

# THE IP COMMISSION

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THE COMMISSION ON THE THEFT OF  
AMERICAN INTELLECTUAL PROPERTY

## **Recommendations Regarding the Trump Administration's Section 301 Investigation**

*March 2018*

The Commission on the Theft of American Intellectual Property (IP Commission), co-chaired by Admiral (ret) Dennis Blair and Dr. Craig Barrett (former Chairman and CEO of Intel Corporation), provides the following policy recommendations for consideration by the Trump administration in response to the Section 301 investigation of Chinese theft of intellectual property (IP) and forced technology transfer.

Given the continued assault on American technology, products, science, copyrights, and trade secrets, the IP Commission notes that changing the cost-benefit calculus of foreign entities determined to steal the IP of American firms is essential to the nation's full economic recovery and future economic success. Too many brilliant start-ups have seen the value of their work stolen and never had the chance to prosper; too many established manufacturers have had their products reverse-engineered and their markets inundated with cheaply priced copies; too many multinational companies have been compelled to transfer technology as a condition of market access. The administration must act, and act decisively with unilateral and multilateral initiatives.

Taking strong positions can be accomplished without forsaking America's values and fundamental commitment to the rule of law. As with challenges faced in the past, the IP Commission urges transparent, law-based approaches to ensure fairness, equal treatment, and justice as well as effectiveness.

The IP Commission acknowledges that the measures recommended below are part of a broader effort. The commission encourages the administration to make plans and policies that seek to develop a comprehensive U.S. economic strategy, one that revitalizes and protects the United States' own national innovation system. Doing so will help create a U.S. innovation ecosystem that unleashes the creative genius of America's entrepreneurs, providing for the lawful protection of their nascent ideas, research and development, production, and marketing.

The IP Commission recommends the following specific measures to respond to predatory practices by Chinese and other actors.

## U.S. Policy Actions

1. Use the emergency economic powers already granted to the president to deny access to the U.S. market and banking system to Chinese entities found to be directly benefiting from the theft of American IP.
  - Under the International Emergency Economic Powers Act of 1977, the president is allowed to sanction individuals and organizations and to “prohibit any transaction in foreign exchange.” Section 1637 of the 2015 National Defense Authorization Act expands this authority to cover “all transactions in property” of any person who the president determines “knowingly engages in economic or industrial espionage in cyberspace.”
2. Designate the national security advisor as the principal policy coordinator on the protection of American IP to reflect the president’s priority and to ensure interagency coordination.
  - The administration should create an assistant to the president and deputy national security adviser for economic security to coordinate the policy dimensions of IP protection, export controls, and investment controls, including the Committee on Foreign Investment in the United States (CFIUS). This position would coordinate with the special assistant to the president for trade policy, or the two positions might be merged.
  - The national security adviser would review all new measures to protect IP, new export controls, and new CFIUS legislation to ensure that measures to stop technology and trade-secret leakage are coordinated and encourage American innovation and production.
3. Provide statutory responsibility and authority to the secretary of commerce to serve as the principal official responsible for effectively administering the president’s policies on IP protection.
4. Expand authority to the secretary of the treasury (in consultation with the secretary of commerce and national security adviser) to deny the use of the U.S. banking system to Chinese and other foreign companies that use or benefit from the theft of American IP.
  - This builds on the existing statutory authority of the president as outlined above and was proposed but not adopted during the prior administration. The IP Commission strongly encourages the adoption of this recommendation to ensure that the United States is well-placed to address new and emerging threats on an ongoing basis.
5. Strengthen and modernize the CFIUS process managed by the Treasury Department to include an evaluation of IP protection as a condition for investment in the United States.
  - Congress should adopt the Foreign Investment Risk Review Modernization Act (HR 4311), which appropriately widens the categories of covered transactions, expands the specific factors that can be considered by CFIUS to deal with new threats to U.S. military technology, and provides for improved congressional notification.

- The CFIUS process should evaluate major new foreign investments on the basis of the demonstrated level of protection afforded to U.S. companies' IP, including assessments of a foreign entity's historical record of IP theft.
  - It should assess whether acquiring companies have damaged or threatened U.S. national security or the national security of U.S. treaty allies through the illegal acquisition of American IP, or other activities against U.S. security polices and interests.
  - CFIUS should review acquisitions that have been previously approved when new evidence comes to light of damaging actions by the foreign companies.
  - It should develop a monitoring mechanism for ongoing evaluation of approved investments in sensitive industries.
  - The administration should add financial resources and manpower to the CFIUS interagency team.
6. Establish a National Counter IP Theft Center, on the model of the National Counterterrorism Center in the intelligence community, to develop a deep understanding of the corporate structure, funding, and activities of foreign companies that pose the greatest threat to American IP.
- This action would establish close coordination with the National Intellectual Property Rights Coordination Center (<https://www.iprcenter.gov>) to inform U.S. government decisions by the Securities and Exchange Commission, the Department of Commerce, and the Department of the Treasury under their authorities.
7. Create a new Investment and Export Control Center, under the secretary of commerce, to develop and implement integrated policy regarding the protection of U.S. technology.
- Such a center would integrate export control procedures with CFIUS efforts to deliver a coherent and integrated set of outcomes to protect U.S. technology from the various methods sought to acquire it for foreign entities—from dual-use violations to forced tech transfer as a condition of market access.
8. In keeping with the IP Commission's earlier recommendation to strengthen the International Trade Commission (ITC) Section 337 process, establish a quick-response capability within the ITC for sequestering goods that incorporate stolen, pirated, or otherwise illegally procured materials or forms of IP.
- Such a capability should draw on and reflect the United States' global leadership as a champion of the rule of law. It should be established using a probable-cause standard of proof for any initial sequestering of goods; provide for a consistent, transparent process for rapid review and judgement; and promote best practices in ensuring access to evidence while also protecting confidential business information.
9. Require the Securities and Exchange Commission to judge whether companies' use of stolen IP is a material condition that ought to be publicly reported.

10. Establish in the private, nonprofit sector a dynamic and regularly maintained database of known foreign entities that have illegally or illicitly obtained American IP to collate and publicize information about their theft alongside key investment and trade data.
  - The creation and regular maintenance of such a nonpartisan database would further empower a broad base of American stakeholders—particularly state and local governments and small and medium-sized enterprises—to make informed decisions about the risks of particular investments and economic partnerships.
11. Enhance the work of the National Intellectual Property Rights Coordination Center, which currently focuses on information-sharing and law enforcement, to make the center the real locus of policy on IP rights protection.
  - The administration should increase manpower and resources, especially in the Department of Justice and FBI, to investigate and prosecute cases of trade-secret theft.
12. Continue to encourage and welcome investment and economic partnerships with Chinese entities that have demonstrated a commitment to promoting high standards of IP protection and that do not engage in unfair trade practices.
  - As aptly noted in the administration’s recent National Security Strategy, the United States “welcome[s] all economic relationships rooted in fairness, reciprocity, and faithful adherence to the rules,” including the pursuit of ongoing closer U.S.-China trading ties. On this basis—and without “turning a blind eye to violations”—the United States should continue to engage with China on pursuing genuine opportunities to strengthen the bilateral relationship. This includes continued efforts on the U.S.-China 100-Day Action Plan and the establishment of a high-standards bilateral investment treaty in ways that “benefit all with equal levels of market access and opportunities for economic growth.”
13. Make it a national goal to delegitimize Chinese indigenous innovation efforts dependent on the theft of foreign IP and ensure that all U.S. agencies speak with one voice to move China to become a self-innovating economy.

## Multilateral Policy Actions

14. Initiate a multilateral policy dialogue among like-minded countries, starting with the European Union and Japan, as well as Australia, the Republic of Korea, and Singapore, to strengthen national policies on Chinese foreign investment (Multilateral CFIUS).
15. Establish a dialogue with Europeans, Japanese, and others who share interests in protecting IP and reforming international trade rules and institutions to harmonize national legal and regulatory frameworks and share information on bad actors.
  - The IP Commission applauds the December 12, 2017, joint statement by the United States, the European Union, and Japan expressing a commitment to work together to

ensure a “global level playing field.” Such partnerships should be encouraged and expanded, including to potentially bring in other champions of free trade and high standards for IP protection.

- The World Trade Organization has proved largely ineffective in providing for the protection of IP from an infringer like China. As a consequence, the United States must work with its allies and friends to chart a path forward that serves the interests of nations committed to the rule of law and fair markets and that incentivizes others to adopt the requisite norms and practices.
16. Encourage the development of evaluative tools that assess the levels of national IP protection and formulate work plans in response (similar to the Trade Secret Protection Index (TSPI), which is an existing tool that assesses national IP-protection performance).
  17. Develop a program that encourages technological innovation on a multilateral basis to improve the ability to detect counterfeit goods.
  18. Establish IP “centers of excellence” with priority countries with strong rule of law to promote best practices for protecting IP rights.

#### *About the IP Commission*

The IP Commission is an independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academia, and politics. The IP Commission published [reports](#) in 2013 and 2017 documenting and assessing the causes, scale, and other major dimensions of international intellectual property theft as they affect the United States; the reports also proposed appropriate U.S. policy responses that would mitigate ongoing and future damage of intellectual property rights by China and other infringers.

#### *About the Commissioners*

Co-chairs:

- Admiral Dennis C. Blair, Co-chair of the IP Commission; Chairman of the board and Distinguished Senior Fellow at the Sasakawa Peace Foundation USA; former commander of the U.S. Pacific Command; and former U.S. director of national intelligence
- Craig Barrett, former Chairman and CEO of Intel Corporation

Other Commissioners:

- Dr. Charles W. Boustany Jr., Chair of the Center for Innovation, Trade, and Strategy at the National Bureau of Asian Research; former six-term U.S. Representative from Louisiana
- Slade Gorton, former U.S. Senator from Washington State; member of the 9/11 Commission
- William J. Lynn III, CEO of Leonardo North America and DRS Technologies
- Deborah Wince-Smith, President and CEO of the Council on Competitiveness
- Michael K. Young, President of Texas A&M University