

CPI's Asia Column Presents:

The Challenges of China & World in New Era - Preface of MRLC IP & Competition Law Annual Report 2017

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2017 is an extraordinary year. Lots of variables have appeared in the international community, and just as what I pointed out in the preface of “Chinese and Korean Intellectual Property and Competition Laws Development Report” in 2016, the world has come to a new intersection, and we are facing a new choice. The USA has entered into a new era. The new American government has changed its previous diplomatic maneuvers. It firstly criticized the globalization, criticized WTO in veiled words, advocated “America First”, and then took a series of actions, including, exiting the TPP that will take shape, putting aside the multilateral trade mechanism of WTO, criticizing many countries from Asia, EU and North America for their unfair trade to America, and carrying out the a series of action like “301 investigation” based on American laws to the Chinese government, expecting through a bilateral or other way that is more beneficial to the interest of the America instead of multilateral trading mechanism established and operated by the America for years. Britain’s act of exiting from the EU has kept simmering. China has announced that the construction of socialism with Chinese characteristics entered into a “new era” aiming to deepen the reform and expand the opening-up. These variables above will bright about lasting and far-reaching influences, and will certainly cause the relations of China and the world, especially, China-US relations, to enter into a new stage. China-US relations will influence the domestic affairs of two countries, and also deeply influence China’s relations with the world and the future of China.

This report mainly discusses Sino-Korea problems related to intellectual property and competitive system, however, Sino-Korea problems are closely linked with international community, and departmental legal problems are also vitally interrelated to the entire legal system as well as different economic and social aspects. These problems include fundamental and derivative ones, but they are frequently of reciprocal causation, and they are mutually stipulated and mutually restrained. As to China, it is complicated, however, China has at least two points that should be answered and thought of. Firstly, the task at the present, that is, how to know and treat the America’s “301 investigation”, to indicate China’s standpoint to “301 investigation”, and how to state the facts to the international community, to tell it a genuine China in terms of intellectual property; secondly, the long-term task, and China shall face its current situation directly and think seriously. After 40 years of reform, what are the fundamental problems that will eventually influence the development of China in the “new era”? Which are problems put forward by the Chinese government and needing deep reform? What are the problems that needs a reform? What is the direction to follow in reform? What is the standard of reform, and how to reform? What are the problems influencing and even hindering our modernization and how to reform?

I. How to know and treat America’s “301 investigation”

It is well-known that, the governing law applicable to “301 investigation” is the domestic law of America in 1974. Since the implementation of this law, American government has taken it as means to investigate related countries and regions again and again, to force the investigated party to make concession in trade issues. According to the rules of World Trade Organization, in case of violation of multilateral trade principles between the countries in terms of intellectual property law, a ruling shall be given via the dispute settlement mechanism of WTO, and it shall not be settled in bilateral way. The US government's continued application of domestic law standards to judge the laws of other members, including China, is contrary to the principles of the World Trade Organization. Therefore, Chinese government rejects it. In addition, the behavior of American government has caused the concern of Chinese’s legal circles. A nationwide academic body in the intellectual property law field

as well as a civil trade association of China, China Council For The Promotion of International Trade has responded to “301 investigation” with a responsible attitude.

China Intellectual Property Law Association and China Council For The Promotion of International Trade respectively submitted an objective and rational report of “comments” to “301 Investigation Committee”, and appointed personnel to attend the hearing held in Washington on October 10th, 2017, to state their own legal opinions to the hearings. Through “comments” and statements in the hearing, China’s intellectual property law circles have made a practical, objective and objective presentation of China’s intellectual property law environment construction. As everyone knows, China, as a developing country, has been a backward agricultural country for a long term, with stagnant economy. Because of the reform and opening-up, China’s economy has been integrated with the world, and China has obtained the achievements today. In terms of intellectual property, Chinese government and people are sincere. China is more difficult than the traditional market economy countries, for the soil that China’s intellectual property system is rooted in is planned economy rather than market-oriented economy. China has transformed the “soil” and also established the intellectual property system in the transformation from planned economy to market-oriented economy. In general, influenced by original system and “Cultural Revolution”, China is still far inferior to USA in scientific and technological level on the whole. Compared with developed countries, China lacks the historical experience of market-oriented economy. Under the planned economy conditions, the environment of public ownership, and the long-term influence of idea “large in size and collective in nature”, we once definitely thought for a long term that, the new knowledge and new technology should belong to all human beings for the reason that they were completed on the basis of existed scientific and technological achievements of predecessors without exception. For a long time, in China of socialism, it has been thought in the national idea that, it is a matter of course that scientific and technological achievements will “benefit the whole country once they are developed by one body”. In the deep-rooted values of Chinese people, the idea of private ownership of knowledge and technology is not acceptable and also it is a great sin. For long-term seal-off, we are not familiar with the market, and we have never heard of the term “intellectual property”, so we are a clean slate in system, experience and consciousness. The change of concept is the key of all changes. Chinese government was determined to give up the planned economy in 1992 and started the construction of socialist market economy. Until now, it has been only short 25 years. Facing such quick, fierce and intensive change, the Chinese people are dazzled and overwhelmed. The mental suffering, concept repetition, economic friction and interests parting suffered in the transformation cannot be understood in any other traditional market countries. Intellectual property system has developed from nothing, and the awareness of intellectual property has become enhanced from weak. Also, China has integrated into the international market without hesitation, changed our ideas with international rules, to force the reform reversely, therefore, becoming an important member of international market economy and international rule system. Today, what showed to the world by China is an intellectual property law system kept consistent with the mainstream of world. Through up-to-date modification of each single law regarding intellectual property, resolute intellectual property court construction, and increasing judicial execution and public trust, intellectual property has obtained increasingly effective protection in China. Therefore, China has formed an intellectual property law environment that can serve the national innovation system construction of China and also serve the innovation and operation in different countries throughout the world. These changes and progresses are apparent.

According to principle of rule of law, intellectual property is a private right, and its subject is an enterprise or individual. The technology transfer issue pointed out by the USA is not a behavior of

government, but a transaction between enterprises, and it is a legal issue between subjects of civil and commercial affairs. The cooperation of enterprises from two countries is on the basis of equality and mutual benefit, in which each party develops its strong points and takes what it needs, and this is a process of autonomous negotiation and decision by two parties. American enterprises' technology transfer to China is a normal commercial behavior, and it is the result of two-way selection and independent decision-making by enterprises. Normal commercial transactions between Chinese and foreign enterprises are not government procurements. In fact, even the government procurements among the countries internationally are also on the basis of equality and free will, and no country can forcibly purchase the technology of government or enterprise from other countries. The value of technology lies in that the technology is used rather than "hidden". Benefit maximization is the highest pursuit of technology owner, and the technology needs to realize its value via market allocation. The technology transactions between Chinese and American enterprises are on the basis of exchange of needed goods, in which, each side takes what it needs and the two parties are on the basis of equality and mutual benefit, and both parties are trade beneficiaries. As everyone knows, America is a strong country of high technology, and also it is proficient in market economy, and also an expert in technology transaction, so it will not fail before an enterprise from China, a developing country in difficult transformation from planned economy to market economy. So the fact is. American enterprises, through cooperating with Chinese enterprises, setting enterprises in China to work on production operation or handing their products to Chinese enterprises for manufacture, have made lots of money and returned satisfactorily. "Nothing forcibly done is going to be agreeable". Till now, we have not seen an example that American enterprises' high technologies were transferred to Chinese enterprises forcibly.

America is a recognized powerful nation of science and technology. In many fields, American enterprises are actually advanced in technology. For historical reasons, the traces of planned economy have been left in different aspects of Chinese society. For example, the first *Patent Law* published in 1984 once stipulated the "planning permission" system to China's state-owned enterprises and took this as a characteristic of socialism. Therefore, in the initial stage of reform and opening-up, Chinese enterprises urgently expected to obtain the advanced technologies of enterprises from developed countries through cooperation, and further digest and absorb these technologies, and get newer technologies via deep research and development, so as to enhance their own power of further development, and this was a constant occurrence in human relationships. However, with the progress of China, these systems not in line with market economy will be abolished. Both China and western countries have followed this law. America is not advanced naturally, and its intellectual property system has not been always advanced. We are clear about that, the "print terms" in America's *Copyright Law* were abolished very lately until the last century. In short, each country has progressed continuously via its own efforts and mutual learning. It is a matter of course that the transferee of technology transferred continues to research and develop the technology and seek for technological improvement, in order to obtain new competitive advantages. Any enterprise is entitled to develop the technology obtained legally and get legitimate rights and interests from this only when its behavior is rightful and proper.

In recent years, China's intellectual property law construction has been improved continuously, and protection has realized the "qualitative change" from passive to active. After joining the WTO, China has actively improved the intellectual property law system, modified the *Patent Law*, *Trademark Act*, and *Law against Unfair Competition* in succession, and now it is catching up on the modification of *Copyright Law*. To improve the judicial level, China has established three intellectual property courts in Beijing, Shanghai and Guangzhou in short several months resolutely; after three years of practice,

lots of intellectual property cases have been dealt with, also, 15 intellectual property tribunals have been established throughout the country in succession, therefore, effectively improving the judicial level of intellectual property in China. In addition, China has carried out national intellectual property strategy, to improve the national consciousness of intellectual property remarkably. In 2017, China possessed more than 1.3 invention patent applications, higher than the sum of America, EU, Japan, and the South Korea. Trademark registration has increased greatly. These are all very reliable measures, and also they are more basic, more fundamental, and have a more lasting effectiveness, aiming to establish a complete intellectual property protection system. From a scholar's perspective, frankly, as far as I know, there is no country like China that has made great efforts in intellectual property protection, with a remarkable effect. I believe that, the colleagues knowing about the Chinese situation from America's intellectual property circles will recognize my opinion. Intellectual property is a property, and also a means of enterprise competition. In the Internet era, technical progress develops crosswise, and overlap and conflict cannot be avoided. More and more intellectual property disputes have occurred to the enterprises in the countries like America. The intellectual property disputes are more frequent to occur in the more developed countries. This is a prominent manifestation of significant contribution of technical progress to economic growth. In the high technology field, rights relations are complicated, and disputes are frequent, which is almost a regular pattern, and especially among the famous large enterprises, intellectual property disputes are more frequent to see, and there are increasing lawsuits. It is hard to say which enterprise is a pure victim, which enterprise is a pure infringer, and much less that which country is a pure victim. Under the market economy and society with rule of law, it is the right way to respect the basic law of economic operation and rule of law, and private right disputes have their channel of way. Therefore, it is required to firstly distinguish that the behavior involved is a state action, corporate behavior or individual behavior. Corporate or individual behavior should be not put on the head of state. In the society with rule of law, these can be solved in legal way, and the enterprises may seek for legal way to solve the matters between enterprises rather than by government intervention. America is a market-oriented nation, and also a society with rule of law, and American government should know this basic reason clearly. If the legislation, policy or practice of related government between the countries violates the rules of WTO, it may be filed to the organizational dispute settlement mechanism for settlement in legal way.

Facing the trans-national disputes between enterprises, American government has given up normal legal way and international rules, instead, the government has walked to the front stage, unilaterally used "301 clause" of its domestic law, and taken a country as the object of ruling, violating the rule of law.

II. China's necessary basic reflection

After about 40 years of reform and opening-up, China will face new choices. We have many problems needing think, and the key lies in the selection of direction. For the long term plan, China's intellectual property rule of law needs to be rooted in the deeply cultivated soil of culture and soil of rule of law, and also it is required to construct a system body deep-rooted and unbreakable. Thus, I think there are following problems needing think at last: first, how to place the position of China well in the "new era"; second, how to treat the so-called "reverse globalization" and how to develop ourselves in the globalization; third, how to lay a solid foundation. If we fail to think seriously, lack a clear direction,

cannot make a decision, and have no effective schemes and feasible measures, the future development of China will be influenced.

A. How to understand China's walking into the "new era"? What are its basic features?

"The reform and opening-up policy" is the sign of an era. Previously, China was in an "isolated" era isolated from the external world, especially the western countries. Isolation was a main cause of backwardness. The same result was caused by passive isolation or active isolation. Since the Ming dynasty, China was once isolated time and again, causing its lagging behind the world. The achievements made in about 40 years of reform and opening-up are universally recognized. It is a long arduous historical practice and also a great theoretical innovation. It's believed that the Chinese government will make an all-around summarization on the reform and opening-up. We can discover the distinctively different results of opening-up and isolation only from the perspectives of resource allocation and economic development. It's often said that, China is vast in territory and rich in natural resources, however, due to isolation, our economic development was stagnant, and our country became weak with poverty-stricken people. Through opening-up, we have made a change, realized resource allocation throughout the world, and developed ourselves while making contributions to the world by addressing our weaknesses and highlighting our strengths. Therefore, to take the development as top priority and touchstone, and give up isolation and select opening-up will be the most fundamental and most profound reform.

"Reform and opening-up" is the connotation and sign of an era. This era has been going through nearly 40 years. If China has stepped into a "new era", then what is the connotation of this era, and what is its difference from the past about 40 years? The basic mode of reform and opening-up is that our Chinese people keeping a foothold in China open up our "door" with conditions out of our own interests, and import the capital, technology and management knowledge from the Western countries on the basis of the principle "Chinese learning as the fundamental structure, and Western learning for practical application", to make China's economy catch up with the development of the world, therefore, the essential characteristic of reform and opening-up is "seeing the world from China". With the acceleration of globalization, China has started to go abroad. From the perspective of economic development, "opening-up" is to handle affairs from the viewpoint of China, and the door to open up may be big or small, and essentially, we are just a "cooperator" of the world economy rather than an "interested party". In the so-called "new era", China will become an interested party of the world economy, and become the manager of the world economy together with other countries of the world, that is, we will be a member of "a community of shared future for mankind" as mentioned by Xi Jinping, and this is the essential characteristic of the "new era". There is no turning back. Since the date of reform and opening-up, China has stepped onto a road of no return leading to the world. Although recently, it's doubted by some people from international society and China that, whether China is retracing its steps and has given up the road of "reform and opening-up" advocated by Deng Xiaoping. However, in fact, we needn't worry about it too much. "Reform and opening-up" conforms to the law of nature, law of economy, and humanity; in a word, it conforms to both natural law and human nature, and reflects the appeal of all Chinese people. According to the constitution of China, all power belongs to the people. The supreme governing philosophy of CPC (Communist Party of China) is "people-centered". "Reform and opening-up" is the choice of all Chinese people ultimately, and no one can go against the will of the people. "Reform and opening-up" has been implemented for about 40 years, and during the period, we have suffered the tortuous history that this policy was

denied for times, however, “the high mountains can never prevent the river water from flowing”, the general direction of “reform and opening-up” has never been changed, and today, no force can prevent China from stepping into the process of modern society. China in the “new era” must go out, change its side, and learn to “stand in the world to see China”. Therefore, Chinese people still have many concepts needing to change, and the reform needed by China is more profound and more arduous.

B. How to treat the so-called “reverse globalization”? How to develop jointly with each country in the globalization?

After President Trump’s taking office, many people have unscrambled this as neo-conservatism and unilateralism, even given him a crown of “reverse globalization”, and held that America’s power became relatively weak and showed a declining tendency, so it was unable to continue to take the role of global police. On the contrary, China is rising, and walking to the center of global stage. Facing this situation, some people have asserted that, the change at present is a “change that has never appeared in 400 years”, “we are faced with the fourth change of world order”. Some people have even proposed that, China will take over the banner of globalization, and be the leader of the world.

This paper holds that, everything must proceed from reality, and we should insist on rational cognition and judgment.

Firstly, the recognition of America cannot be judged wrongly. In terms of globalization, America is absolutely not the advocator of anti-globalism taking a back seat and seeking hegemony in a corner. As the bellwether of post-war world order, America, as the leader and pusher of globalization, cannot give up its position easily and cannot be the advocator of “anti-globalism”, and it has its ideal globalization.

Secondly, the cognition of China. China is a developing country, and generally speaking, it is still in the low end of international industrial chain, and not qualified for being the leader of world’s technology and economy. In terms of globalization, China only can be the constructor, beneficiary, and vindicator. The success of China lies in that whether it can become the flag-bearer of “globalization” but lies in that it should not “select a wrong side”, to avoid becoming an outside of globalization. As for China, a developing country, the determinant for it to keep strategically initiative and always remain invincible is not that whether it is capable or advanced or backward, but the key lies in the selection of direction and route. It is the basis of China’s external relations that whether the Sino-American relations can be handled well.

Globalization is an irreversible tide of history, and also a historical opportunity of resource reorganization. China should seize this opportunity, to seek for joint development with the world.

C. China should behave well.

The most important tool in the future competition is system. Globalization emphasizes mutual cooperation and mutual independence, therefore, market economy has become the “universal value” followed globally. Market is a shared school and examination room of various countries in the world. The one whose system is much closer to the market and reflects the law of market more profoundly will be more skillful in the sea of market economy, its system will have a higher performance cost, and it will get more market advantages. Chinese systems have lots of advantages, and also have many problems that have to be corrected and are better to be corrected earlier. Advantages certainly

can bring about self-confidence, but self-confidence doesn't mean that we can have nothing to worry about and "sleep" on the confidence of system. The problems cannot be obliterated with self-confidence, and we must face new knowledge, new technologies, new things, and new problems hourly and daily, and we have no "wise" ready answers to these. In this aspect, China still has a long way to go.

This is a big topic and big article of China's reform. It's believed that China's top designers can write this article well.

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