

Cooperation or Confrontation: An Analysis of Two Trades Conflicts Between the U.S. and China Centered on IPR

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ABSTRACT

Intellectual property conflicts have affected the U.S. and China's relationships for several decades. Some have been resolved finally through negotiations and compromises, but some escalated to trade war. This paper will discuss why a potential trade war was avoided at the end of the 20th century but happened in 2018. It uses two cases to analyze the two different situations. By focusing on a series of 301 investigations, especially the ones between 1990 to 1999 and the one in 2018, and looking at the societal level, including two nation's domestic environments, China's state policy to SOEs, and the rise of Huawei company, I compare the differences between two situations and explain what causes the opposite results-- peace and decoupling. At the end of the paper, I raise policy recommendations for Chinese enterprises, the Chinese government, and foreign companies that intend to invest in China and some implications for future research.

Keywords: *Intellectual Property Rights, The United States, China, Trade Conflicts, 301 Investigation, Huawei Company*

1. INTRODUCTION

Since the implementation of the opening-up policy in China, the nation began to focus more on the International market, hoping to become integrated with the world and searching to expand relationships with western countries. In 1979, the United States and China established diplomatic relations. Since then, with the booming trade transactions between the two countries, the United States constantly imposed pressure on the issue of China's lacking intellectual property rights protection system. In May of 1979, the two countries reached an agreement and signed the Sino-US Trade Agreement. In 1982 and 1984, China also enacted the Trademark Act and the Copyright law, respectively. Under the push of external force, China's move attracts tons of foreign companies invested in China, which promotes domestic innovation and economic development at the same time.

The intellectual property relationship between the two countries has changed over two decades, ranging from fixing their eyes mainly on the related law to turning into the interplay of law, trade, and politics [1]. To cater to domestic interests and improve the competitiveness of the U.S.

companies in the world market, the Bush administration designated China as the priority country under Special 301 provisions of the 1988 Omnibus Trade and Competitiveness Act. Several years later, the investigation upgraded to the Section 337 investigation, and China was on the priority watch list again, which exacerbated the worsening of bilateral relations.

Although the two nations had serious trade disputes in 1996, the conflicts finally de-escalated through mutual efforts. But just a few years later, still two same nations, similar conflicts, why it finally leads to the trade war? Clearly, several variables are affecting different situations. Comparing these two cases would be important to the know the deep reasons behind the trade war in 2018, how should two nations cope with the crisis, and how would two nation's relations be like after the trade war.

This essay will analyze the trade war between the two nations from the perspective of intellectual property disputes. The body part will use the case study method to analyze two circumstances in the 1990s and 2018 and what factors have an impact on two opposite results. The final part of the essay would be the suggestions for the Chinese

government, Chinese and foreign enterprises, as well as the recommendations for future research.

2. LITERATURE REVIEW

Chinese foreign policy has changed dramatically over the last 40 years. Several decades ago, it was recommended that keeping a low-profile would be the best for China's development under Deng's leadership. Critics in the United States contended that China's foreign policy was soft, with no confidence at all. Then in China, especially on the internet, the hawkish attitude caught on, believing China needed to take a harder stance in foreign policy since the economy was already prosperous back then. Although the Chinese government did not fully agree with this idea, later it gradually adjusted the previous approach [2]. When Xi came into power, he emphasized the peaceful development and win-win outcome. But that was not other countries' thinking. Facing with a rising China that at the same time becomes more assertive in foreign policy, the United States felt being challenged. For the Belt and Road Initiative and AIIB program, other countries also speculated and doubted China's true intention and even found some similarities between the Marshall Plan and Belt and Road Initiative [3].

Therefore, national security concerns became one of the most critical factors leading to the U.S. under the Trump administration initiated a trade war against China. Another important factor is China's pirating behavior in technological products from the United States. Liu and Woo[4] noted that the J.V. form as the access requirement to the Chinese market and the use of unfair market power incurred dissatisfaction from the United States. The American critics claimed that China was theft, gaining American technology at low prices to achieve Made in China 2025(MC-25) Initiative. Actually, before the 2018 trade war, a trade war almost happened between China and the U.S. in 1996 centered on intellectual property rights. Jayakar [5] used a two-level game to analyze copyright conflicts back then. Both nations were trying to avoid the breakdown of the agreement, but the U.S. could always gain more benefits than China if it continued to ask China to reform the copyright system. The U.S.'s concession in the negotiation with China showed the progress made for the public. For China, reforming its copyright system would attract more investment and trade, but the implementation of the policy would impair domestic interests. Therefore, it was reasonable that the U.S. claimed to impose sanctions on the part of China's export commodity when China failed to reach the U.S.'s expectation in terms of copyright implement.

Concerning the final results of the trade war, some experts gave it three potential scenarios. If both sides reached a deal, and it will end the trade war, the U.S. would gain the biggest benefit from it. Not only the U.S. companies invested in China would gain more access to the Chinese market, but also it increased U.S. President Donald Trump's rate of winning the election campaign. But for China, it was

also beneficial for improving I.P. protection, expanding the market opening, and attracting foreign investment were what China expected to see. The second scenario would be two nations did not reach the agreement since China had to make too much concession in order to satisfy the U.S.'s requirement. Another scenario was that although two nations stroke the deal, the interpretation of the agreement might cause some conflicts, and the spillover effect would affect two nations and other nations [6].

Designing an effective and appropriate system of IPRs was complex for any country [7], and different countries held different attitudes towards intellectual property protection. It was quite common to see the multiple developments regarding the enactment of patent law, trademark law, and so forth in both northern and southern countries. Taking Washington as an example, utilitarian philosophy was the main point of the country's intellectual property protection [8]. According to Wechsler, people who held political power tried to prevent intelligence and technology from exporting to competitive rivals. For those domestic companies which had Chinese competitors in the United States, they were satisfied to ask the government to introduce a strong I.P. system and imposed more trading sanctions on China so that they would take more advantages on selling products for they would have fewer competitors. But things were different in developing countries. For the third world countries, it would be costless for them to pirate technology from the developed countries if patent protection was not enforced by governments in these countries [9]. And if they could continually borrow free technology from other countries, they might treat their current I.P. as national interests.

Intellectual property rights were positively relative to economic growth, and it would be more effective in the open economy, but innovation might play a weaker role in a less competitive market, according to Gould, D.M., & Gruben [10]. A company that found low IPRs in their nation could impede their development when they competed with foreign companies by failing to import commodities that held more advantages. If the government enhanced I.P. Protection, it would naturally attract more foreign countries to invest and boost the economy.

However, I.P. protection gradually became the battle of interests among nations [8]. For one thing, they intended to use it as a policy tool to develop the national economy. For another, it also became the bargaining chip in international trade. Every country now realized that skills and knowledge were the most obvious advantage in the long run [11]. Therefore, industrial countries were contributing to transforming into intellectual countries to gain more interests. For those countries which have already realized this goal, they protected their technology from being stolen, exerting pressure on those countries with low IPRs, and even conducted tit-for-tat retaliation.

Previous scholars have already set up mature I.R. theories and tried to use them to explain important events in

world history. From realism's perspective, the world was conflict-oriented. The survival of the state always ranked first. Grieco also claimed that states were the key actors; they were defensive actors and their rationality is goal prone. But it could not explain why the trade war was avoided in the 1990s. Liberalism contended nations shared common interests and values, power and competition were not the only things that mattered. But liberalism focused more on the international institutions to deal with problems, paying less attention to the social level. Thinking about 1996, the year which China has not entered into WTO, so how two nations used global mechanisms to solve the conflict? Likewise, it failed to explain why the trade war happened in 2018 when the two nations' economy has been spoiled partly since liberalism was cooperation-oriented. While from constructivism's perspective, ideology played a key role in the world politic. Political leaders' ideology did matter, but domestic economic and political situations in the two nations were also required to consider.

These theories are not invalidated, but quite good and can explain part of the actors' behavior and motive. But it is relatively weak to use a single one theory to explain these two conflicts, as one theory cannot explain the complex interaction among state actors and non-state actors, and how the process of escalation interplays among different levels of actors. This paper would combine the theories to analyze different variables at different levels, which would be more convincing.

3. CASE STUDY ONE: THE STRENUOUS PROCESS OF SUCCESSFUL NEGOTIATION

Back in 1989, China was under the priority watch list in the special 301 reports. Later it was listed as the priority country since 1991. And in 1991, before the U.S. prepared to impose the sanction on China, the two nations decided to negotiate with each other about intellectual property rights. The first negotiation was conducted in November. Back then, the U.S. had no competitors and was the global leader around the world, while China, a country has not entered into WTO, still had a lot of space to improve and reform domestically. Human rights problems and other issues in China were the bargaining chips to the U.S. The negotiation went smoothly with China's concession; it seemed that the agreement would be reached for the days ahead. But on November 26th, the U.S. claimed that the negotiation broke down unilaterally even without informing China in advance. The trade war was on the verge of breaking out. Feeling surprised on the side of China but without thinking too much, the second negotiation was held in Beijing in December. Both sides refused to make any concession, and China declared that if the U.S. imposed sanctions on China, China would also retaliate back against the U.S. The negotiation was in a stalemate. Finally, in January 1992, the two sides agreed to sign the memorandum of understanding intellectual property rights. The second I.P. conflict

happened in 1995. Again the U.S. issued the 301 investigation and threatened to impose sanction on China, but China also made the list of retaliation commodities. And the conflict was eased when both nations made some concessions. China promised to rectify and close down companies that sold counterfeit products and enacted infringement acts. The U.S. gave up the requirement of establishing software companies and other companies in the form of sole corporations in China.

3.1. Analyzing Special 301 Report in the 1990s and China's Response

The special 301 report focused on issues like piracy of intellectual property, counterfeit commodities in China, exporting of infringing goods in the 1990s and the early 20th century. The accusation was short and clear. China responded it in 1995 that this paper mentioned earlier when two nations reached the second deal. Later Chinese state council issued "Opinions on further cracking down on infringement of intellectual property rights, production and sales of fake and inferior commodities" in 2012 targeted at where the U.S. unsatisfied in later 301 sections. The file took effect quickly, and hundreds of illegal stores were forced to lockdown. The IPR dispute between two nations got eased.

3.2. Two Countries' Situation in the 1990s

There are mainly two reasons that can explain why the nations avoided the potential trade war at that time: the big difference in national power and the similar path choose.

After the breakdown of the Soviet Union, the bipolar global situation disappeared and the United States took over the hegemony of the world. Owing the strongest military power, the U.S. was leading the unipolar world. Undoubtedly speaking, the U.S. barely worried about national security and what the European countries thought about is mostly how to survive under one superpower country's governance. Back then, China was only a relatively poor third-world country that initially developed and was recognized by the whole world. Although the reform and opening-up policy was already implemented in China, the openness of the market was not that complete and the import and export of commodities were strictly limited by the Chinese government. In 1990, China only offered less than 3% global manufacturing output and the eighth source of import for the U.S. From the perspective of the U.S., trading with China only took up a small amount of pie in trading since the United States paid more attention to and interacted more with European countries, while had less interdependence with China. Naturally, the fact that the U.S. trade deficit from China was relatively low could even be omitted. On top of that, Huawei technologies company was a small company that could not compete with technological company tycoons in the U.S., and it did not set up the first sales office in European Union until 2001. the U.S. is still outstripped than other countries a lot globally in terms of

intelligence and technology. Although back then the U.S. was indeed not satisfied with China's incomplete intellectual property system, as long as it did not touch the core interest, the high-tech of the U.S., the conflicts had enough space to be solved.

Surprisingly, the U.S. and China followed a similar direction in the 1990s. Both nations embrace and welcome globalization [12]. While the United States made more effort and contributed more to the World Trade Organization and a free market, China also began to seek more cooperation with other countries. The reform and opening-up policy and more openness in coastal cities are the signals. As the leading countries in the global stage and the largest developing country, they both face the conspicuous wealth gap because of the domestic policy readjustment.

4. CASE STUDY TWO: WHY THE U.S. LAUNCH THE TRADE WAR AND TARGETED AT HUAWEI COMPANY

In recent years, the two nations' relationship escalated sharply. In July 2018, U.S. President Donald Trump confirmed to the public that the U.S. would impose 25% tariff on Chinese commodities that worth 34 billion USD. And just several months later, the chief financial officer of Huawei, Meng Wanzhou was detained by the Canadian government, supported by the U.S. government when she was about to take on the transfer flight in Canada. The detaining reason was that Meng as executive director of Kingcomm technology company had business with Iran in computing devices which violated the U.S. economic sanction imposed on Iran, while the U.S. did not have substantial evidence. In January, 2019, the U.S. formally requested Canada to extradite Meng. China warned the U.S. to cancel the arrest on Meng and the requirement of extraditing. Having hold hearings twice, now Meng still detained in Canada.

4.1. Analysis of Section 301 of Trade Act in 2019

Analyzing the main content in Section 301, the major accusation towards China is concluded in three parts. The first one is China's unfair technology transfer regime for U.S. companies in China. Joint venture form and other restrictions forced the U.S. companies to give the most advanced technology to China in exchange for administrative approval. And most of the companies chose to keep in silence since they feared facing retaliation from the Chinese government and thus lost the potential market and business opportunity in China. The second complaint is relative to outbound investment. Tons of China's state-owned enterprises invested in the U.S., especially in IP-intensive sectors, with guidance and financial support from the Chinese government. They complained that Chinese government even had the right to stop or improve the investment program and decide about future road and reform

in SOEs. Too much intervene is harmful to the competitiveness and fairness of the U.S. industry and U.S. commerce. The last accusation is that the Chinese government-supported cyber intrusion and stole I.P. and sensitive commercial information in the U.S. They had evidence that the Chinese government of all levels provided intelligence of trade secrets in the U.S. to SOEs to improve their competitiveness with other U.S. companies. The whole paper is surrounded by one word and one idea, the one word is technology and the one idea is China is taking away the U.S.'s technology and I.P. by using unfair methods.

Let's take a look at China's "response" this time. It would be better to see it as a domestic policy. In November 2019, the state council issued Opinions on Strengthening the protection of Intellectual Property Rights. In this paper, it emphasized on strengthening the I.P. system and protection, enhancing punishment for infringement and counterfeit selling. This time the words were more opaque, they just responded to one point in the first concern in Section 301, promising to improve communication channels with foreign right holders to better conduct international cooperation. Mentioning no words of technology transfer and government intervention. Obviously, China refused to confess what USTR complained about in the investigation and it could be reflected in the 301 investigation, in which some law experts in China defended that technology transfer was the result of "voluntary agreement" with no government intervenes and they could operate their company normally.

What if China made the concessions as Section 301 mentioned? The trade war would be de-escalated which would be beneficial to both countries, but China would then face a lot of domestic policy reforms and could not obtain cutting-edge technology and I.P. so easily, state-owned enterprises would be less prosperous than before since the Chinese government could not offer "useful" intelligence to the companies and it would take longer to innovate competitive products. What's more, without state funds, Chinese companies would be less passionate about investing in high-tech sectors in the U.S. and the possible consequence would be China could not achieve its strategic economic objectives in the planned time, which would be the last thing that China wanted to see. For the U.S., even if it also made concessions, without these obstacles, the U.S. companies would compete with Chinese companies fairly in domestic and foreign markets. More openness to the Chinese market would offer more opportunities to the U.S. business and provide more jobs for U.S. residents. The economy would be more prosperous, and the road of advance in technology would be more smooth. The U.S. would be the bigger profiteer and winner in this game. Whichever from the perspective of domestic or international impact, China's response in 2019 was the sensible move and possibly the only choice.

4.2. National Security be Challenged

China in 2018 was different from the nation in the 1990s. In 2006, MLP in China set the goal of becoming “a world power in science and technology” by the middle of the 21st century, including the initiative of Made-in-China 2025. In 2010, China surpassed Japan and became the second- largest economy in the world. The founding of Asian infrastructure and investment banks and the program of belt and road initiative, plus some major domestic readjustments in China, also increased the U.S. insecurity. According to the theory that Andrew and Darren [13] brought into, the rising states tended to fulfill the middle and long term goal to attain new technology and innovation, while the dominant states were also beneficial from the rising states’ purchase of technology. But the rising states could threaten dominant states’ strategic interests. Now the U.S. and China fell into such a trap exactly. If intellectual property conflicts already made the U.S. annoyed and unsatisfied in 1996, this time technology transfer, which more and more cases related to high-tech and other competing areas, made the U.S. feel intolerant. Because of the characteristic of the information era, the spillover of knowledge and information could not be controlled easily. It was hard for the U.S. to document cyber espionage from China. For China, of course, it was reluctant to admit. Since this gray zone is difficult to define, it was hard for the WTO dispute settlement process to solve the problem between the two nations. Disappointed with the WTO and felt threatened, the U.S. sought to use the unilateral measure to impose sanctions on China.

The U.S.’s restlessness can be seen from the introduction of the 301 section. When speculating why China intended to conduct technology transfer from the U.S., it said that China aimed to dominate the domestic market and became the global leader in terms of technology. It was repeated several times in the whole paper that high-tech was the core competitiveness for the United States, but now China wanted to use unfair methods to steal cutting-edge technology in the U.S. Apart from that, it used several pages talking about the MLP plan in China and explaining the IDAR approach in detail, not only to elaborate clear evidence to the public to support its accusation but also intend to show that China’s ambitiousness was posing a threat to the hegemony of the U.S.

4.3. Failure to Understand Chinese State Policy to State-owned Enterprises

For a long time, China’s political system is different from western countries’, which leads to a variety of conflicts with other nations. The conflicts are pretty much centered on why the Chinese government is entitled to intervene in the market and subsidize and financially support the domestic firms. A clear example is that when the price of the primary aluminum output diminishes, the production in China still rises, and at the same time, the price of coal, the fuel provided to produce aluminum, also climbs, which

clearly demonstrates that the Chinese Communist Party supports behind to achieve the state economic goal [14].

But here is the United States’ logic. With the Chinese government’s intervention, some of the firms get financial subsidize and thus less worry about the market competition, resulting in selling at a low price and having the obvious advantage of price, which contradicts the rule of the market and is unfair to other countries. This also contributes to the trade deficit in the United States with China, which is the major concern among the public and hawks in the U.S. If China can reach a deal with the U.S. in terms of the openness and more transparency in the market, the U.S. will gain more access in China’s potential market, while for China, the market reform is also beneficial to the domestic economic development and attracts more foreign investment, which will satisfy both nations. But the management of state-owned enterprises in China have been existing for a long time and has become one of the characteristics of the socialist road. Most importantly, SOEs are one of the most effective ways for China to realize industrial state policy. Changing the policy would face a lot of pressure domestically. Apart from that, China faced more trade barriers outside in recent years; it used SOEs to maintain economic growth [15]. The difficulty of changing the state policy and making concessions is easily imagined.

4.4. The Appearance of Huawei Company

Before 1998, the European and American markets did not know Huawei yet, which was only a small company in the software and information technology service sector. In 1999, only 4% of the whole sales were from foreign markets. There are reasons why the U.S. is prudent to Huawei company. For many years, the U.S. high-tech products and communication technology ranks top around the world. When Huawei announced to get the first CE-TEC for its 5G base station in April 2018, it meant that China, for the first time, surpassed the U.S. and became the first country to innovate 5G technology. Previously, although China had its phone brand, Chip solutions still depended on the U.S. tech companies. For instance, Xiaomi technology company’s chip solutions relied on Qualcomm company in the U.S. for a long time. But now, Huawei aimed to get rid of the U.S.’s tech and manufactured its technology and patent, which would not only make the U.S. lose a great sum of dollars but also lose high-tech hegemony in 5G. But Huawei company is not perfect. China’s chip manufacturing is always a major shortcoming-- depending on importing foreign chips to operate. That’s why the U.S. asked all chip manufacturing companies to stop supplying chips and other equipment to Huawei, which is indeed the quick way to make it crippled.

But why the U.S. cannot bear China to lead up the 5G tech? This can originate from the founder of the Huawei company, Ren Zhengfei, who served in the civil engineering sector of the military. His career background drew the attention of the U.S. government, which believed that Huawei had a strong connection with the Chinese military

[16]. One point that the U.S. worried about was that the Chinese government would use 5G technology to spy on the U.S. military system and steal government information, though this would be the thing that the U.S. used to do and did it well. So now, the U.S. begins to use its technology by covering Nokia and Microsoft system and claims that the U.S. will also speed up designing 5G technology.

Another reason would be relative to the Chinese industrial plan. Prior to 2000, the Chinese government expected Huawei to become the global technology giant company and took up more global market share. It was natural to associate the contribution of Huawei company with a series of Chinese state initiatives. If the U.S. cut off all the equipment supply to Huawei, stopped doing business with Huawei, and urged other countries to do the same thing, Huawei would never thrive, which would adversely affect China to reach the goals. For the U.S., striking Huawei, for one thing, can decrease the unfair trade, since Huawei is the significant and most powerful technology company in China and far and away, is the company that government provides state fund support and policy preference. For another, industrial plan and state initiatives' achievements are the symbols of Chinese development. If China can achieve all the plans in 2025, it would seriously affect the status of the U.S. in the world, threaten the hegemony of the U.S.

5. CONCLUSION

This paper focuses on the relationship between the U.S. and China through intellectual property conflicts and why it leads to totally different results in the 1990s and 2018. The paper employs two cases to compare and analyze the reasons why it causes the opposite ending. The negotiation process in the 1990s was strenuous but successful. Finally, the situation in 2018 was way more complex, and the relationship would be more antagonistic due to the fact that the presidential election in the U.S. at the end of this year.

To be far-sighted, Chinese companies should invest more in product innovation and upgrade rather than rely on only importing equipment, for it could be more difficult to gain technological devices from foreign countries. For the Chinese government, it should relax some stringent restrictions properly for foreign companies to invest and open the Chinese market more. Other than that, it could also decrease the control and support for Chinese enterprises to promote more fair market competition. Foreign companies should strengthen communication with the Chinese government, particularly local governments, and cooperate more with Chinese companies to understand more about regulations and policies in China.

Due to the limit of the pages, the paper doesn't focus on the two nation's relationships in the earlier historical background and pays more attention only to the societal level. Future scholars can extend the timeline of trade conflicts between two nations and look at the question in the

global context or from the individual--political leaders' perspective.

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