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US China Trade Dispute Over Intellectual Property

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**US CHINA TRADE DISPUTE OVER INTELLECTUAL
PROPERTY:**

How have Section 301 investigations impacted trade relations between China and the U.S. in clean energy area, and between Japan and the U.S. in semiconductor and auto part areas, and does the impact provide a guide for the possible outcome of the upcoming Section 301 investigation of China?

By

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A Thesis Quality Research Paper
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BACKGROUND

After President Donald Trump's memorandum on August 14, 2017 stating that China's behavior regarding intellectual property rights (IPR) and the high technology industries adversely influences the U.S. economy, the USTR declared the initiation of a section 301 investigation of China on the topic of technology transfer and intellectual property rights (The White House, 2017; USTR, 2017). Before this event, the USTR had not used the section 301 investigation of China for nearly 10 years (USTR, 2017). This research project will analyze potential outcomes of this investigation, based on the experiences that are gained from analyzing past Section 301 investigations.

History and Development of Section 301

Section 301 is a part of the Trade Act of 1974, which endowed the USTR (2017) with the capability to deal with the unfair trade relationships with other countries. If the USTR realized, or was told by an industry association or company, that a foreign country was engaging in unfair activities (for example, setting trade barriers to American companies, violating their rights, or dumping), he would use his discretion or obey the direction of the president to take appropriate actions. Section 301 investigations are usually actions taken by the USTR; however, the USTR will not take actions when "the rights of the United States under a trade agreement are not being denied" (Trade Act of 1974, 2016, p.191), the rights of the United States are not violated, the foreign country agreed to correct its unfair trade practices, or the action

that was taken may have the chance to impact the economy and security of the U.S. After implementing the investigation, the USTR is able to apply four methods to respond to the foreign countries. First, the USTR can suspend or deprive the benefits listed in the trade agreement that had been established at an earlier time. Second, imposing tariffs and setting trade barriers on the foreign country's imported goods and services into the U.S. can be considered. Third, the USTR can also set limits on or postpone treatments, such as the Caribbean Basin Economic Recovery Act. The fourth method is that, the foreign countries that sign binding agreements with the U.S. can agree to lift the existing trade restrictions, terminate the actions that harm the U.S., or offer compensation. Although the section 301 is a policy in regards to imports and exports, the action that the U.S. chooses to take may not be directly related to trade itself (Trade Act of 1974, 2016).

In 1984, the Trade and Tariff Act of 1984 amended the Trade Act of 1974, which elucidated the conditions and situations of implementing section 301 (Trade and Tariff Act of 1984, 1984). Four years later, the Omnibus Foreign Trade and Competitiveness Act of 1988 further modified the section 301 clause. Super 301 and special 301 appeared as the amendments of general section 301 for the first time in the 1988 version (USTR, 1988; Moyer, 1994).

The special 301 targets only the intellectual property rights (IPR) that foreign countries may not appropriately protect. The USTR will complete a National Trade Estimate (NTE), which he will send to the United States Congress before taking

actions. The foreign countries that are evaluated by the NTE as inadequately protecting IPR or “denying fair and equitable market access to United States persons that rely upon intellectual property protection” (U.S. Code, 2012, p.511) will be registered as “priority foreign countries”. At one point, China and India were on the list (National Trade Evaluated, 2017).

Before identifying priority foreign countries, the USTR should contact the proper departments or offices regarding IPR and consider all the necessary information to ensure that these foreign countries are truly not protecting the IPR. The USTR also needs to consider the history of IPR development in the foreign countries and take into account their improvement after inspection by the U.S. (Trade Act of 1974, 2016).

The super 301 focuses on certain foreign countries that have exceptionally unfair trade practices. Within 180 days after finishing the NTE, the USTR ought to determine the priority foreign countries and submit the list to Congress. The USTR should name the primary restrictions of the foreign country, judge whether the foreign country complies with the trade agreements, and consider the impact of the procurement plans and international position of the foreign government (USTR, 1988).

The section 301 is significantly more integrated and comprehensive, as it developed from just one clause to ten clauses later. Initially, the subjects of investigations were only goods, but were extended to services and the area of direct

investment in subsequent years. The scope of jurisdiction also grew, starting with only the economy and trade area, expanding to the political arena to include issues such as labor rights. After the establishment of the World Trade Organization (WTO), the U.S. expanded the range of application of section 301 to nearly every field, including tariffs (Gero and Lanna, 1995).

Initiation of Section 301, Super 301, and Special 301

Section 301

According to the section 302 of the Trade Act of 1974, the section 301 investigation will be applied in the following steps. First of all, any person or group that is interested can appeal to the USTR to take actions under section 301. Within the 45 days after receiving the petition, the USTR needs to decide whether or not he is going to initiate the investigation. If the USTR resolves to not implement an investigation, it will publish an announcement to clarify the reasons for not doing so in *the Federal Register*, as well as notifying the petitioners. If the USTR decides to initiate an investigation, it needs to publish a summary of the petition while holding public hearings (Trade Act of 1974, 2016).

After making the decision, the USTR should have a process of consultation. In general, the USTR needs to decide whether the foreign country violates the rights of the U.S. within 12 months of the process' initiation (Trade Act of 1974, 2016). If the investigation is related to compensation and anti-dumping, the USTR is required to make a decision within 18 months. Investigations related to the intellectual property

rights need to be determined within six months. The determination requires being published in the *Federal Register*. The USTR should take action within a certain period of time, delaying by 180 days under the exception. The USTR will supervise the implementation situations of foreign countries; he will choose to not take further actions, if he considers that foreign countries are closely abiding by the agreements. Under the executive order by the president, or under special circumstances, the USTR may suspend or terminate a section 301 investigation. The USTR should report to Congress regularly in regards to the progress of investigation (Trade Act of 1974, 2016).

The USTR is required to provide information, including trade agreements regarding particular goods, services, investments or IPRs, the similar case, and other information that is needed by U.S. laws (Trade Act of 1974, 2016).

Special 301

The USTR should initiate a special 301 investigation regarding the policies or actions of the priority country within 30 days of determining them - however, if the USTR believes that the investigation will harm the U.S. economy, it will choose to terminate the investigation following a detailed explanation. Generally, for the cases regarding intellectual property rights, the USTR will make a decision within six to nine months. Moreover, under the circumstances that the countries under investigation are making a draft or taking actions to protect the intellectual property rights, or if the foreign government is endeavoring to remedy the damage to the U.S.,

the USTR is able to extend this period of determination by three months (USTR, 1988).

Super 301

Super 301 allows the USTR to implement multiple investigations at the same time, changing the module of section 301 that allows the investigation of only one policy or behavior, which increases the speed of the crackdown. Within 21 days of completing the NTE, the USTR should carry out the investigation of the priority countries. During the negotiations with foreign countries, the USTR typically strives to come to an agreement that urges foreign countries to eliminate violations or establish compensation within three years (USTR, 1988).

Since 1974, Japan was investigated by the U.S. 16 times. Aside from the European Union, it is the most investigated country (Bown and McCulloch, 2009).

What are GATT and WTO?

According to the Brookings Institution's report (2016), negotiation, illuminations, and litigation are three primary functions of GATT and WTO. Among the three functions, negotiation is the most frequently one used by both.

The General Agreement on Tariffs and Trade (GATT) that was reached in 1947 is the predecessor of the World Trade Organization (WTO), which generated the basics for trading between countries. After the Great Depression and World War II, there was a darkness in the international trade market; developed countries, such as Japan and the U.S., set import barriers and imposed high tariffs on other countries. In

order to get rid of this vicious circle, principal suppliers like the U.S., Canada, and the United Kingdom negotiated with each other and came up with the GATT, that was expected to keep the international market stable and eliminate trade restrictions as much as possible (Brookings, 2016). The GATT was very successful, which expanded to a party of 128 countries after starting with only 23 members in a short period of forty-seven years.

The Uruguay Round was the turning point between the GATT and WTO. After setting up the World Trade Organization, the number of members increased to 150 countries. “Equitable” and “mutually acceptable” are two phrases that are frequently used by the WTO (Brookings, 2016).

Unlike the GATT, the WTO attracted more developing countries. Most-favored-nation (MFN) treatment is the primary reason that developing countries seek to join the WTO. The MFN is “nondiscrimination by importers across different foreign export sources” (Brookings, 2016, p.16). If one of the members were to provide a lower import tax or grant easier access permission to a member, it should also give that benefit to the other members in the WTO. Preferential trade agreements are also signed by members (Brookings, 2016).

GATT and WTO do not merely relate to regulating trade behaviors, but also are crucial components of building mutually beneficial trade relationships among countries, which are mainly displayed in two aspects. First, countries that are not in the WTO are inclined to impose higher tariffs during trade. Second, taking the U.S. as

an example, it will set import restrictions on the dominant goods or services that are not included by the WTO to protect the domestic market (Brookings, 2016).

The dispute settlement understanding (DSU) is the method that the WTO uses to solve conflicts (Duke University School of Law, 2017). The dispute settlement body (DSB) carries out the DSU, by holding panels and meetings, giving advice, reporting, and so on (WTO, 2017). The DSU is constituted of twenty-seven articles and four appendixes, which includes the coverage, implementation, general principles, basic methods and procedures, supervision, process of panels, and so on. Ensuring the disputes can be resolved in a bilateral way or upon agreements is the vital role of the DSU, which is a contrast to the unilateral methods - section 301 (WTO, 2017).

The appearance of the WTO did influence the usage of the section 301 investigation. The USTR had initiated section 301 investigations 29 times since the establishment of WTO in 1995, which accounts for 23.77 percent of all investigations - there is a collision between the unilateral and bilateral methods (Gero and Lanna, 1995).

The Status Quo of the Trade Relationship between the U.S. and China

The trade relationship between the U.S. and China has changed significantly and in a positive way since the founding of the People's Republic of China. Since the U.S. and China established their diplomatic relationship, they gradually evolved to become each other's major trade partners (Goodman et al., 2017). The U.S. became China's second largest trade partner, second only to the European Union. "China was the

United States' [third] largest goods export market in 2016” (National Trade Evaluated, 2017, p.77). A great progress has been made by both parties. The total trade volume expanded to \$ 302.1 billion in 2007 from \$2.45 billion in 1979. According to the 2017 National Trade Evaluated report (2017), “The U.S. goods trade deficit with China was \$347.0 billion in 2016, a 5.5 percent decrease (\$20.1 billion) over 2015. U.S. goods exports to China were \$115.8 billion, down 0.3 percent (\$297 million) from the previous year. Corresponding U.S. imports from China were \$462.8 billion, down 4.2 percent” (National Trade Evaluated, 2017, p.77).

As time progressed, China became the second largest world economy, while the U.S. remained the first. Trade deputation between China and the U.S. became more and more common - for instance, the U.S. presented additional conditions to China as their most favored nation. In addition, the difference between China and the U.S. grew from the traditional trade to new types of industries, such high technology and intelligent property rights, all step by step (National Trade Evaluated, 2017).

The trade deficit between the U.S. and China grew, as well as the losses caused by Chinese companies violating IPR protection agreements that negatively influenced the American markets and labor. On April 18, 2017, President Trump released the executive order on “Buy American and Hire American”. Halting the inappropriate behavior of China regarding IPR is an important step for the U.S. to achieve their goal of “American first” (The White house, 2017).

In 2017, the U.S. and China put forward the U.S. – China 100-day action plan under the framework of the U.S. – China Comprehensive Economic Dialogues (Department of Commerce, 2017). Both sides came to agreements in the four areas of agriculture, financial services, investment, and energy; however, there is still a long way to go to attain the “gigantic steps” expected by the public (Bloomberg Politics, 2017; Heatley, 2017). Both the U.S. and China are willing to further discuss the one - year plan on trade and economy cooperation and relationship (Bloomberg Politics, 2017).

President Trump finished his Asian tour in November 2017. During President Trump’s visit in Beijing, the U.S. signed the \$ 253.5-billion- deal with China, which is the largest deal in the U.S. – China trade history. The deals consist of six fields that are energy, transportation capital expenditures (Capex), agriculture, finance, technology, and industrial. During the joint meeting with President Xi Jinping, President Trump gave a speech on the U.S. – China unbalanced trade relationship; he stated “I don’t blame China. Who can blame a country that is able to take advantage of another country for the benefit of its citizens? I give China great credit” (Nakamura and Parker, 2017, www.washingtonpost.com/news/post-politics/wp/2017/11/08/in-beijing-trump-lavishes-praise-on-chinese-leader-touts-great-chemistry-between-them/?noredirect=on&utm_term=.e78c46ad4fc0). President Trump changed his viewpoints to the unfair trade relationship between China and the U.S., which is criticized by a number of citizens (Philip and Mayeda, 2017; Dollar and Hass, 2017).

Since the Trade Act of 1974 was published, the USTR had initiated 122 section 301 investigations in total. Besides China, the European Union, Brazil, Japan, Thailand, and South Korea are key countries investigated by the U.S. on the issues of intellectual property rights; China was investigated five times successively (Coffield, 1981).

According to the 2017 NTE, the U.S. first acknowledged the improvement and development of China's intellectual property rights protection. China follows the requirements of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), amending "its framework of laws and regulations aimed at protecting the IPR of domestic and foreign rights holders" (NTE, 2017, p.77). However, China's market is still on the list of notorious markets of the 2016 special 301 report made by the USTR (USTR, 2016). The NTE (2017) shows five aspects around which China needs to improve their IPR protection. The first issue surrounds trade secrets; Chinese companies steal the trade secrets of domestic and foreign companies in order to give themselves an advantage. The U.S. strongly advised that China should improve and expand the range of its Anti-Unfair Competition Laws. After the U.S. – China Joint Commission on Commerce and Trade (JCCT) meeting held in November 2016, China agreed to enhance its protection on trade secrets. Secondly, the U.S. blamed the bad reputation of China's trademark registration. The third aspect is related to the patent and technology transfer regarding pharmaceuticals. After this, the U.S. pointed to China's lack of protection against

online piracy of motion pictures, music, books, software, and video games. The U.S. exhorted China to establish a healthy surrounding for the development of licensed and legitimate content. The last aspect is regarding counterfeit goods; the many fake products manufactured by China result in losses in the U.S. market every year (NTE, 2017).

Hearing of October 10, 2017

The USTR held a public hearing on “section 301 investigation: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation” in the main hearing room of the U.S. International Trade Commission (CSIS, 2017; *Federal Register*, 2017). The hearing is a part of the section 301 investigation. Chen Zhou of the China Chamber of International Commerce stated that the tension caused by the investigation may end up resulting in the trade war between the two biggest economies (Philip and Mayeda, 2017). Scott Kennedy (2017) argued that because of the influence of China and the size of China’s market, China’s attitude towards the intellectual property rights protection may influence the development of the high technology industry (CSIS, 2017).

Cause Reaction

The investigation created a widespread reaction in both the U.S. and China. The spokesperson of the Ministry of Foreign Affairs of China and the spokesman of the Ministry of Commerce of China responded to the presidential memorandum and investigation, stating that “given the increasingly converging China-U.S. interests and

the close-knit pattern of the two countries being mutually dependent, there will be no future or winner but only losers in a trade war” (MOF’s regular press conference, 2017, www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1484636.shtml).

LITERATURE REVIEW

The USTR announced that a section 301 investigation would be launched with China, aimed at the issue of technology transfer and intellectual property rights. Before that, the U.S. had implemented five section 301 investigations of China.

The first investigation happened on January 4th, 1991. The USTR launched the special 301 investigation (Bello & Holmer, 1989) in the area of intellectual property rights, which focused on defects in the Chinese patent law and the failure to protect the copyright, the trade secret, and the trademark right. Finally, China signed the intellectual property rights agreement with the U.S. in January 1991, and signed the China-US memorandum of understanding regarding intellectual property rights protection on the January 17th, 1992 (Zhang, 1995). China agreed to follow the related international agreement, and amended domestic associated laws and policies (Stewart, 2004). By the agreement, China changed the patent law, trademark law and issued the anti-unfair competition law in the latter half of 1992 (Zhang, 1995).

The USTR initiated the second investigation of China on January 10th, 1991 regarding Chinese domestic market access. The U.S. implemented a one-year examination of unfair barriers to U.S. goods that were exported to the Chinese market (Stewart, 2004). The USTR stated that they would impose a penalty duty if China could not establish an agreement by October 10th. At the final negotiation, China negotiated a deal with the U.S. and promised to remove trade barriers for a number of different products over the next five years (Bown and McCulloch, 2009).

The third and fourth special 301 investigations of China were also related to intellectual property rights; therefore, China issued the second and third China-U.S. agreement regarding intellectual property rights protection in succession (Morrison, 2011; Zeng, 2002).

The last section 301 investigation about China's government support for clean-energy exports was implemented on January 9th, 2010 (USTR, 2010; Robertson, 2010). The USTR "accepted [the] petition, filed by the United Steelworkers under Section 301 of the 1974 Trade Act" (Brown, 2010, www.nytimes.com/2010/10/18/opinion/18brown) and required a bilateral consultation with China within 90 days. In December 2010, the U.S. declared that it would solve this problem under the WTO Dispute Settlement Mechanism (DSM), and China agreed to revise the law regarding the trading subsidy. The past five investigations all ended up with the agreements or compromises - the U.S. rarely used the retaliatory measures to solve the unfair trade practices (Xu, 2008).

The trade deficit is the crucial reason that impelled the U.S. to initiate section 301 investigations of other countries. According to the record of the USTR, "China is currently our largest goods trading partner with \$578.6 billion in total (two way) goods trade during 2016" (USTR, 2017, www.ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china). Besides the merchandise imports and exports, China's fixed exchange rate is also blamed by the U.S. government. The U.S. claimed that the application of the fixed exchange rate led to the increasing trade

deficit between the U.S. and China, which would aggravate the unemployment rate, especially in the areas where China had significant competitive advantages (The Economist, 2005). Furthermore, China can be as competitive as the U.S. in the U.S. export domain market after China's currency, the RMB, is pegged to the U.S. dollar (Lou, 2004).

In addition to China, the U.S. also investigated several countries under the section 301, such as Japan, who is currently the 4th largest goods trading partner with the U.S. (USTR, 2017). During the 1980s and 1990s, Japan was almost the largest trading partner of the U.S., similar to the situation of China nowadays. At that time, Japan mainly focused on the exports, which resulted in their vast trade surplus with the U.S. (Bown and McCulloch, 2009). There are two remarkable section 301 investigations of Japan that are worth learning from; the first investigation was related to the semiconductor, ending in 1987 (Araki, 2004). The USTR accepted the petition of the U.S. Semiconductor Industry Association and asserted that the Japanese government set production barriers in the Japanese semiconductor market. The investigation officially started on July 11th, 1985. After a year-long negotiation, on July 31st, 1986, Japan finished up with an agreement *ad referendum*, opening the domestic semiconductor market, and promising no longer to dump semiconductors to either the U.S. or any other country (Fisher & Steinhardt III, 1982).

Another investigation occurred in 1994, aimed at the auto parts industry (Stern, 2000). Japan was reported by the USTR for “restrict[ing] or deny[ing] U.S. auto parts

suppliers access to the auto parts replacement and accessories market in Japan” (Araki, 2004, p.10). However, at this time, Japan required a consultation under the Settlement of Disputes of WTO. If the U.S. continued to impose unilateral retaliatory methods and violate the WTO rules, Japan would also require a panel. Ultimately, the U.S. had to terminate the section 301 investigation and reached a “satisfactory resolution” with Japan (Araki, 2004).

Because of the appearance of the World Trade Organization (WTO, 2017), the two investigations of Japan had the similar situations, but different results. WTO has well-established agreements to regulate anti-dumping and to settle disputes (WTO, 2017). The USTR needs to adjust its way to implement the section 301 investigations under the WTO agreements. Chen (2003) argued that the U.S. Executive Representative signed the WTO agreement without changing section 301, letting the U.S. “gain advantages from both sides”. The U.S. can choose to abide by the international conventions or to continue to implement section 301 investigation, depending on which method brings the most favorable results; however, the U.S. faces the dilemma of whether to use the Unilateralism policy or multilateralism policy or not (Gero & Lannan, 1995). The multilateralism policy will certainly open the U.S. market up to other countries more than before, which will lead to trade deficit increases. Moreover, the unilateralism policy, like section 301, is always deemed to be unfair, and results in adverse reactions from other trading partners (Thomas & Elliott 1992).

Bown and Muculloch (2005, 2009) studied the U.S.-China and US-Japan trade policies. In the two articles, the writers analyzed the differences between U.S. imports-exports towards China and Japan. The authors also suggested that Asian countries that would like to choose the export-oriented path should take the cases of China and Japan as lessons to learn.

METHODOLOGY

Two methods were employed for this research paper; the first method was primary and secondary sourced research. This research used two kinds of channels for collecting data. First, library research was the main source – the section 301 investigation had been used in many countries. After the analysis, the paper’s focus was narrowed down to Japan and China. According to Bardach and Patashnik (2016), using the concept of a proxy was a useful method to analyze the problems that were similar to those that had happened in the past. Past studies demonstrated the impacts and outcomes of previous section 301 investigations, which could provide the background and could be indicators of the trends and issues to be addressed in the upcoming investigation. Secondary resources would be the official websites. The terminology like “section 301” is explained clearly by the Trade Act of 1974. The regulatory processes for protection intellectual property by the USTR and the regulatory process by the WTO could be found from both past researches and official websites, which were used for comparing and contrasting.

The second method was the interview – companies’ senior managers, government staff members, and industry association members were three categories of people to be interviewed for this research. Those who were in the management of the regulated companies were chosen to be interviewees because they were fully knowledgeable about companies’ affairs, and might be contributing to making decisions regarding the investigations. The second subject was the policy-makers; they had a better understanding of the process and might better understand the results that the

governments want to gain by the section 301 investigation. The third group of participants was the industry association members. Industry associations were subjects that applied the investigation, hence their opinions were worth studying as well. Since the research focused on analyzing the section 301 investigation between the U.S. and China, the interviewees were chosen from those two countries.

Of those interviewed, six were from senior management of affected companies, two were government policy makers, and one were industry association members. Overall three were Chinese and six were American. To ensure candor during the interviews, respondents are identified only by a randomly selected letter.

After collecting all the data that were used by this project, this analysis of upcoming section 301 investigation used outcome evaluation, based on the Sylvia and Sylvia's (2012) program evaluation method. The program evaluation acted in accordance with a four-phase approach, following the order of defining problems, finding solutions, implementing, assessing how effective the solutions are.

Program Evaluation

Phase 1 Problem Identification	Phase 2 Solutions	Phase 3 Section 301 Investigation Implementation	Phase 4 Effectiveness
<p>China's violation of intellectual property rights</p> <p>American companies experienced business espionage and hacking to illegally acquire intellectual property</p>	<p>Section 301 investigation</p> <p>Hearings</p> <p>Results of investigation</p> <p>China's response</p>	<p>Evaluated the results of past three investigations of China and Japan</p> <p>(Mutual agreements; memorandum of understanding; trade war...)</p>	<p>Analyzed the information that is collected from interviews;</p> <p>Compared regulatory processes of the USTR and the WTO</p> <p>(Stop dumping; open domestic market; revised national laws...)</p>

FINDINGS

The China-U.S. Relationship in Intellectual Property Area

From the U.S. point of view

The American Chamber of Commerce in China (AmCham China) is a non-profit and non-government organization, having members of more than 3,300 individuals from 900 American-based companies across China. AmCham China conducts surveys of their members from late October to late November every year and generates the Chinese business climate report based on the result of surveys. “Most respondents are global in nature, and China makes up at least a 10% share of global revenue for almost 50% of member companies” (AmCham China, 2017, p.13). According to the 2017 China Business Climate Survey Report, the majority of members of the AmCham China continued facing the problems of getting growth and profits. “In 2016, 58% of survey respondents reported positive revenue growth in China, up from a low of 55% in 2015, but still far from historical levels of more than 70%. More companies also say that their China operations were profitable in 2016 (68% vs. 64% in 2015), but 80% say their margins in China are less than or only equal to their global average” (AmCham China, 2017, p.4). However, the 2018 report shows that, the stabilizing economy policies made by China’s 19th Party Congress as well as the Trump administration’s first visit to China gave confidence to the U.S. companies. 36% of the businesses surveyed said that they believed that the economic relationship between the two countries will improve, which is much higher than the 17% of last

year (AmCham China, 2018). 46% of members considered that China's government will further open the domestic market, which is 12% higher than the last year's rate. Although most members (64%) claimed revenue growth when comparing with last year, the technology and other research and development (R&D) intensive industries maintain the same level of revenue (AmCham China, 2018).

Although the U.S. companies feel optimistic about the increase of GDP, they are still concerned about issues, such as the execution and the interpretation of laws and regulations which are inconsistent between the two countries, as well as the adverse regulatory environment and increasing protectionism. Members worry about unequal supervision, enforcement, and preferential treatment by China's government of domestic enterprises, which may damage the revenue of foreign companies (AmCham China, 2017). Among all the industries, members in the technology and other research and development (R&D) intensive industries felt they received more unfair treatment when compared to local companies (AmCham China, 2017; AmCham China, 2018). It is also important to notice that the technology industry is the most optimistic about Chinese business environment. More than 77% of respondents predicted that the growth rate of industry market would reach or even exceed 5%. Trade barriers are one of the most commonly mentioned reasons by the members (AmCham China, 2017; AmCham China, 2018).

China is one of the top three priority investment destinations for most of AmCham China's members. The majority of them believed that innovation should be

a crucial mission when operating in China. The development of digitization in China is sharp, which will result in a huge market. However, there are still some barriers faced by the companies, such as intellectual property protection and data security (AmCham China, 2017). In both the 2017 and 2018 reports, member businesses expressed hope that China's government will improve fairness, and provide a predictable and transparent regulatory process, which will greatly influence their investment level in China (AmCham China, 2017; AmCham China, 2018).

Besides that, they also had concerns regarding intellectual property protection in China, which made them become very cautious when bringing intellectual property into China's market. Interviewee E (2018) said that they will be very cautious when transferring technology directly to a Chinese company. They need to know about the company, the technology, the intellectual property and also the relationship between the company and the university that is giving the technology. "[In addition to that,] some particular Chinese regulations require the licensor to guarantee the 'quality' of what's being licensed. [So] we far prefer to grant the license to a U.S. subsidiary of the Chinese company", said by the interviewee E (2018).

Of member companies, 52% thought that the intellectual property leaking and treaties on data security would easily happen in China. When asked what the barriers they thought would prevent them from increasing technology development in China were, 27% thought that it would be the lack of intellectual protection, while 15 % considered the requirement of technology transfer (AmCham China, 2018).

Of the members surveyed, 25% said that the insufficient protection offered by the text of IP-related laws and regulations are the most crucial challenges to their companies. Another 24% thought that the difficulty prosecuting IP infringements in court or via administrative measures was the most important issue. In addition, 14% thought that the problem was IP theft by employees, while 12% believed that the licensing constraints were the root of the problem (AmCham China, 2017; AmCham China, 2018). Most respondents said that the technology and proprietary knowledge that they shared with China's business partners were the same as what they shared with other overseas business partners (AmCham China, 2017; AmCham China, 2018).

Interviewee I (2018) who is in charge of the technology transfer and the patent in a joint-venture company, said that he does not really have an opinion about technology transfer between China and the U.S. He considers the more important issues to be that, due to the differences of the legislation framework and enforcement mechanism between the countries, technology transfers and patent grant processes should be very careful and prudent. Interviewee I (2018) said that the U.S. parent company often chooses the cooperation methods depending on the competitive advantage of the Chinese partner. "We would consider joint ventures if synergies in operational excellence or cost efficiency excel. Otherwise, other formalities of collaboration will be evaluated including the technology transfers, partnership, etc." (interviewee I, 2018), said the manager. For the question of the lifetime of the patent,

the manager claimed that the longer, the better. He did not have any comments on the recent section 301 investigation, and he only focused on the business between the U.S. and China (interviewee I, 2018).

However, most of member companies just have concerns about intellectual property protection, which barely influences their investment or business in China. Of the members surveyed, 20% said that letting them take the increased control of their data and reducing the need for local business partners of joint venture companies has not had a significant impact on increasing their investment level. Another 29% of them thought there was a somewhat significant impact. Only 11% thought that change in that area will have an extremely significant influence. When asked about the policy change in reducing the needs in technology transfer, 19% of members thought that it does not have any influence at all on their future investment, while 27% believed it will have somewhat of a significant influence. Only 6% of members thought the influence would be extreme (AmCham China, 2018).

Interviewing the interviewee F (2018) revealed that he holds a positive attitude regarding technology transfer between the U.S. and China. When collaborating with Chinese companies, they prefer to have a strong and close relationship with their clients. They will play a more active role “if the client is not very sophisticated” (interviewee F, 2018). They are also inclined to build a long-term relationship. Therefore, they will provide complimentary services to build and maintain these relationships. Since interviewee F works in a company that concentrates on the U.S.

intellectual property law, they encounter with various issues and have various concerns for each transaction. Overall, they will pay attention to the purpose of the transfer, the parties involved in the transaction, and the technology per se. Regarding the question of a patents' lifeline, interviewee F thought that it would vary with the speed of technology development ideally (interviewee F, 2018).

Interviewee G and interviewee H (2018), who were coming from the same company, said that they believe in technology transfer between China and the U.S. The joint venture operators obey the agreement they made, and each party needs to clarify their own rights and responsibilities. They argued that their company often worries about losing the right or the control of the technology, or that the intellectual property cannot be protected. Hence, the technology transfer will always be a one-time transfer. Both of the interviewees thought it was good to see that the U.S.'s intellectual property rights can be protected under section 301 of the Trade Act of 1974, and they both supported the recent section 301 investigation (Interviewee G, 2018; Interviewee H, 2018).

Although member companies felt the limits of market access and discrimination in law enforcement, they still had confidence that the Chinese market would keep opening. Almost all member companies thought that China's enforcement of intellectual property rights has been improved in recent years. The majority of members acknowledged that China has made great efforts in improving the transparency of their policies (AmCham China, 2018).

From the China point of view

China and the U.S. have different concerns regarding the trade and economy fields. The U.S. focuses more on the trade deficit with China, market opening, the RMB exchange rate, and IP protection. The U.S. hopes to protect its up-to-date technology and innovation. China focuses more on carrying out the obligations of the WTO, the U.S. export control to China, and Chinese companies' investment in the U.S and the U.S. abuses of trade remedy measures (China's Ministry of Commerce, 2017).

In fact, the essence of the China-U.S. trade relationship is a win-win scenario (Renmin, 2018). Although China has the largest and the most complete categories industry systems globally, it is still in the middle-low end of the value chain. The U.S. relies on the scientific and technological strength, innovation, and development of the service industry, occupying the high-middle end of the value chain. Therefore, China has the trade surplus during the cooperation while the U.S. has the profit surplus (China's Ministry of Commerce, 2017).

Besides that, trade between the two countries resulted in another advantage, which is China promoted the U.S. industries' upgrades to the direction of high additional value and high-technical content, because China took charge of the mid-low production chain. At the same time, the U.S. high-tech companies promoted the development of related industries in China. Based on the data from *A Research Report on China-The U.S. Economic and Trade Relations* released by China's

Ministry of Commerce, the trade deficit between China and the U.S. is not as huge as the U.S. described before. China thought the volume of trade deficit was exaggerated by the U.S. According to the calculation on the Chinese part, the trade surplus between the two countries was \$254 billion in 2016, but the U.S. claimed that the trade deficit was \$366 billion (China's Chamber of Commerce, 2017). There was a \$112 billion difference between the two results. The difference could be caused by many reasons, such as statistical discrepancy, carrying trade, and so on. In the past ten years, the trade deficit between China and the U.S. has been getting better. In 2016, China's current account surplus accounted for 1.9% of the GDP, which is in an internationally recognized and reasonable range (China's Chamber of Commerce, 2017).

China's Chamber of Commerce report (2017) indicated that China's trade surplus is mainly the result of market-based participants from enterprises and consumers making economic decisions from both ends of supply and demand. It is not caused by government intervention. Both China and the U.S. need to strive to solve the trade deficit issue, which is not merely the problem of China.

In the past ten years, the average growth rate of U.S. exports to China was approximately 3 times that of U.S. exports. After China joined in to the WTO, the volume of the U.S. exports to China increased by 500%. In the service industry, the U.S. kept the long-term surplus. According to the estimate of the US-China Business Council, the bilateral investments between China and the U.S. contributed \$216

billion to the U.S. GDP and supported 2,600,000 employment positions in 2015 (China's Chamber of Commerce, 2017). According to the report, trade deficit between the two countries did not directly cause the reduction of U.S. employment. The main reasons for the U.S. insufficient job opportunities were skill improvement and upgrading of industries (China's Chamber of Commerce, 2017).

The last section 301 investigation that the U.S. implemented to China related to steel export. The steel trade has been still an issue between the two countries. China's Chamber of Commerce argued that the Chinese steel industry is established in domestic production, which not only discourages steel exports, but also adopts a series of measures to control exports. China's exports of steel to the United States account for a small proportion of the total imports of the U.S.. Affected by numerous anti-dumping and countervailing measures taken by the U.S. against Chinese steel products, China's steel exports to the United States have been declining year by year in the past decade (China's Chamber of Commerce, 2017).

For a long time, technology, transportation and communication were greatly affected by the strict high-tech export control implemented by the U.S, which meant that lots of the U.S. high-tech products could not be exported to China. According to the Committee on Foreign Investment in the US (CFIUS), from 2012 to 2014, China ranked first in the list of country-level foreign investment countries in the United States for three consecutive years, and reviewed a total of 68 investment projects.

However, in fact, China's investment accounts for less than 1% of the total foreign investment that the U.S. attracts (Dollar, 2017).

Interviewee B (2017) said that, in the Trump administration, any deal with the Chinese government will attract the attention of the CFIUS. The U.S. government may reject Chinese acquisitions of American assets because of a concern for homeland security. But the refusal may come because of many subjective factors. The chances of successfully passing the examination of the CFIUS have slipped away (Interviewee B, 2017). In practice, the U.S. government will focus on the capital sources and ownership structure of acquiring firms when it is investigating acquisitions. The U.S. government mainly inspects the cooperating banks when assessing the capital sources. Communication technology and the big data industry are the most sensitive industries (Interviewee B, 2017).

The cost to the U.S. of intellectual property protection

The IP commission was set up in 2012 and exists for three reasons. First, it records and assesses the causes and effects of international intellectual property thefts that harm the U.S. Secondly, the commission focuses on the actions of China and other infringers in international intellectual property theft. Thirdly, it “[proposes] appropriate U.S. policy responses that would mitigate ongoing and future damage and obtain greater enforcement of intellectual property rights (IPR) by China and other infringers” (IP Commission, 2017, p.1). Based on the calculations of the IP Commission, the annual loss for the U.S. economy in counterfeit goods, pirated

software, and theft of trade secrets exceeded \$225 billion and reached \$600 billion. At this rate, in the past three years, the U.S. economy lost \$1.2 trillion because of intellectual property theft issues (IP Commission, 2017).

The IP commission divided IP theft into three categories, which are counterfeit and pirated tangible goods, pirated software, and the theft of trade secret. Annually, the U.S. will import between \$58 billion and \$118 billion worth of counterfeit goods into the domestic market. Meanwhile, \$85 billions worth of counterfeit U.S. goods will be sold worldwide. Although counterfeit goods have a price difference compared to authentic products, at least 20% of authentic products are substituted by counterfeit ones (IP commission, 2017).

“Ease of downloading software, ubiquitous use of software across industries and countries, and inadequate surveys” (IP commission, 2017, p.2) are there main reasons leading to the rampant existence of pirated software, which will cost the U.S. approximately \$18 billion.

Trade secret theft has always been invisible, so it may not be realized by the companies. Hence, the cost of trade secret theft is hard to estimated and calculate. New estimations show that 1% to 3% of the GDP is the price of trade secret theft, which is between \$180 billion and \$540 billion (IP commission, 2017).

However, the cost of IP theft is not only the cost of intellectual property protection, but also the cost of the immediate and long-term competitive advantages that the U.S. loses, and the cost of improving the laws and regulations. During the

hearing, the IP commission argued that the U.S. government needs to do more to prevent intellectual property theft. In the future, along with the development of technology, intellectual property will become more vulnerable (IP commission, 2017).

The IP Commission stated that the U.S. government sufficiently values the importance of IP-intensive industries to domestic markets. IP-intensive industries contributed 38% of the GDP in 2014. The percentage is probably higher nowadays, so it may occupy 40% of the U.S.'s GDP, based on the estimation of the U.S. In addition, IP-intensive industries employ approximately 35% of the labor force, which is 56 million jobs. Generally, the wage in IP-intensive industries is higher than the wage in non-IP-intensive industries (IP commission, 2017).

After the release the 2013 version *IP Commission Report*, the U.S. government made significant law enforcement changes and defensive measures, such as the Defend Trade Secrets Act of 2016, which truly led to several positive improvements. In addition, the intellectual protection received more attention than before. The U.S. government also made some developments after releasing the report. First of all, the Department of Justice prosecuted five of China's People's Liberation Army (PLA) officers, claiming that the PLA officers illegally invaded the U.S. companies' networks and stole trade secrets and sensitive information. Since the PLA officers will probably never appear in the U.S. courts, these actions mainly serve as a warning to other hackers from the PLA units. The U.S. government also published new acts and

laws with regards to personal protection, national level protection and protection efforts, such as *2015 National Defense Authorization Act*, *National Cybersecurity Protection Act of 2014*, and *Cybersecurity Workforce Assessment Act of 2014* (IP commission, 2017).

However, there were some problems created during the regulation procedures and counting processes. First, foreign lawbreakers are hard to bring to trial in the U.S.. Nowadays, the number of high-tech companies is increasing, which leads to increased costs for intellectual property protection. The damage caused by counterfeiting may be greater than what was estimated because of the difficulty of measuring the amount of IP theft. For instance, the merchants may not even be able to tell the true product from the counterfeit one. The traces of IP theft are hard to detect. Companies sometimes are not willing to make it widely known that there are counterfeit versions of their products in order to keep the market shares.

Of counterfeit goods coming into the U.S. market, 52% are from China. The estimated cost of IP theft may be merely a small fraction of the total. The loss of cutting-edge technology and innovation could result in the loss of the best jobs for Americans. The high-tech industries, such as the information and communication industries, are motivating forces of development for the future U.S., which is the potential cost and loss of intellectual property theft (IP commission, 2017). Based on the report of the IP Commission (2017), China is the principal IP infringer, making up 87% of counterfeit goods imported into the U.S. market.

The IP commission testified at the hearing regarding China's actions of Technology Transfer, intellectual property, and innovation. The IP Commission report can be seen as a complementary document to the section 301 investigation. The testimony was argued from four points of view: China's policies, example cases, cost and damage to the U.S. caused by China's actions, and how the U.S. uses both unilateral and multilateral measures to confront intellectual property theft (IP commission, 2017; Ellings, 2017).

It was the same with the report released by AmCham China. After interviewing U.S. companies, the IP Commission concluded that China was the key perpetrator of intellectual property infringement. During the hearing, the IP commission listed ten vulnerable sectors that may be targeted by intellectual property theft, which are information technology, numerical control tools and robotics, aerospace products, ocean engineering equipment and advanced ships, railway equipment, energy saving and new energy vehicles, power equipment, new materials, medicine and medical devices, and agricultural machinery. According to the testimony given by the IP commission (2017), China uses four measures for getting the intellectual property. First of all, it is the espionage with the support of new technology. Secondly, foreign companies are able to use their intellectual property exchange to get access to China's market or escape tedious procedures. Thirdly, China's government can use policies to regulate the actions of foreign companies, which will weaken the competitive advantages of foreign companies to some extent. Last but not least, foreign companies

need to share their data and intellectual property with local businesses and allow China's government to have full access to their source code (IP commission, 2017).

The status quo of China's intellectual property protection

Both the IP commission and USTR recognized the improvements in China's intellectual property protection laws. China also signed an "expanded memorandum of understanding with the National Intellectual Property Rights Coordination Center of the Department of Homeland Security" (IP Commission, 2017, p.13). In addition, the Chinese government also realized the insufficiencies of intellectual property protection and wished to change from a large IP country to a strong IP country, publishing an act entitled *Opinion of the State Council on Accelerating the Construction of Intellectual Property Powers for China as an Intellectual Property Strong Country under the New Situation-Division of Tasks*. In China's new five-year plan, there are sectors for special support of the high-tech sector and of intellectual property protection, which lists approximately 75 priority technologies (IP Commission testimony, 2017). China started having IP courts in 2014 and is still improving its acts and regulations. The new plan issued by the State Council accelerates the enhancement of the IP court system and further reduces the damage to the intellectual property theft victim (IP Commission testimony, 2017). China's president Xi Jinping also pays attention to the protection of intellectual property, saying that an intellectual property infringer should be punished more severely than before. Besides that, a four-month crackdown was launched by China's Ministry of

Commerce to protect the legal rights of companies with foreign investors (Wu, 2018).

Joining the WTO improved the construction of China's intellectual property protection system to a great extent (IP commission, 2017).

China thought, after years of hard work, that it had already built a relatively complete intellectual property protection regulation system, setting up intellectual property court. China State Council also established the National Leading Group to Combat Infringement and Counterfeiting, which positively promotes long-time mechanism construction. From the aspect of legislation, judicial, and enforcement, China has significant improvements in all three (China's Chamber of Commerce, 2017).

Regulatory Processes for Protecting Intellectual Property by the WTO

Along with the regulation of the WTO, disputes regarding intellectual property protection between member nations will go through consultation processes as the first step. If consultation is not able to settle a dispute, the adjudication panel will start to be used (WTO, 2018).

Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS) under the WTO was signed at the Marrakesh Ministerial Meeting in April 1994, as part of a package deal with the other Uruguay Round Agreements, and it went into effect in January 1995 (Fukunage, 2008). It “address[es] the applicability of basic GATT principles and those of relevant international intellectual property agreements; the provision of adequate intellectual

property rights; the provision of effective enforcement measures for those rights; multilateral dispute settlement; and transitional arrangements” (WTO website, 2018, www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm). The Berne Convention for the Protection of Literary and Artistic Works (1971) and the Paris Convention for the Protection of Industrial Property (1883) are included in the TRIPS agreement. The TRIPS regulates patent terms, regulations of using patents, trademarks, unfair competition, national regulators, and so on (WTO website, 2018).

Until 2008, the WTO DSM had taken over 26 disputes from the TRIPS and solved most of them. Complainants generally will claim from three aspects, which are statute, application, and ineffectiveness of domestic remedies. The statute claims are more concerned about whether countries meet their laws, regulations, or legislations with obligations under the TRIPS, which “provide general rules as opposed to case-specific applications of the rules” (Fukunage, 2008, p.890). Application claims focus on countries that implanted intellectual property regulations ineffectively. Lastly, claims pay more attention to remedy measures (Fukunage, 2008).

In 2007, the U.S. appealed the WTO DSM to form a panel to settle a dispute with China in the intellectual protection area. The U.S. claimed that China violated Articles 61, 46, and 41.1 of the TRIPS, which can be divided into three categories: (1) China’s thresholds of punishment in the area of intellectual property area are too high to be implemented; (2) China’s customs authorities ineffectively deals with counterfeit; (3) the insufficiency of China’s patent and copyright protection (Yu, 2011).

China responded to these claims successively. For the first claim, China argued that different circumstance and criminal laws and methods of calculation resulted in the U.S. government considering the thresholds of China's criminal procedure as high (Yu, 2011). The WTO panel thought the U.S. failed to provide the sufficiently substantial evidences. With regards to the second claim, China argued that its customs authorities have enough discretion to regulate counterfeit and infringing goods and provide remedial measures. Although the WTO acknowledged the efforts of China on intellectual property protection and affirmed that China has met with the minimum standard, China still lost the second claim because of failure to build effective restraints. China also lost the third claim because the WTO panel considered that the Chinese Copyright Law was not completely consistent with the TRIPS (Yu, 2011).

The TRIPS allows member countries to choose appropriate methods to protect their intellectual property. Members will enforce the TRIPS combined with their own regulations, which gives members great discretion and leaves some space for less developed countries. The WTO encourages less developed countries to use DSM to resolve disputes. Just because of that, developing countries become more frequent users of the WTO DSM (Yu, 2011).

The actions of technology transfer and intellectual property protection usually are the behaviors of individuals rather than the responsibility of the governments, which is also a viewpoint emphasized by the WTO. Hence, the governments do not need to undertake all responsibilities and costs. The TRIPS also reserves space for member

countries with different backgrounds to explain and translate the Agreement depending on their situations (Yu, 2011).

All the members that constitute the TRIPS council are in charge of overseeing the implementation of the TRIPS. The TRIPS council has five roles, which are monitoring, consultation, technical cooperation, review and negotiation, and review agreement (WTO website, 2018). Comparing other councils in the WTO, the Council for the TRIPS has the primary role of receiving and publishing information rather than consultation and resolving disputes between countries. Therefore, subsequent development of negotiation functions of the Council for TRIPS is a significant step for TRIPS (Yu, 2011; WIPO website, 2018). Another important function of the Council for TRIPS is serving as a monitoring body, analyzing and evaluating intellectual property regulations and the laws of member countries. According to the section 18 of the Protocol on the Accession of the People's Republic of China, the Council needed to implement an annual transitional review until 2009 to ensure that the intellectual property regulations of China meet the requirements of the TRIPS. The Council also helps with each of the member countries to share their experiences related to implementation. The Council tries to prevent the disputes and resolve them before they are presented to the panel (Yu, 2011).

An effective DSM is the guarantee of effective of minimum standards policies under the TRIPS. Panel and strict time-frames further ensure the effectiveness of the

TRIPS. Moreover, DSM also ensures that an individual country cannot hold back the panel (Yu, 2011).

Part III of the TRIPS provides minimum standards for the enforcement of IP rights, which provides more elaborate criteria and makes up for the drawbacks of the WIPO. The TRIPS, as the part of package signed by WTO members, includes more developed and developing countries. Although the TRIPS emphasizes complying with the minimum standards, it also encourages the appearance of high standards (Yu, 2011).

Regulatory Processes for Protecting Intellectual Property by the USTR

After the USTR initiated the section 301 investigation, a hearing held by the inter-agency section 301 committee should occur to hear the opinion of the public, interest groups, and other departments. After the hearing, the USTR should receive written comments by the midnight on September 28, 2018. This time, the USTR investigated the actions of China from four aspects (*Federal Register*, 2017). First, China's government used a variety of tools to force the U.S. companies to transfer technology. Secondly, the Chinese government reduced the competitive advantages of the U.S. companies in licensing procedures and negotiations and undermined the control of U.S. companies over their technology. Thirdly, China's government participated in the acquisition of U.S. companies and obtained cutting-edge technology from these investments. Fourth, China's government was charged with stealing trade secrets from U.S. companies. The USTR should have results within 12

months from the date of releasing the investigation, after consulting with appropriate departments and also with China's government (*Federal Register*, 2017).

The New Progress of The Section 301 Investigation

After just over 100 days from launching the section 301 investigation, the USTR already finished a draft of the investigation report and shared it with other departments for checking and overseeing (*Asia Times Staff*, 2017). China responded that it prepared for the upcoming unilateral trade action. According to a report published in 2017 December, a spokesperson from the USTR claimed that the U.S. will do anything to stop the unfair action of China (Behsudi, 2017). The section 301 investigation is the first one of many that the Trump administration will implement to China.

On March 22nd, 2018, the U.S. President Donald Trump signed the executive order, claiming what the results and possible actions that may be taken by the U.S. were, related to the recent section 301 investigation of China's Laws, Policies, Practices, or Actions related to technology transfer, intellectual property, and innovation. After a public hearing, two rounds of public written commentary, and consultation with appropriate departments and section 301 Committee, USTR had four major findings. First, "China uses foreign ownership restrictions to require or pressure technology transfer from U.S companies to Chinese entities" (Trump, 2018, www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/), such as forced joint venture requirements

and investment restrictions. China also uses the differences between its laws and the U.S.'s laws to put pressure on U.S. companies to transfer technology, which “undermines the values of U.S investments and technology and weakens the global competitiveness of U.S. firms” (Trump, 2018, www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/). Secondly, China puts up substantial barriers and restrictions, such as limits on technology licensing terms and procedures, in actions and investments of U.S. companies, which weakens the bargaining chip of U.S. companies and gives the unfair advantage to China's companies (Breuninger and Tausche, 2018). Thirdly, China's companies directly invest in U.S. companies in order to get cutting edge technologies and intellectual property, and then transfer the technology into mass production to fit with China's own industry strategies. Fourthly, China's government has “unauthorized access to intellectual property, trade secrets, or confidential business information to support [its] strategic development goals” (Trump, 2018, www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/).

Regarding the key results mentioned before, the U.S. government came up with three measures. First of all, the U.S. government will increase tariffs by 25 % on certain types of Chinese products, which is equivalent to \$50 billion. The USTR calculated that was the annual harm to the U.S. caused by China's inappropriate

actions. According to the executive order, the list of products needs to be provided within 15 days after the memorandum (USTR, 2018).

Secondly, the USTR applied consultation via the dispute settlement mechanism of World Trade Organization (WTO) to address China's discriminatory licensing practices (Trump, 2018). According to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the U.S. government argued that China violated Article 3 and Article 28, claiming that China gives disparate treatment to foreign intellectual property rights holders and failed to protect the patents of foreign holders (USTR, 2018). The USTR also claimed that, "China's laws provide less favorable treatment of foreign entities than the comparable treatment of domestic Chinese entities" (USTR, 2018, www.ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/following-president-trump's-section). Consultations at the WTO will be the first step taken by the DSM. If the WTO consultations do not go as well as expected, the WTO adjudication panel will be the next step (WTO, 2018).

As the last step, the U.S. government will restrict the direct investment of China's companies in key U.S. technology, such as the semiconductor industry, which will be taken charge of by the Secretary of the Treasury (Lexology, 2018; *Federal Register*, 2018). The U.S. will limit the same sectors in which China's government restricts the investment of U.S. companies (CSIS, 2018). The U.S. government used all the available measures to respond to China's action that they thought were harmful to the U.S. economy (Executive Office of the President, 2018).

During the hearing, members of the China Chambers of Commerce, China Enterprise Confederation, and Intellectual Property Law Society participated and responded to the following aspects. They argued that China's government does not have technology transfer requirements in its laws. Technology transfers are done voluntary and independently, based on the drive of benefits. The "Made in China 2025" is just an initiative that is provided for the development of China's economy (Fischer et al., 2017).

ANALYSIS

The TRIPS agreement under the WTO system has three important improvements. The main purpose of the TRIPS is to remove discrimination between different countries in laws and regulations on the national level. When comparing it with WIPO, the Paris Convention and the Berne Convention, the TRIPS is more comprehensive, combining all types of intellectual property protection together. The Paris Convention, as one of the predecessors of the TRIPS, aims to protect intellectual property rights, which is one of the first international agreements in the intellectual property protection area.

Its second merit is that “TRIPS established standards for enforcement by incorporating domestic procedures and remedies to ensure the protection of intellectual property rights” (Monten, 2005, p.395). The third advantage is the effective dispute settlement mechanism (DSM), which guarantees the enforcement of the Agreement (Monten, 2005).

The TRIPS also complies with the “Most-Favored Nation” clause that was raised by the WTO, which means that if a nation gives any favor or advantage to another member nation, it should also give the same advantage to other members. The Most-Favored Nation treatment further eliminated the discrimination between member countries.

From another side, TRIPS still has its disadvantages. In the first five years of the TRIPS agreement, DSM settled six cases out of 23. One of them was a dispute regarding patent laws between the U.S. and Japan. The majority of disputes could be

solved before being sent to the WTO DSM. Nearly all disputes happened between developed countries and developing countries. Developed countries are always the complainants while developing countries are the respondents (Yu, 2011). Companies with intellectual property are mostly in developed countries, which makes developed countries more likely to take actions to protect IP.

After 2001, the WTO DSU only solved three disputes. The limitations of the WTO started appearing. Complaints and respondents can come up with a temporary agreement or memorandum of understanding that usually has a time limit (Yu, 2011). Respondents are able to not do anything, and waiting means that the agreement loses its effectiveness. Complainants think that they won the dispute, but the dispute is actually was not solved at all, such as the case between the European Community and the U.S.. Among all disputes that were solved by the WTO, nearly 85% of them were found to have at least one violation (Fukunage, 2008). The enforcement of WTO report is the drawback, which is that there are not mandatory laws that need to be enforced.

In addition, the TRIPS does not have relevant clauses to regulate technology and innovation transfer. Another drawback is that the TRIPS does not have enough authority to resolve disputes fundamentally. The third shortcoming is that complainants cannot know whether respondents implement remedial measures or not (Monten, 2005). Based on the TRIPS, complainant countries need to provide

sufficient proof of the infringement of other countries. Moreover, the evidence is sometimes hard to obtain.

Although the WTO has drawbacks that were mentioned above, member countries still considered that the dispute settlement mechanism (DSM) of the WTO was more effective and stronger (Fukunage, 2008). Compared to investigations by section 301 of the Trade Act of 1974, many countries would rather solve disputes under the WTO DSM. Most countries believe that the section 301 investigation is an unpleasant measure (Monten, 2005).

In the history of the section 301 investigation, the country that was investigated would change or amend its legislation or signed a bilateral agreement with the U.S., promising to remedy its actions under strong pressure from the U.S.. (Monten, 2005). Interviewee A (2017) said that the section 301 investigation that the USTR had previously implemented mainly focused on Japan and the European Community countries at that time. The U.S. can always get the results that they are satisfied with. Especially during the 20th century- in the 1980s to the early 1990s to be exact - Japan compromised with the U.S. by voluntarily restricting their exports, which actually violated the regulations of the WTO (interviewee A, 2007).

Based on U.S. Code, the USTR should use DSM under the WTO first, before it launches its own section 301 investigation. However, in the recent section 301 investigation, the U.S. sought the consultation of the WTO after it had the result of the USTR investigation.

Although, the U.S. signed the TRIPS agreement, it merely amended its regulations to fit with the Agreement. The U.S. wants the role of section 301 to remain strong and effective when trading with other countries. A foreign country will be charged with violating the U.S. IP protection regulations even if it meets with the standards of the TRIPS. Among developing member countries, WTO praised China for meticulously carrying out the minimum standards of the TRIPS. From the stance of the WTO, it does not want a member country to use unilateral measures against other member countries. The WTO also claimed that section 301 is in the “prime facie violation” of Article 23 of the WTO DSU. If the U.S. keeps using unilateral measures like the section 301 investigation, it will undermine the established international order and international DSM, which will result in global agreements like the TRIPS losing their effectiveness (Monten, 2005). Although the WTO sometimes cannot sufficiently take effect, it still prevents the world from going back to the “Wild West” before the appearance of the WTO (Capri, 2017).

China hopes to resolve the dispute via the WTO DSM from the beginning to the end (Capri, 2017; Renmin, 2018). According to the Report published by China’s Ministry of Commerce (2017), the legal protection of the trade relationship between China and the U.S. is WTO and multi-bilateral agreements. Regulations of the WTO provide stable and strong institutional guarantees to bilateral relations between the two parties. The trade relationship between China and the U.S. is under the frame of the WTO rules (China’s Chamber of Commerce, 2017). Beijing will work on

opposing the unilateral measure of the U.S. and strive for a better situation with other American trade partners. China will insist on maintaining the multilateral trade system and preventing the world economy from the unilateral measures.

For the recent section 301 investigation, “China cited DS152 to make the claim that unilateral trade restrictions taken by the U.S. via Section 301 would be inconsistent with WTO rules” (World Trade, 2018, [www.insidetrade.com/daily-news/us-china-tussle-over-section-301's-compatibility-wto-rules-dsb](http://www.insidetrade.com/daily-news/us-china-tussle-over-section-301-s-compatibility-wto-rules-dsb)). Two decades ago, the European Union and the U.S. had a similar situation. After the panel, the WTO claimed that powerful economic entities cannot threaten others with the unilateral measures (Miles, 2018). Besides that, China claimed that the U.S. violated the article 23 of the DSU. DSU Article 23 states that the WTO members shall use the WTO dispute settlement system to seek redress for alleged the WTO violations as opposed to acting unilaterally. It also states that “WTO members shall use the WTO dispute settlement system to seek redress for alleged WTO violations as opposed to acting unilaterally. The WTO states that members shall not determine that a violation of WTO rules has occurred except through recourse to dispute settlement” (WTO, 2018, www.wto.org/english/tratop_e/dispu_e/dsu_e.htm). The actions of the U.S. government will undermine the function of WTO and of a multilateral mechanism.

In this case, keeping using the unlitary measures will possibility lead to a trade war. However, the trade war is a lose-lose scenario. If the trade war begins, both China and the U.S. will feel pain.

The U.S. government increased the tariff and restricted the investments on the innovation and technology industries, such as new energy vehicles and high-speed transportation, which will have a negative influence on China's "Made in China 2025" plan to some extent. The Chinese economy relies more on trade and export when compared to the U.S. (Lawder, 2018). According to the data of the World Bank, the total trade volume in 2016 of China was 37% of China's GDP, while the total trade volume only comprised 26% of the U.S. GDP. Besides, it is easier to find the substitutes for China's products (Zheng, 2018). For China, it is important to know whether the American measures are temporary or permanent, and whether the trade relationship between them will shift. The restricted areas included aerospace, information and communication technology and machinery, which are crucial for the China's development plan (Bloomberg, 2018).

China's Foreign Ministry spokeswoman Hua Chunying (2018, www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1527756.shtml) said that "[at] the same time, as we all can see, it is exactly the U.S. that acts and speaks in a unilateral manner and poses an unprecedented challenge to the multilateral trading system, over which many WTO members have expressed their concern. We hope the US can look at China correctly and take concrete actions to uphold [multilateral trade arrangements]". The spokesman of China's Ministry of Commerce argued that China will not let others damage its rights. China already made full preparations to defend

its legal rights (Renmin, 2018). The secretary of China's Minister of Commerce, Fuli Chen, claimed that the section 301 investigation violated the regulations of the WTO.

As responses, China will be increasing the tariffs on the same value of imports. A few hours after the president's memorandum, China announced the tariff on \$3 billion of imports, which will first influence the American exporters. The list of import products tentatively includes seven categories and 128 taxable products. China also planned levies on \$50 billion worth of imports (Bloomberg, 2018). However, China will adjust the plan in accordance with the regulations of the WTO. The U.S. customer will feel the price of China's imports increase. The U.S. manufactures see disruption of the production chain because of losing the middle and lower reaches (CSIS, 2018).

The targeted industries will follow two criteria. First, China needs to have appropriate substitutes for the targeted industries. Secondly, the targeted industries need to create significant influences in the U.S., such as agriculture and transportation. Interviewee A (2017) claimed that if the U.S. government wishes to conduct sanction measures, it needs to get the cooperation of American companies that have been forced to translate their technology or lost intellectual property related to trade with China. However, the majority of those multinational companies have extensive market interest in China. They may risk losing the Chinese market. Hence, they may need to weigh the advantages and disadvantages of doing so (interviewee, A, 2017).

“The incoming tariffs are the most significant to date from a president who campaigned on a promise to correct the U.S.'s global trade imbalance, particularly with China, and to revitalize U.S. manufacturing” (Diamond, 2018, www.cnn.com/2018/03/22/politics/donald-trump-china-tariffs-trade-war/index.html). If the Chinese information and communication technology exports were imposed with 25% tariffs, the U.S. economy would lose about \$332 billion in the next ten years.

Although China imposed tariffs on the U.S.'s agricultural productions, it does not want to start the all-around war, and neither does the U.S. Although the president of the U.S. signed the memorandum that appears to create tension between the two countries, he still wants to solve trade issues via diplomatic measures (Diamond, 2018). On the morning of Month 24th, the member of the Political Bureau of the Chinese People's Congress Central Committee He Liu, talked with the U.S. Department of the Treasury and stated the Chinese stance, that China is ready to protect its own rights and hopes to keep negotiating with the U.S.. (Xinhua, 2018).

A trade war will push China to focus on other markets, such as the “one belt one road”. Interview C (2017) said that the “One Belt One Road” policy opened unprecedented markets to Chinese enterprises. The U.S. companies may oppose the Trump administration's decision because they may think that China is an indispensable market (Bloomberg, 2018).

The majority of member companies believed that bilateral relations between China and the U.S. would influence the U.S. companies' business growth in China to

a great extent. A positive trade relation is important to all industries (AmCham China, 2018).

The two countries are in different stages of market economy developments. The U.S. is the forerunner of the market economy, which has a more mature economic structure. Besides that, the U.S. took the lead in establishing antitrust laws and intellectual property protection laws at its founding. For instance, the U.S. Constitution of 1787 makes the central government responsible to protect intellectual property (Article 1, Section 8), and the U.S. published patent law and copyright law in 1790 (China's Ministry of Commerce, 2017). Compared with that, China built up the Socialist Market Economic System in 1992. In the past 20 years, although China has improved a lot, these laws and regulations still need to be enhanced (China's Ministry of Commerce, 2017).

Interviewee D (2017) explained why the economic relationship between China and the U.S. is becoming more and more tense. First, as the second economy, China has an increasing number of competitive enterprises. For instance, Chinese companies comprised 11 of the 50 most profitable enterprises chosen by "Fortune", which is the largest number on the list for any country except the U.S. Ten out of those 11 Chinese enterprises on the list are state-owned, which shows that the Chinese government plays a leading role in national economic development. Secondly, in recent years, China's overseas acquisitions have been growing rapidly. However, 60 % of purchases, overseas trading activities, and outward foreign direct investments are

accomplished by state-owned enterprises. Besides that, some industries that are protected by the Chinese government, and many private enterprises, started to expand their overseas business, which has made the market even more unbalanced. Taking cloud computing industry as an example, Chinese companies are able to run businesses simply by using a regular business license. However, the cloud service providers from the U.S. do not even have the chance to apply for a business license in China. The U.S. companies have to rely on local providers and cooperate with them (AmCham China, 2017; AmCham China, 2018).

Interviewee C (2017) said that Chinese companies constantly accelerate the pace of mixed ownership reform. On the other hand, Chinese companies speed up the exploration of European markets.

Facing the current Chinese competitive environment and the U.S. – China economic relationship, both interviewee C and interviewee D (2017) clearly believed that the healthy economic development of both China and the U.S. are important to one another.

The way to develop the trade relationship between China and the U.S. is to realize the complementary advantages between the two countries. China has the advantages on the manufacturing side and the U.S. has the advantages on the technological side. China-U.S. economic and trade cooperation is the inevitable result of the division of labor and the optimized allocation of resources under the background of economic globalization. Trade and economic cooperation between

China and the U.S. has more and more global influence. As members of the WTO and APEC, China and the U.S. contributed to promoting the multilateral cooperation and agreements. Before President Trump's memorandum, China's Premier Li Keqiang said that China will open the market more and protect intellectual property during a conference in Beijing (Wu, 2018). China and the U.S. are not opponents in the zero-sum game, but are mutually benefiting friends.

CONCLUSION

The U.S. has a long history of using section 301 investigation to respond to unfair trade activities with other countries. In the last century, Japan was the major object of investigation. Gradually, China has developed and become the second economic entity of the world, which also leads to more disputes with the U.S.. The majority of section 301 investigations that the U.S. implemented against China related to intellectual property protection, which resulted in the improvement of China's intellectual property protection regulations.

After the establishment of the WTO, China hopes that the WTO DSM can be approached to resolve disputes between the two countries rather than using unilateral measures. Although the WTO DSM has its own drawbacks in implementation procedures, it is still a more fair and acceptable measure for each country. The recent investigation regarding intellectual property protection leads up to a large-scale trade war step by step. The WTO DSM will be the appropriate method to settle the dispute and prevent a trade war from happening.

APPENDIX A

Interview Questions

A. Company Senior Managers

1. What is your title in the company?
2. What is the export/import volume before the investigation?
3. What is the export/import volume after the investigation?
4. What do you think of the section 301 investigation initiated by the U.S. from an enterprise perspective?
5. How do you think the section 301 investigation will influence your company?
6. If the company suffers the retaliatory measures by the U.S./China, what kind of measures will be taken by the company?
7. Will the company's US market/Chinese market will be changed because of the section 301 investigation or not?

B. Government Staffs

1. Why did the Trump administration launch section 301 investigation of China?
2. What is the key field of the upcoming investigation?
3. What is the current status of the investigation?
4. What are retaliatory measures that may be taken by China/the U.S. after the investigation?
5. How does the Chinese government prepare for the potential outcomes of the investigation?

6. What kind of measures will be taken by the Chinese government to react to the investigation?

C. Industry Association Members

1. After the section 301 investigation, what are the industries that may be punished by trade sanctions imposed in retaliation?
2. Are there any countermeasures from the perspective of the entire industry?
3. What is the role of the US-owned enterprises in the investigation implemented by the US government?
4. Do the US-owned enterprises worry about the potential retaliatory measures imposed by the Chinese government? If so, what are their corresponding counteractions?

GLOSSARY AND ACRONYM LIST

Term	Definition
AmCham China	The American Chamber of Commerce in the People's Republic of China
APEC	Asia-Pacific Economic Cooperation
CFIUS	The Committee on Foreign Investment in the United States
DSM	Dispute Settlement Mechanism (WTO)
DSU	Dispute Settlement Understanding (WTO)
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IP	Intellectual Property
IP commission	The Commission on the Theft of American Intellectual Property
PLA	People's Liberation Army (People's Republic of China)
TRIPS	Trade-Related Aspects of Intellectual Property Rights (WTO)
USTR	U.S. Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
Berne Convention	1886, protects copyright for intellectual and artistic works.
Omnibus Foreign Trade and Competitiveness Act of 1988	An Act to enhance the competitiveness of American industry, and for other purposes.
Paris Convention	1883, protects to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition.
Trade Act of 1974	An Act to promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate fair and free competition between the United States and foreign nations, to foster the economic growth of, and full employment in, the United States, and for other purposes.
Uruguay Round	1986-1994, 8th round of multilateral trade negotiations conducted within the framework of the (GATT), embracing 123 countries as "contracting parties".

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