During his visit to China, President Trump raised concerns about the trade deficit between the United States and China and China’s trade practices. One longstanding concern in this regard has been technology/intellectual property (IP) transfer requirements in China—an issue the United States Trade Representative is currently investigating through a rarely-used tool under U.S. law. Below, we provide a summary update of the issues raised in the investigation and next steps.

On August 18, 2017, USTR initiated an investigation to determine whether acts, policies, and practices (APPs) of China related to transfer of technology, IP, and innovation are actionable under Section 301(b)(1) of the Trade Act of 1974 (Section 301). Section 301 provides USTR with the authority to...
investigate and take action in response to unfair trade practices. USTR has requested comments from interested parties and held a public hearing.

Complaints Raised by U.S. Industry

U.S.-based businesses and associations in the semiconductor, biotechnology, manufacturing, pharmaceutical, telecommunications, and software sectors complained that China uses measures to incentivize or require technology transfers contrary to its commitments under the WTO. The measures include:

- The *Regulation on Technology Import and Export Administration*, which mandates domestic ownership of improvements of imported technology, and imposes other non-market terms in licensing and technology contracts.
- Government licensing and approval processes that require expert panel reviews.
- Foreign investment ownership restrictions.
- Government-directed support for targeted mergers and acquisitions in prioritized industries, such as the semiconductor industry.
- Government-led industrial plans, such as the *Made in China 2025* initiative.
- Requirements for foreign companies to disclose source code and other sensitive information under the *China Cybersecurity Law*.
- Chinese measures that restrict the free flow of data, preventing foreign businesses from operating efficiently, including:
  - Restrictions on cross border data transfers under the *China Cybersecurity Law*.
- Chinese measures that have the effect of undermining the value of IP, including:
  - “Overbroad” compulsory licensing provisions under the *Anti-Monopoly Law*.
  - “Aggressive” efforts to mandate indigenous technical standards.

Responses from Chinese Interest Groups

Members of the China Chambers of Commerce, China Enterprise Confederation and Intellectual Property Law Society participated in the hearing to rebut the allegations. These groups replied to the allegations as follows:

- The *Regulation on Technology Import and Export Administration* is intended to safeguard rights and interests of licensees who have a weak position in international transfer negotiations.
- Chinese laws do not impose technology transfer requirements.
  - The terms of technology transfer agreements are prescribed by contracts that are negotiated
voluntarily and independently.

- Decisions to enter into joint venture agreements with domestic companies are voluntary.
- The Chinese government does not direct acquisitions of foreign companies; such transactions are made by companies for commercial reasons.

- The Made in China 2025 initiative is not a mandatory law. Instead, it is an “information and promotional platform” for economic growth.
- China’s IP laws have evolved and developed significantly over the years. Examples of some developments are as follows:
  - Progressive enactment of various laws that strengthen IP protections.
  - Increased enforcement of violations of IP laws and availability of strong remedies.
- The *China Cyber Security Law* and market access issues for U.S. companies in particular sectors are beyond the scope of the investigation.

**Timeframe and Next Steps**

Under the statutory timeline, USTR must determine by August 2018 whether APPs of China subject to the investigation are actionable under Section 301. Actionable APPs include conduct that is “unreasonable or discriminatory and burden[s] or restricts U.S. commerce.” USTR has explained that “unreasonable actions are those that while not necessarily in violation of, or inconsistent with, the international legal rights of the United States are otherwise unfair and inequitable.” Accordingly, actionable APPs under this investigation comprise conduct that is: 1) covered under World Trade Organization (WTO) obligations, or 2) not so covered, but otherwise “unfair and inequitable.”

According to USTR officials, if the United States makes an affirmative determination, the next steps will likely proceed in two tracks: in response to APPs discovered that provide a WTO cause of action, the U.S. may elect to bring a WTO challenge; and, in response to other actionable APPs, the U.S. may take unilateral action. Unilateral actions can include:

- Suspension, withdrawal, or prevention of the application of benefits of trade agreements concessions
- Duties or import restrictions
- Withdrawal, suspension, or limitation of benefits accorded to certain developing countries
- Binding agreements to eliminate or phase out practice, or provide compensatory benefits
- “All other appropriate and feasible actions” within the power of the President.

USTR has indicated its willingness to consider new information and information to rebut the public record. All comments will be available in the docket for public inspection (except for business confidential
information).