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President Trump Directs Action as a Result of USTR's Section 301 Investigation on China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation

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Yesterday, President Trump signed a Presidential Memorandum regarding China's technology transfer, intellectual property, and innovation-related laws, policies, practices, and actions. The Presidential Memorandum directs the Office of the United States Trade Representative (USTR) to "take all appropriate action under section 301 of the [Trade] Act (19 U.S.C. 2411) to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce." In particular, the President directs:

- *Tariffs* – "[T]he Trade Representative shall publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum. After a period of notice and comment … , and after consultation with appropriate agencies and committees, the Trade Representative shall, as appropriate and consistent with law, publish a final list of products and tariff increases, if any, and implement any such tariffs." A fact sheet released by USTR states that USTR will propose "25 percent ad valorem duties" on "certain products of China, with an annual trade value commensurate with the harm caused to the U.S. economy resulting from China's unfair policies." It is not yet clear exactly which products will be targeted by these proposed tariffs, although the fact sheet notes that the proposed product list will include aerospace, information and communication technology, and machinery products. During a hearing before the Senate Finance Committee yesterday, USTR Robert Lighthizer further identified the following as products that could be hit by the tariffs: advanced information technology, automated machine tools and robotics, aerospace and aeronautics equipment, maritime equipment, modern rail transport equipment, new energy vehicles, agriculture equipment, and biopharma and advanced medical products. We understand the deliberations in this regard are ongoing.
- *Investment Restrictions* – "The Secretary of the Treasury (Secretary), in consultation with other senior executive branch officials the Secretary deems appropriate, shall propose executive branch action, as appropriate and consistent with law, and using any available

statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States." These restrictions on investment would be imposed outside the process conducted by the Committee on Foreign Investment in the United States (CFIUS).

- *WTO Dispute* – "The Trade Representative shall, as appropriate and consistent with law, pursue dispute settlement in the World Trade Organization (WTO) to address China's discriminatory licensing practices. Where appropriate and consistent with law, the Trade Representative should pursue this action in cooperation with other WTO members to address China's unfair trade practices." In connection with the Section 301 determination, USTR announced today that it has filed a request for consultations with China at the WTO with respect to certain Chinese technology licensing requirements. The consultation request identifies claims under Articles 3 and 28 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) relating to China's alleged discrimination against foreign intellectual property rights holders (Article 3) and its alleged failure to ensure patent rights for foreign patent holders (Article 28).

Yesterday's announcement follows a seven-month investigation by USTR that was initiated at the President's request pursuant to Section 301 of the Trade Act of 1974. USTR's Section 301 report, also released yesterday, contains further detail on specific Chinese acts, policies, and practices related to technology transfer, intellectual property, and innovation that USTR found are "unreasonable or discriminatory and burden or restrict U.S. commerce." In particular, USTR concluded that the following acts, policies, and practices, among others, result in the unfair and harmful acquisition of U.S. technology:

- *Forced or pressured technology transfer*: the Chinese government's use of "foreign ownership restrictions … , other foreign investment restrictions, and the administrative licensing and approvals process to require or pressure the transfer of technology from U.S. companies to Chinese entities."
- *IP licensing restrictions*: the Chinese government's requirements that "U.S. companies seeking to license technologies to Chinese entities must do so on non-market-based terms that favor Chinese recipients."
- *Strategic acquisitions of U.S. companies to extract their technology*: the Chinese government's direction and facilitation of "the systematic investment in, and acquisition of, U.S. companies and assets by Chinese entities, to obtain cutting-edge technologies and intellectual property and generate largescale technology transfer in industries deemed important by state industrial plans."
- *Cybertheft*: the Chinese government's initiation or support of "cyber intrusions into U.S. commercial networks targeting confidential business information held by U.S. firms."

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As noted above, the Presidential Memorandum instructs USTR to publish the proposed list of products subject to additional tariffs in the Federal Register within 15 days, although it may do so even sooner. USTR will then provide a 30-day period for public comment. This will allow interested stakeholders the opportunity to submit comments and recommendations regarding the proposed actions prior to their implementation. USTR has also stated that it will hold a public hearing with respect to the proposed list on a date yet to be announced.

As noted, the legal basis for yesterday's measures is Section 301 of the Trade Act of 1974, as amended (19 U.S.C. § 2411). Section 301 provides USTR, subject to the specific direction of the President, with broad authority to unilaterally impose restrictions against countries that violate trade agreements, or that engage in acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce. Importantly, the European Union previously challenged whether Section 301 was consistent with US obligations under the WTO in *United States – Section 301-310 of the Trade Act 1974*.[1] In that case, the WTO Panel found that the specific aspects of Sections 301-310 at issue in the dispute were not inconsistent with the U.S.'s obligations under the WTO. However, the Panel noted that its consideration did not include “determinations and actions taken by the USTR that do not concern the enforcement of US rights under the WTO Agreement, including the provisions authorizing USTR to make a determination as to whether or not a matter falls outside the scope of the WTO agreements.”[2] Yesterday's actions, or at least their further implementation, may result in a similar WTO challenge by China, although such a dispute would likely take several years to resolve.

China has indicated that it will likely take retaliatory action in response to the imposition of tariffs on Chinese goods and the restrictions on Chinese investment, and there is concern in Congress and elsewhere that China will, at a minimum, target agricultural trade. If China acts consistently with its past practice, the retaliation will likely come in the form of tariffs imposed as a result of a trade remedies investigation, as the Chinese government has already stated that certain agricultural products such as soybeans are sold below their value in China and are unfairly subsidized by the United States.

WilmerHale continues to monitor these developments closely.

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[1] *United States – Sections 301-210 of the Trade Act of 1974 (Panel Report)*, WT/DS152/R, adopted Dec. 22, 1999.

[2] *Id*. at para. 7.13.

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