



東南大學

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**STATEMENT OF**

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**BEFORE THE**

**THE 301 COMMITTEE MEMBERS**

**CONCERNING**

**PROPOSED DETERMINATION OF ACTION PURSUANT TO SECTION 301: CHINA'S ACTS,  
POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL  
PROPERTY, AND INNOVATION**

(DOCKET NO.: USTR-2018-0005)

MAY 15, 2018

**EXECUTIVE SUMMARY**

Both the United States of America ( the United States ) and P. R. China (China) are members of World Trade Organization (WTO), Under the exclusive jurisdiction of the WTO dispute settlement system, any attempt to seek trade remedy must be made in the institutional framework of the WTO only. The announcement of unilateral measures by the United States against China under its domestic Section 301 investigation violates its WTO obligations. Even if United States Trade Representative (USTR) made no findings in the Section 301 investigations that China breached its WTO obligations, which

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means that a given Section 301 investigation does not involve a trade agreement, remaining available and can still be used to provide relief, However, under this circumstances, Section 301 investigation will also be ruled and regulated by Non-violation claims in GATT/WTO jurisprudence.

## FORMAL STATEMENT

Good afternoon, Distinguished Chairperson and Members of the 301 Committee, My name is Bo Yi, Associate Professor of International Trade Law from China. On behalf of Law School, Southeast University, I would like to express my warmest thanks to the 301 committee, for the opportunity to offer comments concerning the proposed determination of action pursuant to section 301: China's acts, policies, and practices related to technology transfer, intellectual property, and innovation (docket no.: ustr-2018-0005)

I am pleased to submit this statement for opposing USTR's proposed action to increase tariffs on a list of products from China.

**I Without authorization from the WTO's Dispute Settlement Body, The WTO rules do not permit the United States to unilaterally claim against China and impose additional tariffs**

WTO Dispute Settlement Mechanism commits WTO members to bring trade disputes involving the WTO agreements and against other members to the WTO, instead of resorting to unilateral trade-related action. However, Section 301 allows the USTR to implement trade-related measures without following formal WTO dispute settlement processes if USTR determines that the conduct in question **does not** **"involve a trade agreement."** In 1994, when the United States became one of original members of



WTO , the United States Government issued one Statement of Administrative Action (the “Statement”) that Congress approved along with the relevant implementing legislation for the WTO agreements. Most importantly, the Statement indicated that the United States would refrain applying Section 301 in a manner which would violate its WTO obligations, indicating that if a Section 301 investigation involves a violation of a WTO agreement, the United States is committed to pursuing formal dispute settlement before the WTO. And, the Statement’s introduction states “that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement.”

In USTR’s final report on March 22, 2018, USTR concluded that certain “acts, policies, and practices of the Chinese government related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce ” and USTR now proposes to impose a 25 per cent duty on 1333 tariff lines that cumulatively cover approximately US\$50 billion worth of Chinese exports to the United States, and the United States’ position appears to be that it is unnecessary to bring the instant dispute to the WTO’s Dispute Settlement Mechanism. However, regarding to the President Trump’s directive related to the filing of the WTO case concerning Chinese licensing practices, on March 23, 2018, the USTR announced it had requested WTO consultations with China. This announcement seemingly indicates that the USTR considers that at least some of the conduct investigated during the Section 301 Investigation **“involves a trade agreement”** and therefore requires resort to the WTO’s Dispute Settlement Body.



In accordance with Article 23.1<sup>1</sup> of the Dispute Settlement Understanding of WTO, The WTO rules do not permit the United States to unilaterally claim against China and impose additional tariffs without authorization from the WTO's Dispute Settlement Body and Section 301 tariffs could eventually result in retaliatory tariffs from China.

**II if Section 301 investigation does not involve a trade agreement, it will also be ruled and regulated by Non-violation claims in GATT/WTO jurisprudence**

I have read one twitter message which revealed that an official from the USTR at a WTO Dispute Settlement Body meeting in Geneva after 5 days when USTR issued the Section 301 report said “It is very important for you to understand that not every bad trade action violates the WTO” which means China’s practices involving technology or intellectual property transfer did not implicate any specific WTO TRIPS-related obligation. In other words, China’s policies and practices were entirely compliant with its WTO treaty commitments.

For above reason, because Section 301 investigation does not involve a trade agreement, it will remain fully available to address unfair practices from China that do not violate the United States rights or deny United States benefits under the WTO Agreements. In other words, it is unnecessary to resort to dispute settlement proceeding of WTO when Section 301 investigation does not involve a trade agreement. However, under this circumstance, Section 301 investigation will also be ruled and regulated by Non-violation claims in GATT/WTO jurisprudence which means that Section 301 investigation

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<sup>1</sup> DSU, Article 23.1, When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.



which not ruled by WTO trade agreement could be claimed by China by virtue of non-violation nullification or impairment doctrine in the GATT/WTO.

It is contained in Article XXIII of the GATT 1994 version of GATT, which provides in pertinent part:

*If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of*

**...the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or...**

*the contracting party may [have recourse to the dispute resolution process] ...*

In accordance with Article XXIII of GATT 1994, although Section 301 investigation to China's practice does not violate the WTO rules or does not stipulated by WTO laws, it also be constructed as one measure, whether or not in conflicts with WTO disputes settlement understanding and China will have legal right to start the implementation of Non-violation complaints against the United States under WTO laws.

## CONCLUSIONS

**In conclusion, The United States shall be obligated under international trade law to bring the dispute to the WTO under the Settlement Understanding, not to unilaterally claim against China and impose additional tariffs under its domestic law.**