with the current U.S. - China economic relations, because it adds to great uncertainty and unpredictability to U.S. - China business, and it is hurtful to the interests of both sides. As a unified voice for the Chinese enterprises in the U.S., we are deeply concerned about the proposed actions of increasing tariffs on Chinese imports and adding restrictions on Chinese investments released on April 3, 2018. The proposed actions in the Report would do more harm than good (if any good) to the United States. The Report ignores the achievements made by the Chinese

¹ 2017 Fortune 500 ranking.



government in the intellectual property areas, disregards the harm caused to the American consumers and key export industries in the U.S., and violates international agreements (especially the WTO). On behalf of Chinese enterprises, we are firmly against the findings and its subsequent conclusions in the Report. We oppose the use of tariff and investment restriction measures as a tool for political gain.

I. Chinese government has made tremendous improvements to its intellectual property rights protection and enforcement

Intellectual property in China has been strengthened year by year, and related legal systems have become more complete. Chinese government has been making greater efforts in protecting intellectual property rights. Though there is still room for improvement, substantial progress has been achieved by Chinese government. In addition to the policies and rules presented in our October 2017 comments submission to this Committee, we would like to point out that recent progresses can be clearly demonstrated from three aspects - institutional system, judicial level and national legislation level.

- Institutional system: China has continuously carried out institutional reforms to enhance the systematic and institutionalized protection of intellectual property disputes and cases. Since the establishment of the first intellectual property judicial tribunal in 1995, China has constantly been improving its institutional system from the combining of civil, administrative and criminal proceedings in one intellectual property court in 2016, to today where there are a total of 15 intellectual property courtrooms in Zhengzhou, Tianjin, Changsha, Xi'an, Hangzhou, Ningbo, Jinan, Qingdao, Fuzhou, Hefei, Shenzhen, Nanjing, Suzhou, Wuhan, and Chengdu, which were all set up, together with the three special intellectual property courts in Beijing, Shanghai and Guangzhou, they constitute a new “15+3” plan of protection for China’s intellectual property.² Additionally, there are now over 5,000 intellectual property judges, judge assistants, technical investigators and clerks to provide the technical knowledge necessary in any intellectual property case.

Chinese courts have also increased collaborations with arbitration institutions, industry associations, and mediation organizations to promote the construction of third-party platforms for civil dispute resolution of intellectual property rights disputes. For example, the Beijing courts strengthen the links with the Beijing Municipal Office for the Protection of Intellectual Property Reporting Services, the China Internet Association Mediation Center, and other related entities, and fully mobilize the power of administrative mediation, industry mediation, and people's mediation organizations to advance the peaceful settlement of disputes.³

² <http://www.sipo.gov.cn/cms/search/searchResults.jsp>

³ "The Judicial Protection Status of Intellectual Property Rights in Chinese Courts (2016)"



- Judicial policy: The Supreme People’s Court has formulated judicial policies to guide trial practices and make sure legal application standards for the creation, use, and trade dispute resolution of intellectual property in different periods, different regions and different fields are unified, transparent and effective. From 1985 to 2016, a total of 34 judicial interpretations related to intellectual property rights were formulated, and over 40 judicial policy documents were issued. The Supreme People's Court established "The Supreme People's Court Research Center for the Judicial Protection of Intellectual Property Rights", "The Supreme People's Court Intellectual Property Case Guidance Research (Beijing) Base", "Chinese Court International Exchange (Shanghai) Base for the Judicial Protection of Intellectual Property Rights", and "The Supreme People's Court Research (Guangdong) Base for the Judicial Protection and Market Value of Intellectual Property", and regularly publishes "The Judicial Protection Status of Intellectual Property Rights in Chinese Courts (2016)", "The Supreme People's Court Annual Report on Intellectual Property Rights", and "The Yearbook of the Judicial Protection of Intellectual Property in China". These efforts are all aimed at providing a transparent and standardized interpretation of the intellectual property rights laws in China.

For example: The Judicial Protection Status of Intellectual Property Rights in Chinese Courts (2016)⁴ points to:

- ✓ The “Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Infringement of Patent Dispute (II)” was implemented on April 1, 2016: Further perfected the rules for the determination of patent infringement, specifying the choice of claims, the interpretation of claims, the approximate design, indirect infringement, defenses against the application, defense of the standard implementation, the purpose of production and operation, the defenses of legal sources, the calculation of the amount of compensation, application of Article 47 of the Chinese Patent Law and other legal application issues, which will effectively promote the correct application of the patent law.
- ✓ The "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Licensing and Confirmation of Trademarks" was implemented since March 1, 2017: Focused on outstanding issues in judicial practice, based on the "Provisions of the Several Issues Concerning the Trial of Administrative Licensing and

<http://www.court.gov.cn/zixun-xiangqing-42362.html>

⁴ <http://www.court.gov.cn/zixun-xiangqing-42362.html>



Confirmation of Trademarks" issued in 2010, the provisions mainly cover the substantive content such as scope of examination, the judgment of distinctive features, the protection of well-known trademarks, copyright, right of personal name, and other prior rights, as well as procedural content of violations of legal procedures and non bis in idem. In addition, it made clear the important issues involved in the administrative cases of trademark authorization and confirmation and the difficulties in trial practice.

- ✓ The Supreme People's Court has promulgated the "Provisional Regulations on Several Issues concerning the Participation of Technical Investigations of Intellectual Property Courts in Litigation Activities", and it is hurrying to work out guidance for the selection of technical investigators of intellectual property courts. The Higher People's Court of Shanghai has formulated the "Guidelines on the Judicial Authentication of Technical Facts in Civil Litigation of Intellectual Property Rights" to improve the identification mechanism of diversified technical facts. The Beijing Intellectual Property Court set up a technical investigation room and formulated the "Measures for the Management of Technical Investigations". The proportion of cases closed by the court in 2016 for technical cases increased by 27.5% year-on-year. The Guangzhou Intellectual Property Court has hired 29 experts from administrative agencies, colleges, research institutes and other units to form a technical expert advisory committee to provide professional opinions for the case hearing. In 2016, the court used technical experts or technical investigations in 88 cases, and the rate of withdrawal after mediation reached 64.7%. The Higher People's Court of Guizhou Province, in cooperation with the Science and Technology Department of Guizhou Province, engaged scientific and technical consultants to provide advice on the professional technical issues involved in the case to ascertain the technical facts. The Higher People's Court of Sichuan Province selected experts from the fields of electronic information technology, machinery manufacturing, medicine, and new plant varieties to enter the Intellectual Property Technology Experts Database to enrich the identification system of technological facts.
- ✓ The "China's Intellectual Property Judicial Protection Outline" (2016-2020), published on April 26, 2017. The outline defines the guiding ideology and goals for the judicial protection of intellectual property rights of the people's courts during the 2016-2020 period, defines the protection principles and measures, and plans development paths and blueprints.



From the clarity that the judicial system is able to provide, more and more foreign enterprises are feeling comfortable enough to seek relief in Chinese courts. As an example of the increased activities in Chinese courts, here are some major and typical cases of intellectual property rights in 2017: The "Red Cannon Disputes" between JDB and Wong Lo Kat, the copyright dispute case of "Mao Dun Manuscripts", the "Land Rover" trademark infringement dispute were selected as part of the top 10 intellectual property cases in China in 2017. In addition, the "Huiyuan" trademark infringement dispute, and the trademark infringement dispute between Hennessy of France and Penglai Liquor Co., Ltd. were selected as part of the top 50 typical intellectual property cases in China in 2017.

Taking the "Land Rover" case for instance, the Higher People's Court of Guangdong Province has increased the protection of well-known trademarks, regulated the behavior of malicious registration of trademarks, and guided the public to respect intellectual property rights, which shows the judicial attitude against the malicious accumulation of trademarks and reflects the legal protection of intellectual property rights of foreign-invested enterprises in China.

- National legislation level (protection of intellectual property infringement): The state pays more attention to the protection of intellectual property infringement disputes from the legislative level and makes amendments to laws and regulations aimed at the main points found in judicial practices. Just recently, on November 20, 2017, General Secretary Xi Jinping chaired and convened the first meeting of the 19th Central Leading Group for Comprehensive Deepening Reform and reviewed and approved the "Opinions on Several Issues Concerning the Strengthening of Reform and Innovation in the Trial of Intellectual Property Rights". The meeting emphasized that China must give full attention to the leading role of judicial protection in the protection of intellectual property rights, deepen the idea that protecting intellectual property rights is protecting innovation, improve the intellectual property litigation system, and strengthen the construction of the intellectual property court system.”

For example:

- ✓ Among the eight principles identified in "China's Intellectual Property Judicial Protection Outline (2016-2020)", Article 7 stipulates: "Insistence on the proportionate value concept. Coordinate the protection of rights and incentivize innovation, adhere to the protection of the scope and intensity of intellectual property rights in coordination with its degree of innovation and contribution, the infringer's infringement costs are



compatible with its subjective malice and behavioral hazards, and the protection and development laws of intellectual property are matched with national conditions and development needs. Legally and reasonably balance the interests of right holders, the legitimate rights and interests of others, social public interests, and national interests, realize the harmony and unity between protecting intellectual property, promoting technological innovation, and promoting industrial development.”

- ✓ Key Measures (VII) in the “Outline (2016-2020)” builds a tort compensation system that fully realizes the value of intellectual property rights: Vigorously promote the concept of respect for knowledge and talent. Adhere to the value orientation that intellectual property rights can create value, right owners should enjoy benefits and returns, and infringement of intellectual property rights is a violation of others' personal rights and property rights. Establish a fair, reasonable and harmonized damage compensation system of intellectual property, based on compensation and supplemented by punitive measures, so that the rights holder's interests can be compensated, the infringer is unprofitable, and the losing party takes up the cost of rights protection. Promote the establishment of a punitive damages system in laws such as the Copyright Law, the Patent Law and the Anti-Unfair Competition Law, and increase the legal compensation for intellectual property infringement. According to the requirements of the decision such as "Opinions of the CPC Central Committee and the State Council on Deepening the Reform of Institutional Mechanism and Accelerating the Implementation of Innovation-driven Development Strategies" and "Opinions of the CPC Central Committee and the State Council on Perfecting Property Protection System and Protecting Property Rights According to Law", realize the historic transformation of the strict protection of intellectual property.⁵
- ✓ The General Office of the CPC Central Committee and the General Office of the State Council issued the "Opinions on Several Issues Concerning Strengthening the Reform and Innovation in the Field of Intellectual Property Judgments":
 - (1) Establish lawsuit evidence rules that are consistent with the characteristics of intellectual property cases.

In accordance with the intangibility, timeliness, territoriality and other characteristics of intellectual property rights, improve the

⁵ <http://www.court.gov.cn/zixun-xiangqing-42362.html>



system of evidence preservation, give full play to the role of expert assistants, appropriately increase the power of people's courts to investigate and collect evidence according to their authority, and establish a litigation mechanism that encourages the parties to actively provide evidence. Various methods have been used to give full play to the role of notarization in the fixing of evidence in intellectual property cases. Strengthen the establishment of a system of integrity litigation in the field of intellectual property, explore and establish rules for evidence disclosure, exclusion of invalid evidence and other rules, rationally allocate the burden of proof, appropriately reduce the burden of the right holder on the burden of proof, and focus on cracking down on the issue of "difficult to prove" for holders of intellectual property rights.

- (2) Establish a system of compensation for infringement damages reflecting the value of intellectual property rights.
 - Adhering to the value orientation that intellectual property rights can create value and right owners should enjoy the benefits and returns. Give full play to the role of social organizations and intermediary agencies in the evaluation of the value of intellectual property rights. Establish a judicial recognition mechanism for tort damages, with the compensation as the main and punishment as the secondary, based on respect for intellectual property and encouragement for the use of innovation, and guided by the value of the intellectual property market. Concentrate on cracking down on the issue of "low compensation amount" in infringement lawsuits of intellectual property rights.
 - Increase the punishment of illegal acts of intellectual property rights infringement and reduce the cost of rights protection. For repeated infringements, malicious infringements, and other serious infringement circumstances, it is necessary to increase compensation and increase the amount of compensation according to law. By deterring the costs of rights protection by the losing party and paying a heavy price for the infringer, it effectively curbs and deters infringement of intellectual property rights, create a legal atmosphere where people do not dare infringement and reluctance to infringe, and realize historic changes to the strict protection of intellectual property rights.



- (3) Promoting reform of trial methods conforming to judicial proceedings of intellectual property rights.

Further play the leading role of judicial protection of intellectual property rights, strengthen the judicial review of administrative actions of intellectual property rights in accordance with the law, and promote the unification of administrative enforcement standards and judicial adjudication standards of intellectual property rights. Strengthen the research and application of the large judicial data, improve the case guidance system of intellectual property rights, reform the way of trial, promote the simplified shunt on cases of intellectual property rights, effectively enhance the convenience and timeliness of the judicial relief of intellectual property, and try to solve the problem of "long cycle" in the case of intellectual property rights.

Others: In the eight basic principles listed in the "Outline", the fourth principle is: "Adhere to equal protection. The legitimate rights and interests of intellectual property rights between different ownership entities and parties in different countries must be protected equally. The equality of rights, opportunities and rules must be upheld. Whether it is a publicly-owned economy or a non-publicly-owned economy, whether it is a domestic party or a foreign party, it is necessary to effectively guarantee that the parties enjoy equal procedural rights and substantive rights in intellectual property litigation."

Further to this point, 12 governmental bodies recently jointly published "The Action Plan for Protecting Foreign Companies' Intellectual Property Rights" ("Plan"). The 12 agencies are:

1. Office of the National Leading Group on the Fight Against IPR Infringement and Counterfeiting
2. State Intellectual Property Office of the PRC
3. Public Safety Bureau
4. Ministry of Agriculture
5. Ministry of Commerce
6. General Administration of Customs
7. The State Administration of Press, Publication, Radio, Film and Television of PRC
8. State Administration for Industry and Commerce
9. National Ministry of Forestry
10. China Post
11. The Supreme People's Court of China



12. The Supreme People's Procuratorate of China

The Plan pleads to take actions against intellectual property violations on foreign company's IP rights. It is the first time that Chinese government launched such special actions.

The Plan lists 11 working tasks, clarifies responsibilities of each participating department, calls for harsh clampdown on violations of trade secret, patent right, new plant species rights, malicious trademark registration, infringing famous brand, and internet IP infringement and piracy. Furthermore, it will enhance supervision over key segments, such as import/export and shipping. The interagency group will thoroughly investigate infringement and counterfeiting cases that have extreme bad influence to protect the right owners.

The Plan demands relevant administrative, law enforcement and criminal justice departments to work closely in sync, improving inter-agency collaboration and case handling efficiency. Cases of this nature should be handled immediately and by law, as an effort to create a market condition as well as an investment condition that encourages fair competition.

A more specific timeline was also proposed.

- **Mobilization:** by September 10, 2017, the Plan should be published, the interested parties should be mobilized, the tasks should be identified, and individual responsibilities should be clarified. Each participating member should detail its implementation plan.
- **Implementation:** from September to December 2017, each region and each member takes targeted actions, strictly clamping down infringement and counterfeiting behaviors, publicizing typical cases to discipline the violators. Critical cases need to be filed to Office of the National Leading Group on the Fight Against IPR Infringement and Counterfeiting ("Office").
- **Conclusion and Summary:** by December 31, 2017, each region and each member should conduct comprehensive summary of the Plan implementation and submit special report to the Office, which will analyze and promote best practices.

II. The Proposed Tariffs in the Report Would Cause Significant Harm to the U.S. Consumers.



Evidence clearly shows that the proposed \$50 billion tariff measures will have a significantly higher impact on U.S. consumers than it will hurt Chinese companies. The sanction will hurt U.S. consumers in the form of higher prices to end consumers. The punitive measures involve a large number of products closely related to the American public, such as No. 2937, No. 300 series of medicine products, and the No. 843 series of agricultural products. Most of these products are general consumer products. The proposed tariff increase will definitely lead to price increases of these products, which will hurt the interests of American consumers.

Chinese manufacturers have established themselves in various industries in the United States. Such a large-scale tariff increase to made-in-China products will increase the prices of products and/or production costs of corresponding products in the United States. According to the U.S. Consumer Technology Association (CTA), about 47% of all TVs sold in the U.S. are imported from China, as are 83% of PC monitors and 34% of lithium batteries. After the proposed tariffs, American shoppers could expect to pay about 23% more for TVs, computer monitors, batteries, and printer ink and cartridges. These products represent just a small portion of the 1,300 tech-related imports from China the 301 Report has targeted. More importantly, this does not only affect products that are made in China, but the overall prices for these 1,300 products would increase across the board (no matter the location of manufacture), since most retailers would spread their additional costs to other models. For our TV example, U.S. consumers could pay an additional \$711 million a year and cut back their total purchases by 7.8%.⁶

III. The Proposed Tariffs in the Report Would Cause Significant Harm to the U.S. Economy.

A. The proposed tariffs would hurt U.S. production due to a lack of downstream suppliers.

It is the CGCC's position that the main industries in the U.S. and China are complimentary and not competitive. Most main industries in the U.S. are service industries; while the main industry in China is manufacturing industry. The proportion of China's primary and secondary industries is larger than tertiary industries, and it does not have a lot of advanced technologies. In contrary, tertiary industries in the United States have a major significance, and it also has a lot of advanced technologies.

The currently published HTS for the steel industry, especially machinery manufacturing industry, contains a large number of general machinery equipment such as elevators, boilers and baking ovens under the HTS headings beginning with No. 840, 841, 842. The

⁶ Paul Davidson, "Trump China tariffs could hike prices for TVs, batteries by 23%, study shows", *USA Today*, April 17, 2018, <https://www.usatoday.com/story/money/2018/04/17/trump-china-tariffs-hike-tv-prices/521249002/> (accessed April 21, 2018)



low added value of these products effectively fills the gap in the United State's domestic output. As such, the high tariff imposed on such products is not conducive to the development of related industries. The HTS includes the exports of parts and components of many major products, and the purpose of importing such products is that the United States does not produce or has no alternative products. The prohibition of the import of such products will directly affect the production of some large scale United States machinery products, which will likely cause a fatal blow to the entire industry.

B. CGCC members have brought substantial tangible benefits to the U.S. economic development, taxation, and job creation.

By the end of 2017, CGCC Chinese member companies have made approximately \$120 billion of investments, contributed to billions of taxes income for U.S. government, and employed over 200,000 people in the U.S. labor force. CGCC's 2017 survey data has shown that 59% of companies have increased their employment in the past year, and 71% planned to expand their U.S. workforce to accommodate the business expansion in the next two years. Chinese companies are committed to giving back to local communities. 87% of surveyed Chinese companies plan to reinvest their U.S. profits back to the U.S. operations, which is higher than the figure of 73% in 2016. The continued investment from Chinese companies would lead to more jobs to be created in the long term.

Indeed, over the years, with sincerity and integrity, CGCC member companies have won the trust and respect of their local business partners and employees. Wanxiang is an automotive parts manufacture with headquarters in China's Zhejiang province. Through a number of mergers and acquisitions in the U.S., and with due respect to technology and intellectual property, Wanxiang's revenue has grown from merely \$3 million in 1995 to 3.5 billion in 2015, and has created or retained 12,000 jobs. However, due to the uncertainty to the business climate created by the proposed actions in the Report, we have seen some of members contemplating pulling out of the U.S. market completely, which would lead to job and economic losses to many communities in the U.S.

C. Chinese companies in the U.S. are building stronger awareness of the compliance and respect of U.S. laws and regulations.

CGCC survey found that Chinese companies apply stricter compliance measures and observe higher compliance cost in the U.S. than that in China. It is one of CGCC's top priorities to proactively promote public awareness of intellectual property protection and the compliance of local laws and regulations. Steady progress has been made as CGCC member companies increase reliance on local law firms and other professional service firms.

CGCC strives to continuously improve its members' awareness and better understanding of intellectual property rights, and to promote open dialogues and cooperation between Chinese and U.S. business communities. Since 2014, CGCC has hosted the following



forums, seminars for our members, and meetings with U.S. federal and state-level legislature and regulatory agencies as well as civil society organizations to provide an effective communication platform.

CGCC's efforts to promote better legal and regulatory practices

Forum:

- 2018 International Finance and Infrastructure Cooperation Forum (New York, 2018)
- “China-U.S. Intellectual Property Cooperation Dialogue & Chinese Brands Going Global” Forum (New York, 2016)

Seminars on U.S. taxation system, labor law, CFIUS, and administrative licensing:

- CGCC Legal and Policy Series: US-China Relations Outlook Under Trump's Administration (New York, 2018)
- Inbound FDI Taxation Training (Houston, 2017)
- CGCC Legal and Policy Series: Working with CFIUS on U.S. Investment Transactions (New York, 2016)
- Taxation Discussion with State Administration of Taxation of China (Washington DC, 2016)
- U.S. Taxation System Seminar (Houston, 2016)
- U.S.-China Administrative Licensing Dialogue: Review of Government Licensing Decisions (Washington DC, 2014)
- Lecture on Labor Laws in the U.S. (New York, 2014)

Meetings with U.S. federal and state-level legislature, regulatory agencies and civil society organizations:

- Roundtable Discussion with New York State Senator Jesse Hamilton (New York, 2017)
- CGCC Member Companies Visit New York State Legislature (Albany, 2017)
- Roundtable Discussion with Under Secretary for International Affairs of U.S. Department of the Treasury (New York, 2016)
- CGCC-AmCham Shanghai Member Reception (Washington DC, 2016)

With over thousands of participants, accumulatively, and broad media coverage, CGCC's efforts have helped Chinese member companies and their U.S. counterparts better understand the best practices relating to various legal and regulatory operations.

IV. Potential Aftermath of these Section 301 Investigations Would be Detrimental to U.S. Commerce



The punitive measures from the 301 Report violate WTO rules and disregard the corresponding international rules and guidelines. Extreme tariff measures are unilateral behavior; it was not authorized by WTO under dispute resolution mechanism and is a violation of WTO obligations and rules. From the prospect of the settlement mechanism for trade disputes, bilateral trade negotiation is a common and effective method in solving trade frictions. However, we should recognize that methods according to WTO multilateral rules are fairer and more just than bilateral methods relying on politics and strength to solve problems. This is because the WTO dispute settlement emphasizes rules and procedures more. Therefore, it is necessary to adjust the traditional practice of only relying on bilateral solutions and to develop the habit of respecting, observing and applying multilateral rules and mechanisms. We should dare to and be good at resolving trade disputes under the WTO legal framework.

CONCLUSION:

Given the various factors above, we respectively suggest that this Committee reevaluates the proposed across the board 25% tariff increase on approximately 1,300 products, especially those products mentioned in the comments above. We urge the two countries to quickly resolve these disputes and give clarity and assurance to our over 1,500 member companies.