



THINK FORWARD

USTR Publishes Initiation of Section 301 Investigation into China's Practices Related to Technology Transfer, Intellectual Property and Innovation

By [Lyle Vander Schaaf](#)

August 30, 2017

On Thursday, August 24, the United States Trade Representative published formal initiation of the awaited [Section 301 investigation](#) under the Trade Act of 1974 to determine whether acts, policies and practices of the Government of China related to technology transfer, intellectual property and innovation are actionable under the Trade Act. The Section 301 investigation is being initiated pursuant to a request by President Trump issued in a memorandum on August 14, 2017 for USTR to investigate any of China's laws, policies, practices or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation or technology development.

Background on Section 301

The Trade Act of 1974 authorizes USTR to investigate to determine whether any conduct is actionable under Section 301 of the Trade Act, such as acts, policies and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce. Unreasonable actions are considered those that while not necessarily in violation of, or inconsistent with, the international legal rights of the United States or WTO commitments are otherwise unfair and inequitable. Because of this extensive reach of Section 301, it is often criticized by other countries. Many scholars and attorneys – as well as many member countries of the WTO - have indicated that the use of Section 301 is inconsistent with United States' obligations under the WTO. For this reason, since the WTO's formation, other Presidents have chosen not to use Section 301 and instead have used mechanisms under the WTO Agreements when they believed another country's acts, policies and practices were unreasonable or discriminated against U.S. commerce.

Scope and Focus of Investigation

USTR has requested consultations with the Government of China concerning the issues under investigation. USTR announced that, in particular, the investigation will address the following four specific issues:

1. Whether the Chinese government uses tools (including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements and other mechanisms) to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies (including whether vague and unwritten rules, as well as local rules diverge from national ones and are applied in a selective and nontransparent manner by Chinese government officials to pressure technology transfer).

2. Whether Chinese government acts, policies and practices deprive U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China. For example, whether the Regulations on Technology Import and Export Administration mandate particular terms for indemnities and ownership of technology improvements for imported technology, and other measures to impose non-market terms in licensing and technology contracts.
3. Whether the Chinese government directs and/or unfairly facilitates the systematic investment in, and/or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.
4. Whether the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets or confidential business information, and whether this conduct harms U.S. companies or provides competitive advantages to Chinese companies or commercial sectors.

USTR announced that, in addition to these four types of conduct, interested parties may also submit for consideration information on other acts, policies and practices of China relating to technology transfer, intellectual property, and innovation.

Timing and Schedule

USTR announced that the inter-agency Section 301 Committee, which oversees the investigation, will be holding a public hearing and seeking comments in connection with the investigation. Comments and requests to appear at the hearing must be submitted by no later than **Thursday, September 28, 2017**. The hearing will be held on **Tuesday, October 10, 2017** at the U.S. International Trade Commission in Washington, D.C. Post-hearing rebuttal comments are due no later than **Friday, October 20, 2017**.

USTR has 12 months to make a determination whether any act, policy or practice described in Section 301 of the Trade Acts exists and, if that determination is in the affirmative, what action, if any, to take.

Contact Us

If you have any questions concerning this action by USTR or would like to file comments or participate in the investigation, please reach out to your contact at Brinks Gilson & Lione or contact the author of this IP Alert.