

# Analysis of China-US Intellectual Property Trade Friction

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**Abstract.** In the 21st century, the global economic integration and the China-US Trade frictions are becoming more and more complicated and the United States' pressure about the trade imbalance between China and the US is severe. The United States has increased its crackdown on intellectual property products from China and used The "Special Section 301" and "307 Survey" to restrict China's exports considering the high pressure of trade imbalance between China and the United States. Compared with the intellectual property legal system, China, which is developing relatively rapidly in the intellectual property industry, is constantly striving to improve the authority of intellectual property rights in China from various aspects such as law, enterprise and society for accelerating the construction of innovative country. Chinese enterprises should correctly understand the differences between China and the United States in the field of intellectual property law, seize the core of China-US intellectual property trade friction, and improve the core competitiveness of innovation based on the characteristics of their own enterprises, in order to get an superior position in property rights trade. The article summarizes the causes and characteristics of trade friction through analysis of the two countries, and proposes political, economic and legal aspects for Chinese enterprises through actual case analysis. The suggestions and strategy choices are given after the strengths, weaknesses, opportunities and threats analysis (SWOT) faced by Chinese IP companies.

**Keywords:** China-US Trade Friction; Intellectual Property; Special Section 301;307 Survey.

## 1. Introduction

### 1.1 Research Background and Purpose

Since China and the United States established diplomatic relationships in 1979, bilateral relations have been steadily strengthened in the continuous integration in general, and common progresses have been made in various fields and industries contributing to the bilateral trade development. Chinese statistics show that trade in goods between China and the US in 2017 amounted to US\$583.7 billion, a 233-fold increase from 1979 when the two countries forged diplomatic ties, as well as a seven-fold increase from 2001 when China joined the World Trade Organization. Currently, the US is China's biggest export market and sixth biggest source of imports. In 2017, the US took 19% of China's exports and provided 8% of China's imports. China is the fastest growing export market for US goods and the biggest source of imports of the United States. In 2017, 8% of US exports went to China [1].

Due to the deepening of economic and trade exchanges between the two countries and the internal differences in the level of intellectual property-related laws between them, intellectual property friction has gradually emerged, and restricts the trade between the two countries in some extent. The United States has repeatedly used the "Special Section 301" of the US Trade Law and the "337 Survey" of the Tariff Act to establish intellectual property barriers in domestic. At the international level, it used The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the more strict requirements of the Anti-Counterfeiting Trade Agreement (ACTA Agreement) for China as well as other countries with relatively poor levels of intellectual property protection to infiltrate its intellectual property hegemony status.

### 1.2 Research Content and Method

By reviewing the development of international intellectual property rights, the paper has summarized the main characteristics and methods of current China-US intellectual property trade frictions due to differences in economy, history, culture and law between China and the United State, and it further discusses China's condition through intellectual property practical cases. Finally it

considers the background of the times suggestion China should put forward a positive strategy in the trade of intellectual property .

The article is divided into three chapters, the main contents are:

The first chapter is the introduction. In the background of economic globalization and the deepening of China-US trade, the reliance of each other is gradually increasing, but at the same time intellectual property issues are becoming more and more prominent. This chapter generally indicates that China is affected by this issue. The relevant US legal provisions and challenges have provided a realistic basis for in-depth study of China-US intellectual property trade issues.

The second chapter expounds the prominent problems of China-US intellectual property trade frictions from different aspects, and analyzes the causes of China-US intellectual property trade frictions from the aspects of economy, law and culture. The United States uses "Special Section 301" and "337 Survey " causing the repeated disputes in China which have affected the Chinese and American companies to varying degrees. On this basis, the government and enterprises are recommended to take active measures to solve the current China-US intellectual property trade frictions and provide a favorable environment for long-term bilateral trade.

The third part is a SWOT analysis of the current trade situation in China's intellectual property enterprise. The internal strengths, weaknesses and external opportunities and threatens are discussed in detail. Moreover the corresponding recommendations and strategies of the TO, WO, TS and WT are proposed to respond to the changing international market for maintaining a good market share and innovative power.

## **2. China-US Intellectual Property Trade Frictions**

### **2.1 Reasons for the Prominent Intellectual Property Trade Frictions between China and the United States**

The different level of protection of intellectual property rights in the historical development and the starting time has led to differences in intellectual property standards between the two countries. At the same time, China has appeared as a rapidly developing country. The huge trade deficit especially in the United States caused the United States to impose certain economic sanctions on China in its policy. Therefore, China-US intellectual property disputes are jointly induced by the legal, economic, and cultural aspects of China and the United States.

#### **2.1.1 The Gap between the two Countries in Terms of Intellectual Property Standards**

The US intellectual property legislation has a long history which has more than 200 years development. It has formed a relatively complete legal system for intellectual property protection. Its intellectual property protection has extensive content and long protection time since the earlier time. The provisions on intellectual property protection are proposed in the Constitution. In the process of development, the US domestic intellectual property system has been revised and improved to adapt to the development of the domestic economy focusing on the protection of the rights of the owners; In the foreign trade exchanges, the "Special Section 301" and "337 Survey" are frequently used to protect the economic benefits of national intellectual property [2].

In contrast to China's intellectual property legislation process, China's intellectual property legal system starts late and is difficult to implement. In the decades before the reform and opening up, intellectual property issues have not received the attention of the country and its leaders.

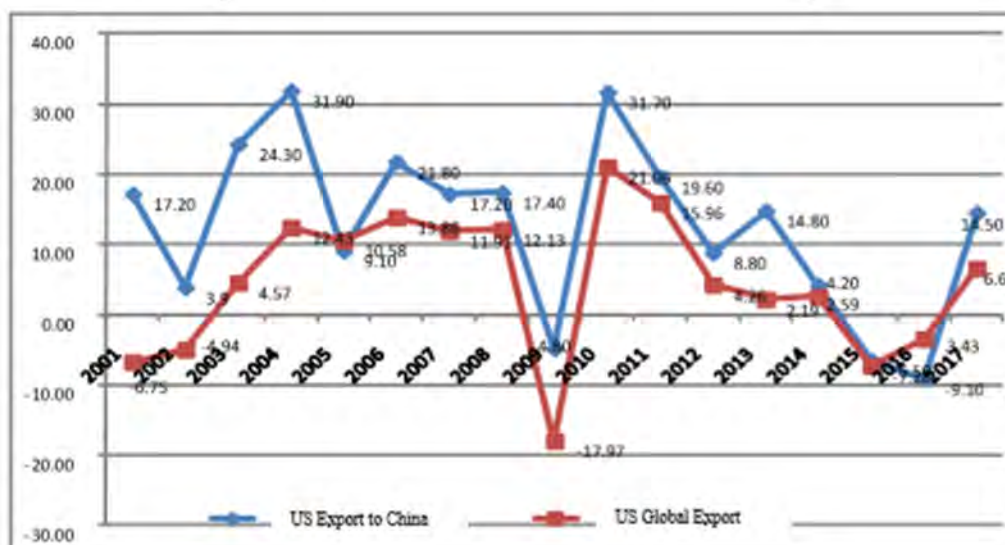
The relevant laws on intellectual property rights in China have only been in existence for more than ten or twenty years. The established standards, although based on relevant standards developed internationally, are far from mature standards in implementation and awareness.

#### **2.1.2 The Huge China-US Trade Surplus has Intensified the Friction**

US exports to China are growing much faster than its global average. Since its accession to the WTO, China has become an important market for US exports, which have grown rapidly. UN statistics indicate that in 2017 US exports of goods to China amounted to US\$129.89 billion, a 577%

increase from US\$19.18 billion in 2001, and far higher than the 112% average growth rate of overall US exports [3].

Table 1. US Exports to China Grow Faster than its Global Export Trade (%)



Source: UNCTAD

In recent years, the United States has generally maintained a trade deficit with China's trade. The trade between the United States and China has serious imbalances in different production areas, and the gap between them has shown an expanding trend [4]. As the country with the highest level of technological innovation and development in the world, the United States holds many core technologies, and its technological innovation capability is at the highest level in the world. Furthermore, It is also highly dependent on intellectual property-based technology trade in order to reverse the current disadvantages. The United States excuses China's export enterprises for the incomplete protection of intellectual property rights, alleged infringement of its intellectual property-related products, reducing the import of Chinese products and affecting China and the United States' trade surplus.

## 2.2 US “Special Section 301” and “337 Survey ” Case Analysis

The two major domestic laws in the US legal system - "Special Section 301" and "337 Survey" perform their duties for seeking comprehensive protection of intellectual property rights. The former mainly targets the intellectual property system of other countries and mandates other countries' effectively product protection of the United States; The latter is used between the United States and other countries' trade, the United States will investigate and sanction foreign companies as well as the related products which constitute infringement, and exclude infringing products and related enterprises from the national market. It targets the enterprises of other countries and their products rather than the government of other countries. The combination of these two major domestic laws allows US intellectual property to be well protected while maintaining its competitiveness for a long time. Due to the wide applicability of the “Special Section 301”, the simplicity of the procedure, the rigorous relief measures and the limited right of the defendant to counterclaim, the number of “307 Survey” initiated by the United States in recent years remains high including more than one third of the cases targeting Chinese products.

Table 2. Summary of the number and ratio of “337 Survey” in China from 2012 to 2017

The year	The global total number	Number of Chinese companies involved	ratio of involved Chinese companies
2012	40	13	32.50%
2013	42	14	33.33%
2014	39	12	30.77%
2015	36	10	27.78%
2016	54	22	40.74%
2017	58	24	41.38%

Source: China Import and Export Fair Trade Bureau.

Since the 1980s, the “337 Survey” has become an important tool for US companies to protect the intellectual property of their companies. The development of the domestic legal system of intellectual property in the United States has been perfected and has become a leader in intellectual property legislation in various countries of the world. On this basis, the United States has increased the investigation of companies that infringe on its intellectual property rights. This fundamentally strengthens the function of intellectual property protection in the United States. US government curbs foreign trade exports to the United States in order to adapt to the needs of the US new trade protectionism economic policy and foreign trade policy.

### 2.2.1 The US International Trade Commission Initiated “337 Survey” on Huawei and ZTE

In recent years, ZTE and Huawei have developed rapidly in electronic communication. They are not only leaders in China's high-tech industry, but also open up the large overseas markets. On July 24, 2012, American Technology Assets Co., Ltd., Phoenix Digital Solutions LLC, and Patriot Scientific applied to ITC to accuse the China exports and sales in the US domestic market. Wireless consumer electronic devices and their components infringe United States' patents (US Patent No. 5809336); On August 24, 2012, the US ITC officially opened a case investigation, the investigation file number is 337-TA-853, of which China Huawei Technologies Limited The company and ZTE Corporation were involved in the case of mandatory respondents [5]. After more than a year of difficult litigation, in the preliminary decision of the 337 survey (337-TA-853) involving some wireless consumer electronic devices released by the US ITC on September [6].

It was claimed that the import of wireless electronic devices from the Huawei and its subsidiaries, as well as ZTE in the domestic market does not infringe the claims of Nos. 1, 6, 7, 9-11 and 13-16 of US Patent No. 5,809,336, and does not violate the provisions of Section 337 of the United States. For the products that ZTE and Huawei export to the United States and sell in the US market, no injunctions and exclusion orders will be issued. At the same time, it was ruled that the US domestic industry had illegal use of patents involving No. 5809336.

After receiving the “337 Survey” from the United States, China quickly responded. ZTE and Huawei quickly convened professionals in the fields of technology, law, business, and lawyers with experience in investigating, and they actively planned countermeasures and solutions. On the one hand, it collects relevant evidence and materials to make reasonable and sufficient defenses against the plaintiff's accusation such as the global invalidity of the patent in question, on the other hand, they became active for the accusation, and organized relevant forces to launch attacks against the prosecution. Huawei said that the company had initially considered the possibility of intellectual property infringement of the product itself and had sufficient awareness of intellectual property protection. The early patent application and the comprehensive, adequate preparation and scientific

operational plan in the response to the lawsuit laid a solid foundation for ZTE and Huawei to win the case.

As the leader in the domestic electronics field, Huawei and ZTE have not only encouraged the confidence of other domestic industries to settle the US “337 Survey”, but also greatly Encourage many entities to fight against patent operating companies.

### **2.2.2 Chinese Companies Respond to the US “337 Survey” Strategy**

At present, China has become the largest country involved in the “337 Survey” of the United States. As competition in the international market intensifies, the “337 Survey” will become more normal in the future, and the types of intellectual property involved will be more complicated and diverse.

For enterprises, the most urgent task is to raise awareness of the crisis and actively establish an intellectual property system, turning passive into initiative. First of all, attaching importance to the construction of intellectual property rights and setting up a special intellectual property department to handle early intellectual property application, registration, registration, authorization protection, legal proceedings, etc. It also should track the subsequent intellectual property rights condition through the information processing for providing long-term stable development for the company [6]. Second, by applying for a patent in the United States, companies can establish their own intellectual property protection barriers. Not only can the characteristics of current US patents, trademarks and other intellectual property rights be accurately understood, but also the Chinese products can avoid risks and minimize the scope of infringement as much as possible, which are helpful to expand the international market share. In addition, enterprises should strengthen effective communication and exchanges through relevant academic institutions and industry associations to exchange relevant information.

The government should redistribute its macro-control functions. First, improve the intellectual property legal system and increase law enforcement. At present, China's laws on the protection of intellectual property rights like the Anti-Unfair Competition Law, the Copyright Law, the Patent Law, and the Trademark Law [7]. All belong to the single-line method. The formulation of each law has the function of the functional department. In the specific implementation process, there are repetitions and conflicts, which makes the law enforcement departments have difficulty in selecting specific law enforcement. So It is therefore possible to call on the legislature to establish an integrated intellectual property law that includes both principled and specific rules to accommodate the emerging new issues in the field of intellectual property. Second, carrying out the actively bilateral and multilateral dialogues, and improving the existing bilateral exchange mechanism between China and the United States to strengthen the further communication between the two governments. Emphasizing China's unrelenting efforts as a developing country to promote the development of intellectual property trade, China does not want to be a "World Hegemon" and is wary of the risk of the "Thucydides trap" [8]. For China, the win-win progress of economic and trade is regarded as the goal.

## **3. SWOT Analysis of Chinese Intellectual Property Enterprises' Trade with the US**

### **3.1 Strengths of Chinese Intellectual Property Enterprises in Trade with the United States**

#### **3.1.1 Innovation-driven Development Strategy Drives the Development of Intellectual Property**

Since the country put forward the "Rejuvenation of the country through science and education", the total amount of R&D investment in China has increased year by year, which has effectively promoted the implementation of China's innovation-driven development strategy and consolidated the basis construction of China's innovative country. In the field of intellectual property, the scale and intensity indicators of R&D are generally used to reflect the technological strength and core competitiveness of a country. On October 9, the National Bureau of Statistics, the Ministry of Science and Technology and the Ministry of Finance jointly issued the "Statistical Bulletin on the National Science and Technology Funds in 2017". According to it, the total investment in research and



experimental development (R&D) in China exceeded 1.76 trillion RMB in 2017, increasing 12.3% than last year, and the growth rate increased by 1.7 percentage points over the previous year; R&D expenditure intensity reached 2.13%.

To achieve economic growth, we must increase the contribution of technological innovation to the total economic output. On one hand, China's technological development relies on the introduction, digestion, absorption and improvement, and the secondary transformation of intellectual property products. On the other hand, it also continues to strengthen the force of independent research and development so as to get rid of the weak position and take the initiative in trade with the United States.

### **3.1.2 Rapid Development of Industries Related to Intellectual Property**

Related industries refer to the complementary industries that share certain technologies or the same marketing channels and services [9]. Industries which are related to the intellectual property are various, including the intellectual property trade agency industry, the publishing and printing industry.

Nowadays, the one-stop industrial chain intellectual property service organization has emerged to promote the sustainable development of the intellectual property industry. The Integrated service organizations provide the comprehensive service:

Agency services: a number of intellectual property agencies and subsidiaries affiliated with domestic patents, trademarks, foreign-related patents and trademark agencies have been established;

Legal services: The special law firm have established and they establish a special trademark law department and patent law department in the intellectual property agency;

Information service: a patent consultation department is set up in the intellectual property agency company, which provides information services such as patent search analysis and provides future [10];

(4) Consulting services: they establish a professional intellectual property management consulting company, and set up a trademark consulting department and patent consulting department in the intellectual property agency.

## **3.2 Weaknesses of Chinese Intellectual Property Enterprises in Trade with the United States**

### **3.2.1 Insufficient Awareness of Intellectual Property Protection Among Smes**

Chinese enterprises are still lacking forward-looking for the protection of intellectual property rights. Many developing small and medium-sized enterprises have the phenomenon of emphasizing the conversion of intellectual property into acquired property and ignoring patent applications at home and abroad. There is a misunderstanding of legal knowledge in the field of intellectual property, ignoring the geographical and time-sensitive feature of intellectual property rights. It is believed that products are inventors and users as long as they are invented and used for a long time.

Take brand trademarks and patent protection as examples. China has many well-known brands, but they have encountered problems when these brands enter the international market. The countries or regions where the brands want to enter have already been registered. From the 1980s to 2017, more than 2,000 domestic trademarks have been squatted outside the country. At last, enterprises have to solve this problem by redeeming high prices, changing trademarks, and abandoning the market. Therefore, the annual loss of intangible assets is reached 1 billion RMB.

The United States is the world's most perfect intellectual property country for protecting the Intellectual property. Therefore, China should strengthen its awareness of intellectual property rights, train to use intellectual property rights to protect its legitimate interests, and strive for legitimate rights and interests [11]. Chinese companies also should conduct real-time monitoring of the target countries in the field of intellectual property, and keep abreast of the latest developments.

### **3.2.2 China's Intellectual Property Trade has High Dependence on the US**

China's payments for the use of US intellectual property continues to rise. Chinese statistics indicate that the US is the largest source of intellectual property imports to China. From 2012 to 2016, China imported nearly 28,000 items of intellectual property from the US. China's payments for US intellectual property doubled in six years from US\$3.46 billion in 2011 to US\$7.2 billion in 2017.

(Table 3) In breakdown, China's intellectual property payments to the US accounted for a quarter of its total intellectual property payments to foreign countries [12].

Table 3. China's Payment for the Use of US Intellectual Property



Source: MOFCOM, China

Secondly, as a developing country with rapid development, China is determined by the times and social reality that the key development target is the intellectual property field represented by high-tech industries, while the US high-tech industry is the leading international leader. Under the premise of rapid development, China will inevitably overlap with the US patents or trademarks and other related intellectual property products. However, for the development of their own enterprises, Chinese companies have to pay corresponding intellectual property fees.

### 3.3 Opportunities of Chinese Intellectual Property Enterprises in Trade with the United States

#### 3.3.1 China's Influence in the Field of International Intellectual Property is Gradually Strengthened

China has continuously improved its intellectual property legal system and established a complete and high-standard intellectual property legal system in a relatively short period of time. It has gone through the legislative journey that developed countries usually complete decades or even hundreds of years.

China's progress in IP protection has been recognized by the international community. In 2011, China Customs won the National Public Body Award of the Global Anti-Counterfeiting Network. In 2012, the Economic Investigation Bureau of the Ministry of Public Security won the award for Distinguished Contributions to Anti-counterfeiting Enforcement. On 9 May 2011, former US president Obama stated that China had made good progress in IP protection. The US was willing to export more high-tech products to China and other countries in the interests of both sides.<sup>3</sup>In February 2018, GIPC released a report on the International Intellectual Property Index 2018, which maps the national IP environment for 50 surveyed economies with 40 indicators. China ranked 25th, up by 2 places from 2017 [13].

At the same time, it actively participated in regional intellectual property trade cooperation, and won more initiative power in the formulation of intellectual property rules in international trade. During the "'One Belt, One Road' International Cooperation Summit Forum" in 2017, the signing of the "'One Belt and One Road' Intellectual Property Cooperation Agreement between the Government of the People's Republic of China and the World Intellectual Property Organization" marks a new stage of international strategic cooperation in intellectual property rights. China attaches importance to domestic and international intellectual property communication coordination and cooperation, and strives to jointly form a consensus among countries based on the rules of its own culture and national conditions and promote the healthy development of intellectual property trade cooperation.

#### 3.3.2 Using the TRIPS Agreement and Dispute Resolution Mechanism in WTO

China is a member of the WTO. The MFN principle in the WTO clearly states that a member state in the organization should treat the enterprises or products of other countries not less than the treatment of the same enterprise or product in own country. This principle also applies to the domestic and foreign patents, copyrights and trademarks.

China should make full use of the principle of MFN treatment, strengthen exchanges and information sharing with member states, and strive for the participation of other members and common confrontation. Moreover, China can use the relevant dispute resolution mechanism to ease conflicts and reduce friction between the two sides. Through the better study of the TRIPS Agreement, China can improve its legal system of intellectual property protection, and comparatively analyze the gap between China's current law system of IP and TRIPS [14]. When China and the United States break out intellectual property disputes, China must know how to use the dispute settlement mechanism under the WTO to deal with China-US intellectual property friction. The dispute settlement mechanism that is specifically used to resolve trade contradictions among its member in the WTO. Its basic procedures are consultations; mediation; arbitration procedures; expert group procedures and appeal procedures etc. The application of international rules can not only restrict the behavior of the United States, but also establish the confidence of Chinese intellectual property enterprises.

### **3.4 Threatens of Chinese Intellectual Property Enterprises in Trade with the United States**

#### **3.4.1 US Trade Protectionism**

The trade deficit between the United States and China has intensified. In order to protect the domestic economy, the United States has changed from the traditional high tariff barrier to the general non-tariff barrier, which has evolved into today's invisible barrier dominated by technical trade barriers. Many trade restrictions and behaviors that distort market competition, hinder fair trade, and separate global industrial chains have been carried out [15]. Such as: discrimination against other countries' products, abuse of "national security review", providing tariff subsidies, distorting market competition and using many non-tariff barriers, all seriously affect the normal development of China-US economic and trade relations, and intellectual property-related trade is also affected.

The United States has adopted the "337 Survey" to protect its high-tech industries. For example, in 2018, the merger plan between China Ant Financial Services Group and Money Gram International Inc. was canceled, and the cooperation between HUAWEITECHNOLOGIESCO.,LTD., and The American Telephone & Telegraph was also disappointing. This series of events fully demonstrates that the US trade protection against China is not weakening, but more and more normalized and serious. In fact it has become the paralysis of China's national economic development and global economic recovery.

#### **3.4.2 Application of the ACTA Agreement Increases Control of China**

The ACTA agreement (Anti-Counterfeiting Trade Agreement) is an agreement formed by developed countries with intellectual property protection to combat piracy and counterfeit products. It initially excluded countries with low levels of intellectual property protection from negotiations. The stricter regulation of ACTA, more comprehensive enforcement measures, stricter enforcement standards, and stricter enforcement penalties are equivalent to setting up a new round of trade barriers for China in the development of intellectual property rights, making China's trade is even more serious.

The member countries of ACTA, especially the United States, the European Union and Japan, are main import and export countries of China. Nearly half of China's import and export trade will be influenced. On one hand, ACTA implements multi-process supervision of all intellectual property objects (goods, etc.), At the same time giving customs the initiative to suspend release, determine infringement, etc., which means it expands customs power and creates new intellectual property barriers. On the other hand, it requires member states to continue to strengthen the enforcement of infringement and counterfeit goods (including criminal liability and civil measures, etc.), which will also have a major impact on China's intellectual property legal system.



### 3.5 International Strategic Choices based on SWOT Analysis

In the international trade of intellectual property rights, changes in the internal and external environment of Chinese companies will lead to different marketing choices, and Chinese companies should adopt appropriate strategic measures.

(1) Growth strategy: Enterprises should increase their financial support in the field of intellectual property to innovate, improve the ability of innovation and transform of results, The cultivate monopoly advantages in technology should be set, and keeping up with world development trends in the international area. Moreover, paying enough attention to product rights protection, and effectively seizing the international market.

(2) Torsional strategy: When the external environment is excellent, but the internal weakness of the company is obvious, the product is usually subject to green barriers in foreign countries. At this time, the company should enhance the core competitiveness of products and creation in China and pay attention to the company's brand promotion at abroad.

(3) Diversified business strategies: When the internal strengths of the company are obvious but the opportunities in the external market are not good, it is usually a state in which the international market environment is relatively chaotic or fluctuating. At this time, the company should adopt a variety of business methods, such as the acquisition of related companies, obtain the corresponding patent technology or cooperate with other multinational companies [16]. Through the cross-licensing of intellectual property rights, enterprises with independent intellectual property rights can eliminate the obstacles to the development of intellectual property rights, so that both parties in the cross-licensing can obtain the required enterprise technology [17].

(4) Defensive strategy: The situation of internal and external are both in troubles during the international process. The government should issue corresponding policy guidance, and industry associations should cooperate to cope with external threatens. The company itself can reasonably allocate R&D funds, and obtain the right to use related products through cross-licensing of intellectual property rights.

## 4. Summary

By reviewing the development characteristics and the background of the intellectual property rights of the two countries, the paper summarizes the main characteristics and methods of the current intellectual property trade friction from various aspects, and discusses the progress of China in the field of intellectual property trade through relevant case. Finally, four strategies are proposed in order to cope with the ever-changing international trade environment. These have significant value to Chinese medium-sized enterprises that are developing rapidly but whose intellectual property protection awareness is still weak.

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