



Tricks of the Trade: Section 301 Investigation of Chinese Intellectual Property Practices Concludes (Part II)

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As noted in [Part I](#) of this two-part Sidebar, the Office of the U.S. Trade Representative (“USTR”) recently concluded its [investigation](#) under [Section 301 of the Trade Act of 1974](#) (the “Section 301 Investigation”) “to determine whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce.” Thereafter, the President issued a [memorandum](#) (the “Memorandum”) in response to the investigation’s findings directing the USTR (1) to determine whether to increase tariffs on certain goods from China and (2) to pursue dispute settlement before the World Trade Organization (“WTO”) to address China’s allegedly discriminatory licensing practices. The [Memorandum](#) also directed the Secretary of the Treasury to propose possible investment restrictions on China in response to China’s alleged systematic investment in and acquisition of U.S. companies to obtain technologies and intellectual property. While [Part I](#) describes the legal framework governing Section 301 investigations generally, this part applies this legal framework to this specific Section 301 Investigation, providing background on the investigation, describing the USTR’s findings and the President’s directives, and concluding by addressing what legal issues lie ahead.

The Section 301 Investigation

On August 14, 2017, President Trump [directed](#) the USTR to “determine . . . whether 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.” The USTR [initiated](#) such an investigation pursuant to [Section 302\(b\)](#) on August 18, 2017, and requested consultations with the Government of China as required by [Section 303\(a\)](#). On August 28, 2017, China’s Minister of

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Commerce [responded](#) that China opposed the initiation of the Section 301 Investigation. As part of its [investigation](#), the USTR accepted public comments and convened a [public hearing](#) on October 10, 2017. The USTR issued the [final investigation report](#) on March 22, 2018.

The USTR's Determinations

In its [notice of initiation](#), the USTR noted it was investigating China's conduct under [Section 301\(b\)](#). As described in detail in [Part I](#), this provision governs "discretionary action" under which the USTR is to determine whether (1) "an act, policy, or practice of a foreign country is unreasonable *or* discriminatory *and* burdens or restricts United States commerce" *and* (2) "action by the United States is appropriate." In addition, the [initiation notice](#) cites [Section 304\(a\)\(2\)\(B\)](#) as furnishing the deadline for this investigation, a provision that applies to Section 301 investigations that do not involve trade agreements. Moreover, in its [final investigation report](#), the USTR stated that the "unreasonable" or "discriminatory" conduct provisions of Section 301(b) were "most relevant to this investigation." Thus, as a threshold matter, it appears the USTR determined that this Section 301 Investigation (or at least certain aspects of it) did *not* "involve[] a trade agreement."

As detailed in [Part I](#), the USTR's apparent determination that at least certain aspects of this Section 301 Investigation do not involve a trade agreement is legally significant because it indicates the USTR's view that resort to formal dispute settlement procedures is unnecessary, and unilateral action to redress some of China's practices is arguably possible. Moreover, if the USTR determines that China's conduct is not covered by a WTO agreement, then the United States' position (as stated in the [1994 Statement of Administrative Action](#) that accompanied the [relevant implementing legislation](#) for the WTO agreements) appears to be that it is unnecessary to bring the instant dispute to the WTO's [Dispute Settlement Body](#). It should be noted, however, that these issues are not addressed in the [USTR's report](#).

As to the USTR's findings, following an analysis of the evidence it received, the 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." Specifically, the USTR determined that:

1. China's use of foreign ownership restrictions (such as joint venture requirements and foreign equity limitations), foreign investment restrictions, and administrative licensing and approval processes to pressure technology transfers from U.S. to Chinese companies is [unreasonable and burdens or restricts U.S. commerce](#).
2. China's use of licensing processes to transfer technologies from U.S. to Chinese companies on terms that favor Chinese recipients is [discriminatory and burdens U.S. commerce](#).
3. China's facilitation of systematic investment in and acquisition of U.S. companies and assets by Chinese entities to obtain technologies and intellectual property, thereby generating large-scale technology transfer, is [unreasonable and burdens U.S. commerce](#).
4. China's cyber intrusions into U.S. computer networks to gain access to valuable business information are [unreasonable and burden U.S. commerce](#).

Having made this determination, the [statute](#) directs that the USTR "shall take all appropriate and feasible action authorized under subsection (c) [of Section 301], subject to the specific direction, if any, of the President regarding any such action."

The President's Directives

In response to the USTR's findings, the President issued the [Memorandum](#) directing three responses to the Section 301 Investigation. First, Section 1 of the [Memorandum](#) directs the USTR to "publish a

proposed list of products” from China and “any intended tariff increases within 15 days of the date of this memorandum.” These proposed tariffs would then be subject to a notice-and-comment period and consultations with other agencies and committees, after which the USTR “shall . . . publish a final list of products and tariff increases, if any, and implement any such tariffs.” Second, Section 2 of the [Memorandum](#) directs the USTR to pursue dispute settlement before the WTO with specific regard to the USTR’s second finding concerning China’s allegedly discriminatory licensing process. The USTR is to report to the President within sixty days on the progress of this effort. Third, Section 3 of the [Memorandum](#) directs the Secretary of the Treasury to “propose executive branch action . . . to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.” The Secretary is also to report to the President within sixty days as to progress on this front.

Legal Issues Going Forward

As is evident, the [Memorandum](#) directs various actions by several actors, raising legal questions at both the domestic and international levels. As to the proposed tariffs, the USTR is reportedly preparing a list of products that will be subject to increased tariffs with a value commensurate with the harm caused to the U.S. economy resulting from China’s unfair policies (estimated to be at least \$50 billion per year according to a [fact sheet](#) issued by the USTR). The White House has issued a [fact sheet](#) indicating the tariff increase could be 25% and may target the aerospace, information communication technology, and machinery industries. More certainty regarding the tariff increases, however, will be gained with the release of the USTR’s tariff list, currently due on April 6, 2018. Further, as noted, the proposed tariffs are subject to a notice-and-comment period before being imposed. Thus, whether tariffs will definitively be imposed following this Section 301 Investigation remains an open question that will not soon be resolved.

If the proposed tariffs are imposed, they could be subject to challenge in court under the [Administrative Procedure Act](#), as noted in [Part I](#). The tariffs would likely raise international legal questions as well. As a unilateral action taken without authorization from the WTO’s [Dispute Settlement Body](#), the tariffs could be found to violate certain WTO obligations, a finding that could eventually result in retaliatory tariffs on U.S. exports. As discussed in [Part I](#), such a violation will likely pivot on whether the Chinese conduct that the United States is attempting to redress unilaterally “involves a trade agreement”; if so, the United States may be obligated under international trade law to bring the dispute to the WTO under the [Dispute Settlement Understanding](#).

With regard to the President’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 (the first step in the WTO dispute settlement process). 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](#), as discussed in [Part I](#). Indeed, in its [request for consultations](#), the United States has alleged that certain conduct on the part of China is inconsistent with China’s obligations under the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#). Whether additional disputes before the WTO will be pursued to challenge other Chinese acts, policies, or practices examined during the Section 301 Investigation is unclear.

Finally, the legal implications of the [Memorandum’s](#) directive to the Secretary of the Treasury regarding investment restrictions on China are the least clear of the three courses of action. According to [one report](#), “the Trump Administration is considering a reciprocal investment regime under which Chinese foreign investment would be restricted to the extent China restricts U.S. foreign investment.” Such a regime could be subject to challenge if it runs afoul of any of the WTO agreements, such as the [Agreement on Trade-Related Investment Measures](#). However, the United States and China could also enter into a mutually acceptable bilateral agreement to avoid further disputes. The details of the activities and negotiations

related to this directive will likely be [away from the public eye](#); therefore it is difficult to anticipate what, if any, action will result and what the legal implications of those actions will be.

Some Members of Congress are [reportedly](#) closely monitoring the actions that will be taken in response to the Section 301 Investigation, particularly the possible imposition of tariffs. All such resulting measures, however, could be affected or superseded by [ongoing negotiations](#) between the United States and China. And, as discussed in [Part I](#), any resulting action could be subject to challenge in court. While it is [unclear](#) what concrete actions will eventually result from the USTR's findings in this Section 301 Investigation, it is clear that activity related to the investigation will continue for some time to come at both the domestic level (through the tariff proposal process) and the international level (through the [WTO dispute](#)).
