

UNITED STATES OF AMERICA
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Person Presenting Testimony:

Jie Lian, Esq.

Beijing Globe-Law Law Firm,

on behalf of

PATENT PROTECTION ASSOCIATION OF
CHINA

Docket No.: USTR-2018-0005

JIE LIAN'S TESTIMONY FOR PUBLIC
HEARING REGARDING THE PROPOSED
ACTION IN THE SECTION 301
INVESTIGATION OF CHINA'S ACTS,
POLICIES, AND PRACTICES RELATED TO
TECHNOLOGY TRANSFER,
INTELLECTUAL PROPERTY, AND
INNOVATION

Panel: 16

Room: Courtroom A

Hearing Date: May 15-17, 2018 (Day 3)

Time: 11:30AM

Location: U.S. International Trade Commission,
500 E. Street S.W., Washington DC, 20436

TO THE SECTION 301 COMMITTEE:

I, Jie Lian, on behalf of the Patent Protection Association of China (the "PPAC" hereinafter) intend to testify as follows at the above-captioned hearing:

1. The Trade Act of 1974 limits the President's power to take only "appropriate" measures. Whether the proposed level of increase in the rate of the duty and the aggregate level of trade to be covered is "appropriate" is an issue of damages in nature. New survey conducted by the PPAC suggests that the alleged damages/discrimination suffered by U.S. firms, if any, has been overstated. Additionally, it appears that insufficient evidence (as opposed to speculations, bias, hearsays, and inadmissible opinions) has been provided to support damages allegedly suffered by U.S. firms due to China's alleged acts. Thus, the proposed measures are not supported by evidence, and thus are not "appropriate", falling outside the scope of the President's power under Section 301.
2. For example, the Section 301 Investigation Findings issued on March 22, 2018 (the "March 22,

2018 Findings” hereafter) states that the *Regulations of the People’s Republic of China on the Administration of the Import and Export of Technologies* (the “TIER” hereafter) discriminates against foreign parties.¹ For example, the March 22, 2018 Findings mentions that, while the TIER requires foreign licensors to warrant to Chinese domestic licensees that the licensors’ IP rights being transferred do not violate others’ IP rights, Chinese domestic licensors are not required to make such a warranty in the same type of transactions.² The USTR thus found the TIER discriminatory against foreign firms who export technologies to China.

3. However, a recent survey conducted by the PPAC among its member companies across multiple industries has suggested that, as their common practice, Chinese domestic licensees require both domestic and foreign licensors to make said warranty to protect the licensees’ legal interests. For instance, one major Chinese domestic high-tech company stated in the survey that it is the company’s standard practice to require all licensors, foreign or domestic, to make said warranty to ensure that the company is purchasing the IP rights from the real valid owners. The company said it does not waive this warranty for Chinese domestic licensors. In response to the survey, 58 Chinese domestic entities stated that, as their usual practice, they do not waive the warranty when transact with Chinese domestic licensors. This is one example of how the March 22, 2018 Findings are inconsistent with the common practice of Chinese domestic companies suggested by the survey.
4. The October 10, 2017 Section 301 public hearing testimonies also strongly suggest that the proposed additional rate is based on speculations and bias, rather than reliable evidentiary facts.

¹ Appendix E of the Finding Dated March 22, 2018: Statement of the Office of IP and Industry Research Alliances (IPIRA) at the University of California, Berkeley

² *Id.*

5. For example, when asked how much “forced transfer of technology” allegedly suffered by U.S. firms happened “behind the scene”, the witness merely responded with generalized statements in languages that were speculative in nature (e.g. “you can imagine” “the anecdotal evidence”, etc).³
6. Furthermore, there is no evidence (as opposed to speculations) showing why the proposed level of increase is “appropriate”. In fact, during the October 10, 2017 hearing, when asked how the estimated \$225 billion to \$600 billion total damage allegedly caused by China’s acts was calculated, the witness could not even provide a basic methodology; instead, the witness responded, among other things, that “figuring out the extent of ... illicit IP transfer is so difficult”, that the evidence is “anecdotal.....”, that “the methodology is imperfect”, and that “We don’t know them precisely”.⁴
7. The Trade Act of 1974 mandates that the measures taken under Section 301 by the President must be “appropriate”. Considering the strategic importance of matters relating to trade with other major nations, it is reasonable to infer that the limitation of “appropriate” imposed by the legislature on the President’s power to take measures requires a very higher standard of care and in-depth analysis based on reliable evidence. The testimonies offered at the October 10, 2018, however, lacked admissible evidence which is required to support “appropriate” measures. Thus, it appears that the proposed increase of duty violates the requirement of “appropriate” set forth by the Trade Act of 1974.
8. Additionally, since the issuance of the March 22, 2018 Findings, the Chinese government has made numerous announcements regarding its intended to further enhance protection of foreign firms’ IP

³ Transcript of the October 10, 2017 Hearing, page 32, line 20 to page 39, line 6.

⁴ Transcript of the October 10, 2017 Hearing, page 53, line 1 to page 55, line 13.

rights, which has mitigated the alleged damages suffered by U.S. firms, if any.

9. The high standard of “appropriateness” inherently requires that the measures be adjusted according to the latest developments in the circumstances, including new evidence regarding the reliability of information on which the measures were initially based, the remedial measures taken by a foreign country which have mitigated any damages, and the possible negative impacts of the measures (e.g. retaliation by a foreign country).
10. In conclusion, it appears that the proposed additional duties may have been based on flawed facts finding and is thus inappropriate.

RESPECTFULLY SUBMITTED by

Jie Lian

Jie Lian, Esq.
Representative of the
PATENT PROTECTION ASSOCIATION OF CHINA