



To tariff or not to tariff

Jeffrey S Whittle examines the high-profile China and US trade war

At the time of writing, the US had recently halted trade negotiations with China particularly as related to trade tariffs for alleged “unfair trade practices” under Section 301. Though it may be popular to label the Trump administration’s latest tariffs on China as part of an ongoing “trade war”, the response elides a significant point: that imposing tariffs may be one of the only “strong ways” to force China to stop what the US president alleges are “unfair trade practices” by improperly taking valuable US intellectual property (IP). Much of these trade tariff enforcement actions by the US president are ways to force China to implement fairer laws and procedures for US entities operating within China’s borders and to reduce improper actions by Chinese individuals or entities within US borders.

The “unfair trade practices” by China with respect to alleged intellectual property theft are estimated to cost the US between \$22.5 and \$60bn a year – whether it is a Beijing-based wind turbine company allegedly stealing trade secrets from a Massachusetts company or a string of large US chemical companies investing in China with the risk of losing their IP rights as part of current Chinese law.

Of late, China has given exceptions to certain industries in areas where it believes it lags behind – electric vehicles or downstream petrochemical companies, for instance – but energy companies investing in China need to be up to date on these exceptions. There also are ways in which organisations can structure investments so as to reduce the risk of losing significant IP rights to China. For one, when negotiating joint ventures (JV), companies need to consider terminating the JV when it wants to withdraw and thereby terminating any associated IP licence associated with the venture – otherwise, Chinese law dictates that the JV may be able to continue to use the IP brought in during the JV formation.

A second way to consider reducing risk would be to license the IP into your own company in China to the extent China allows the formation of your own entity there, so as to avoid licensing into a problematic Chinese JV. And lastly, companies can try and keep the applicable law and arbitration of these issues outside of China altogether – arbitrating disputes in Hong Kong, Singapore, or London, for example.

Meanwhile, in the US, organisations need to conduct audits, manage technology, provide important employee guidelines and policies, and implement other strong internal trade secret and IP protection.

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prices for mineral (eg, barite), materials (eg, steel), parts, overseas assemblies, and the like in the energy sector, as well as potentially changing trade and supply patterns. It is uncertain how long this pain may last, this may cause some US energy industry products to be less competitive on a global level, especially where reliance on Chinese goods may be an issue. In the long term, it is yet to be seen whether it will be an effective strategy. But until now, the US Department of Commerce has not been able to move the needle on Chinese IP issues. And “To Tariff”, despite its drawbacks, is a chance for success that this US Administration is determined to take.

Author



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