

***UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA
(DS543)***

**RESPONSES OF THE UNITED STATES TO THE PANEL'S
SECOND SET OF QUESTIONS TO THE PARTIES**

March 17, 2020

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. First Written Submission	
US-1	<i>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</i> (March 22, 2018) (“Section 301 Report”)
US-2	<i>Update Concerning China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974</i> (November 20, 2018) (“Update to Section 301 Report”)
US-3	Ministry of Commerce, People’s Republic of China (MOFCOM), <i>Announcement on Imposing Tariffs on Some Goods Originating in the US</i> (June 17, 2018)
US-4	MOFCOM, <i>Announcement on Imposing Tariffs on Certain Goods Originating in the US</i> (August 10, 2018)
US-5	MOFCOM, <i>Announcement on Levying Tariffs on Goods and Commodity Imports from the US</i> (September 19, 2018)
US-6	MOFCOM, <i>China to increase tariffs on imported U.S. products</i> (May 14, 2019)
US-7	Doug Palmer, <i>China Has Begun ‘Phase Two’ of Retaliation, Former U.S. Diplomat Says</i> , Politico, (June 6, 2018)
US-8	MOFCOM, <i>Ministry of Commerce Spokesperson Answers Questions about China’s Establishment of an “Unreliable Entities List” Regime</i> , (June 1, 2019)
US-9	Sarah Zhang, <i>China will not rule out using rare earth exports as leverage in trade war with US</i> , South China Morning Post (May 29, 2019)
US-10	<i>NDRC official talks about the development of China’s rare-earth industry</i> , Global Times (May 29, 2019)
US-11	<i>China to impose additional tariffs on U.S. imports worth 75 bln USD</i> , Xinhua (August, 23, 2019)
US-12	California Code, Penal Code § 484 (General Theft Statute)

Exhibit No.	Description
US-13	Texas Penal Code, Title 7, Chapter 31 (Offenses against Property – Theft)
US-14	8 U.S. Code CHAPTER 31 (Embezzlement and Theft)
US-15	Ryan Lucas, <i>Charges Against Chinese Hackers Are Now Common. Why Don’t They Deter Cyberattacks?</i> , NPR (February 9, 2019)
US-16	Computer Fraud and Abuse Act (18 U.S.C. § 1030)
US-17	Economic Espionage Act of 1996 (18 U.S. Code § 1831-1832)
US-18	Uniform Trade Secrets Act (1985)
US-19	Uniform Trade Secrets Act (1985) – adoption tracker
US-20	Federal Trade Commission Act, Section 5 U.S.C § 45
US-21	35 U.S.C. 200 (Patents Policy and objective)
US-22	Restatement (Second) of Contracts, § 205
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U.S. Opening Statement at the First Panel Meeting	
US-24	BDI, China, Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy? (January 2019)
US-25	Xinhua, Commentary: Xi demonstrates China's role as responsible country in New Year address (January 1, 2018)
U.S. Responses to the Panel’s First Set of Questions	
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US-27	Statement from the Press Secretary Regarding the President’s Working Dinner with China (December 1, 2018)
US-28	Remarks by Vice President Pence at the Frederic V. Malek Memorial Lecture (October 24, 2019)

Exhibit No.	Description
US-29	German Chamber of Commerce, Business Confidence Survey 2019-20
US-30	18 U.S. Code CHAPTER 41 (EXTORTION AND THREATS)
U.S. Second Written Submission	
US-31	<i>Sherman Act</i> , Section 15 U.S.C. § 1
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US-33	<i>Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China</i>
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US-34	USTR, <i>Letters RE: Product Exclusion Requests</i>

3 ARTICLE XX(A) OF THE GATT 1994

To the United States

21. *Please explain the relationship between the Section 301 Report and the additional duties imposed on List 1 Products and List 2 Products.*

Response:

1. At the outset, the United States would like to (re)emphasize that nothing in the text of Article XX(a) suggests that the United States is required demonstrate any particular “relationship” between the measures at issue and the products concerned in order to justify the measure under that provision. Article XX(a) refers to measures “necessary to protect public morals” – full stop – not measures necessary to protect public morals from morally offensive *products*. And, that Article XX(a) does not specify any particular threat (or source of offense) to “public morals” suggests that the drafters recognized that threats to “public morals” could emanate from a variety of sources or circumstances, not just morally offensive products *per se*.

2. Rather, the fundamental question is whether the measures at issue are “necessary” within the meaning of Article XX(a). As the United States has explained, the measures at issue are necessary because it is reasonable to conclude that China will continue to pursue its unfair trade acts, policies, and practices while it is advantageous to China to do so and until the economic costs of doing so begin to approach or outweigh the economic benefits.¹ Accordingly, it was necessary for the United States to adopt measures that are capable of changing China’s economic cost-benefit analysis. The measures at issue do just that by imposing significant tariff increases on Chinese products until China takes steps to eliminate the unfair trade acts, policies, and practices detailed in the Section 301 Report.²

3. Further, the benefits and advantages that China derives from the unfair trade acts, policies, and practices described in the Section 301 Report are designed to serve China’s industrial policy goals and economic objectives writ large and in a comprehensive sense.³ Therefore, any corresponding response to combat China’s unfair trade acts, policies, and practices could, likewise, be expected to be broad-based and designed to apply economic pressure to China in a comprehensive fashion, not just with respect to narrow range of products.

4. That being said, there is a clear and direct relationship between the “List 1 Products” and the unfair technology transfer policies, and practices described in the Section 301 Report. In particular, the Chinese products subject to additional duties under the measure that took effect on July 6, 2018 (*i.e.*, List 1) were found to benefit from the unfair policies, and practices documented in the Section 301 Report. This is clearly shown by the record evidence in this

¹ U.S. First Written Submission, para. 78.

² U.S. First Written Submission, para. 79.

³ *See* Section 301 Report (Exhibit US – 1), pp. 150, 153, 154.

dispute, including the U.S. legal instruments (*i.e.*, Federal Register Notices) through which the United States implemented the measures at issue and the Section 301 Report itself.

5. The Section 301 Report was the product of a comprehensive eight month investigation into China policies relating to technology transfer, intellectual property, and other unfair trade acts.⁴ The Report is over 200 pages in length, and is based on public testimony, public submissions, and other evidence. The evidence collected during the investigation includes public media reports, journal articles, over 70 written submissions, and witness testimony from the representatives of U.S. companies, workers, trade and professional associations, think tanks, as well as law firms and representatives of trade and professional associations headquartered in China.⁵ The report supported the following conclusions:

6. First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing process, to require or pressure technology transfer from foreign companies. Second, China directs and unfairly facilitates the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies. Third, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. Through these cyber intrusions, China has gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.⁶

7. Further, the Report found that China adopted the aforementioned unfair trade acts, policies, and practices to advance China’s industrial policy objectives,⁷ in particular the goals and objectives reflected in *Made in China 2025*, “China’s ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development.⁸ As found in the Section 301 Report, through the *Made in China 2025*:

⁴ See Office of United States Trade Representative (“USTR”), *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* (March 22, 2018) (the “Section 301 Report”) (Exhibit US – 1).

⁵ See Section 301 Report (Exhibit US – 1), pp. 9, 19.

⁶ See Update to the Section 301 Report, pp. 3-4.

⁷ See Section 301 Report (Exhibit US-1), pp. 17, 20, 27, 29, 36, 63, 149, 150, 153.

⁸ See Section 301 Report (Exhibit US – 1), p. 14 (“In 2015, the State Council released the *Made in China 2025* Notice, 66 which is China’s ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development: (1) advanced information technology; (2) robotics and automated machine tools; (3) aircraft and aircraft components; (4) maritime vessels and marine engineering equipment; (5) advanced rail equipment; (6) new energy vehicles; (7) electrical generation and transmission equipment; (8) agricultural machinery and equipment; (9) new materials; and (10) pharmaceuticals and advanced medical devices.”).

[T]he Chinese government seeks to acquire foreign technology, absorb that technology to boost indigenous innovation, and displace foreign competitors in both domestic and international markets. China’s technology transfer regime is a key mechanism to achieve this goal.⁹

8. Accordingly, the legal instruments through which the United States adopted and implemented the measures at issue place significant emphasis on *Made in China 2025* and the Chinese industries that benefit from that initiative. For example, in the April 6, 2018 Federal Register Notice (Exhibit CHN – 10) that summarized the findings of the Section 301 Report and proposed certain actions in response,¹⁰ USTR stated the following with respect to the products to be targeted by the measures at issue:

The list of products [*i.e.*, List 1] covered by the proposed action was developed using the following methodology: Trade analysts from several U.S. Government agencies identified products that benefit from Chinese industrial policies, including *Made in China 2025*. The list was refined by removing specific products identified by analysts as likely to cause disruptions to the U.S. economy, and tariff lines that are subject to legal or administrative constraints. The remaining products were ranked according to the likely impact on U.S. consumers, based on available trade data involving alternative country sources for each product. The proposed list was then compiled by selecting products from the ranked list with lowest consumer impact.¹¹

9. The United States adopted the measures at issue pertaining to “List 1” products following a notice and comment period on the tariff action proposed in the April 6 Notice. As stated in the June 20, 2018 Notice (Exhibit CHN – 2) through which the “List 1” measures were implemented:

USTR and the Section 301 Committee have carefully reviewed the public comments and the testimony from the three-day public

⁹ Exhibit US – 1, p. 47. *See also* Update to Section 301 Report (Exhibit US-2), p. 7 (“As detailed in the introduction to the Section 301 Report, official publications of the Chinese government and the Chinese Communist Party (CCP) set out China’s ambitious technology related industrial policies. These policies are driven in large part by China’s goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The most prominent industrial policy is ‘Made in China 2025,’ initiated in 2015. 21 Industrial sectors that contribute to or benefit from the ‘Made in China 2025’ industrial policy include aerospace, information and communications technology, robotics, industrial machinery, new materials, and automobiles.”).

¹⁰ *See* Exhibit CHN – 10, Section B (“Determination on Acts, Policies, and Practices Under Investigation”) and Section C (Proposed Determination on Appropriate Action).

¹¹ *See* Exhibit CHN – 10, Section C (“Proposed Determination on Appropriate Action”).

hearing. In addition, and consistent with the Presidential directive, USTR and the interagency Section 301 Committee have carefully reviewed the extent to which the tariff subheadings in the April 6, 2018 notice include products containing industrially significant technology, including technologies and products related to the “Made in China 2025” program. Based on this review process, the Trade Representative has determined to narrow the proposed list in the April 6, 2018 notice to 818 tariff subheadings, with an approximate annual trade value of \$34 billion.

10. In short, the record evidence demonstrates that (1) China adopted the unfair trade acts, policies, and practices documented in the Section 301 Report to support the industrial policy goals reflected in *Made in China 2025*; (2) the “List 1” products benefit from the *Made in China 2025* initiative; and (3) the United States adopted the “List 1” measures because the so-listed products were found to benefit from *Made in China 2025*.

11. The relationship between the additional duties on List 2 products and the Section 301 Report is different in that the List 2 measures apply to a broader class of products than those found to directly benefit from the unfair trade acts, policies, and practices documented in the Section 301 Report. The List 2 measures are nonetheless linked to the Section 301 Report because the United States adopted the List 2 measures only after China “made clear—both in public statements and in government-to-government communications—that it [would] not change” the conduct detailed in the Section 301 Report and instead “responded . . . by increasing duties on U.S. exports to China.”¹² In this respect, the measures that imposed additional duties on “List 2 Products” are derivative of the additional duties measures imposed on “List 1 Products.”

22. *Please comment on China's arguments in paragraphs 48 and 70 of its second written submission. Please explain the product exclusion process, and how the criteria used by the USTR to grant product exclusions relate to the objective of "public morals".*

Response:

12. As an initial matter, the United States would note that the exclusion process is not a

¹² See *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47974 (September 21, 2018) (Exhibit CHN – 3) (“China’s response, however, has shown that the current action no longer is appropriate. China has made clear—both in public statements and in government-to-government communications—that it will not change its policies in response to the current Section 301 action. Indeed, China denies that it has any problems with respect to its policies involving technology transfer and intellectual property. The United States has raised U.S. concerns repeatedly with China, including in Ministerial level discussions, but China has been unwilling to offer meaningful modifications to its unfair practices. Furthermore, China openly has responded to the current action by choosing to cause further harm to the U.S. economy, by increasing duties on U.S. exports to China.”).

measure challenged by China in this dispute. That is, in none of its submissions does China argue that the exclusion process is inconsistent with U.S. obligations under the GATT 1994. Therefore, to the extent that the exclusion process plays *any* role in this dispute, it would only be as evidence regarding some factual or legal issue involving the measures at issue.

13. Nevertheless, the existence of the exclusion process – and the factors considered in deciding on whether to grant exclusions – are fully consistent with the United States’ invocation of Article XX(a) of the GATT 1994. Moreover, the factors used in the exclusion process confirm that the U.S. tariff measures address the moral harm caused by China’s unfair technology transfer policies. This is evident from the text of the formal notices that establish the exclusion process. For List 1, the relevant notice was published on July 11, 2018.¹³ For List 2, the relevant notice was published on June 24, 2019.¹⁴

14. The July 11 notice explains the rationale for the exclusion process:

During the notice and comment process, a number of interested persons asserted that specific products within a particular tariff subheading only were available from China, that imposition of additional duties on the specific products would cause severe economic harm to a U.S. interest, and that the specific products were not strategically important or related to the “Made in China 2025” program. In light of such concerns, the Trade Representative determined to establish a process by which U.S. stakeholders may request that particular products classified within a covered HTSUS subheading be excluded from the additional duties.

15. As is plainly stated, the United States, in combatting China’s unfair and immoral acts, wished to minimize unnecessary economic impacts on U.S. interests. There is certainly nothing in Article XX(a) which requires a Member to ignore economic impacts in designing a measure to combat a threat to public morals. In seeking to minimize this harm, however – and as the notice indicates – the United States did not intend to exclude products that benefit from China’s unfair and harmful industrial policies.

16. The notice further explains the specific criteria to be examined in the evaluation of an exclusion request. Two of these criteria are of particular relevance here.

17. First, there is the criterion of “Whether the particular product is strategically important or related to ‘Made in China 2025’ or other Chinese industrial programs.”¹⁵ If a product falls within this category, it is unlikely to be excluded. As we have explained in response to question

¹³ See Exhibit CHN – 20.

¹⁴ See Exhibit CHN – 21.

¹⁵ See, e.g., Exhibit CHN – 20.

21 above, the Section 301 Report found that China’s technology transfer policies are aimed at promoting industries that make these products—that is, industries that are covered by China’s *Made in China 2025* program or other industrial programs. The adoption of these criteria are thus are irrefutable evidence of the link between the U.S. tariff actions and the unfair and immoral acts found in the Section 301 report.

18. A number of exclusions were explicitly denied because the product subject to the request was covered by China’s *Made in China 2025* program or other industrial programs. In Exhibit US-34, we have provided a sample of three such denial letters.

19. Second, the notice also provides that the United States will take “into account whether the exclusion would undermine the objective of the Section 301 investigation.”¹⁶ As plainly stated in our formal notices, the objective of the Section 301 investigation is to obtain the elimination of China’s unfair technology transfer policies.¹⁷ Thus, these notices make clear that the United States is unlikely to grant an exclusion if it would undermine the objective of combatting China’s unfair technology transfer policies. In this regard, the exclusion process clearly supports that the United States adopted its tariff measures to address its concerns with China’s practices.

20. In practice, approximately 20 percent of the List 1 exclusion requests denied by USTR were rejected on grounds that the product for which an exclusion was sought related to *Made in China 2025* or because granting the requested exclusion would undermine the objective of eliminating the unfair trade acts, policies, and practices documented in the Section 301 Report.¹⁸

23. ***Please explain how the different factors relevant for granting product exclusions have been assessed by the United States in the exclusions granted to date.***

Response:

21. The United States has established a fair and transparent process for granting product exclusions.

22. First, the United States issues a notice establishing the process. The notice describes the

¹⁶ See, e.g., Exhibit CHN – 20.

¹⁷ The United States adopted the measures at issue pursuant to authority under Section 301 of the Trade of 1974, which authorizes the USTR to take actions (including the imposition of duties) that are “appropriate” and “feasible” to “obtain the elimination of” “an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce.” See, e.g., 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* (issued June 20, 2018; effective July 6, 2018) (Exhibit CHN – 2).

¹⁸ As noted, each letter denying an exclusion requests states the reasons for the denial. All of the denial letters are publicly posted on the public docket referred to in the above-cited *Federal Register* notices. Samples of denial letters have been provided in US-34.

factors to be considered in granting or denying exclusions, and to be addressed in each application for exclusion.

23. Once the process is established, USTR begins receiving requests for product exclusions. Each request is publically posted. After the public posting, interested parties may support or oppose an exclusion request. If an interested party opposes an exclusion request, the requestor is given an opportunity to respond. All of these additional submissions are made publicly available.

24. Once the public submission process for a particular exclusion request is complete, USTR begins its review process. Each request undergoes a multistep review by trade and tariff experts. The review can involve specialists from particular U.S. government agencies, depending on the product. Each examination of an exclusion request applies all of the relevant factors (as set out in the notice), and are examined on a case-by-case basis. At the end of this process, USTR issues a decision letter to the initial requestor. These letters are also publicly posted.

25. Each decision letter states whether the request has been granted or denied. If the request has been denied, the letter identifies which of the factors resulted in the denial. For example, if the request has been denied because the product was covered by the *Made in China 2025* program or another industrial program, the letter will state this.¹⁹ The use of these factors as the basis for the decisions made during the exclusion process again confirms the relationship between the U.S. tariff measures and the objective of obtaining the elimination of China's unfair and immoral technology transfer policies.

¹⁹ For examples of these denial letters, see USTR, *Letter to Borch Import and Export, Inc. RE: Product Exclusion Request Number USTR-2018-0025-11429* (February 7, 2019) USTR, *Letter to FCA US LLC RE: Product Exclusion Request Number USTR-2018-0025-12905* (May 29, 2019); and USTR, *Letter to Siemens Medical Solutions USA, Inc. RE: Product Exclusion Request Number USTR-2018-0025-3112* (May 7, 2019) (Exhibit US – 34).