

UCLA Anderson School of Management

US-China Conflict: Huawei and US Law

Panel Discussion: Monday, April 29, 2019

Time: 5 pm - 6.30 pm Venue: (tbc)

Panelists:

Mr. Craig Ehrlich Mr. Gary Lincenberg Mr. Jason Linder

Convenor

Prof. Christine Loh

Panel Discussion

The detention in Canada of Huawei's CFO for extradition to the US caused major concerns in international business, particularly among companies and executives in the telecoms and technology sectors.¹ They are concerned that their business dealings with Huawei and Chinese telecom/technology companies might be caught by US law's wide extraterritorial reach. UCLA Anderson would like to explore issues the Huawei case has thrown-up, as well as understand better how US law might be used. Questions of interest include:

- Foreign Corrupt Practices Act – where acts by non-US citizens on foreign territory could be caught (e.g. money transits through the US, bank accounts in US are drawn, servers based in US are used etc);²
- US trade sanctions – e.g. Iran, North Korea, Cuba etc;³
- Presidential executive order – would the US use it to bar US companies from doing business with Huawei and other Chinese companies?
- Worst case scenario in China-US rivalry: Could the US use export controls to deny Chinese companies access to US technology? Would such controls restrict sales across borders, including by companies in other countries whose products include US components? Could transfer of information to foreign nationals be considered “deemed exports”? Could Chinese nationals working in the US for US tech companies be segregated from projects related to “emerging” and “foundational” technologies as defined by the Department of Commerce? Could it affect biotech, neurotech, advanced computing, machine learning, robotics, advanced materials etc?

¹ Huawei's CFO is accused of falsely filing paperwork, violating her fiduciary duty, and committing fraud; extradition hearing on 6 March.

² Case of Eberhard Reichert, German national extradited from Croatia on bribery charge of an Argentinian official (2017). Case of Patrick Ho for bribing UN official (2018).

³ ZTE traded with embargoed countries, Iran and North Korea, and was fined US\$1 bn (2018).

Background

- **US diplomacy shows hardened position on China**

While US-China negotiations on tariffs seem to be reaching resolution, the US has hardened its position in respect of Chinese technology and the use of Chinese telecommunications equipment.

In mid-Feb, US ambassador to the EU, Gordon Sondland, warned that any Western country which allowed Huawei or other Chinese equipment makers to be used in critical infrastructure projects would face the risk of US countermeasures (Bloomberg). A few days later, Sondland said the US and EU should overcome their current trade tensions and join forces to “check China in multiple respects: economically, from an intelligence standpoint, [and] militarily; ... we want to keep critical infrastructure in the Western world out of Chinese malign influence”. Sondland said “someone from the Politburo in Beijing picks up the phone and says, ‘I wanna listen in on the following conversation, I wanna run a certain car off the road that’s on the 5G network and kill the person that’s in it’, there’s nothing that company legally can do today in China to prevent the Chinese government from making that request successfully” (Politico).

During his visit to Hungary in mid-Feb, Mike Pompeo said the presence of Huawei complicated the country’s partnership with the US. Pompeo warned the US might scale back certain operations in Europe and elsewhere if countries continued to do business with Huawei.

Speaking at the annual Munich Security Conference, Mike Pence described Huawei as a severe security threat and asked allies to turn their backs on Huawei. Pence said that “Chinese law requires them to provide Beijing’s vast security apparatus with access to any data that touches their networks or equipment ... We must protect our critical telecom infrastructure, and the United States is calling on all our security partners to be vigilant and to reject any enterprise that would compromise the integrity of our communications technology or national security systems”.

- **China’s response**

Chinese government media says in an editorial that the 1994 Communications Assistance for Law Enforcement Act enables US federal agencies to access data traffic; and the Foreign Intelligence Surveillance Act allows the NSA to gather intelligence on foreigners overseas by collecting data from chokepoints where fibre optic cables, owned by telecom companies, enter the US. Moreover, Edward Snowden’s revelations showed the NSA had intercepted communications on a vast scale with or without the help of telecoms/tech companies (Global Times).

China’s Foreign Ministry made various statements through its spokesperson, Hua Chunying, on several occasions in Feb, which could be summarized thus:

- (i) US actions to suppress and block Chinese high-tech companies is “bullying” and “unfair and immoral”, including putting undue pressure on other countries;
- (ii) US claims on national security grounds are “baseless accusations” – there is no evidence;

- (iii) US action are “political motivated” aimed at cracking down on Chinese companies;
- (iv) US is selective in citing certain clauses in China’s new National Intelligence Law, which asked organisations and individuals to support, assist and cooperate with China’s intelligence work, but not other clauses. Hua points out the law not only states that organisations and individuals were obliged to support, assist and cooperate with China’s intelligence work, but the rights of organisations and individuals should also be respected, and Chinese law also protected data security and privacy; and
- (v) Network security is everyone’s concern and “all parties can absolutely solve this concern through equal and friendly coordination and appropriate arrangement as long as they hold no prejudice, strengthen mutual trust and don’t politicise normal economic behaviour”.

- **Huawei’s statement**

One of Huawei’s three rotating chairmen, said in a media briefing in Shenzhen in mid-Feb that the US was launching a “coordinated, tactical geopolitical campaign” against Huawei. Xu advised that Huawei would spend more than US\$2 bn over the next five years to boost cyber security, including rewriting some codes, as an extra step to deepen the trust with foreign telecom carriers.

At the Mobile World Congress in Barcelona (26 Feb 2019), chairman Guo Ping said Huawei is a vendor, “we don’t operate carriers’ networks and we don’t own carrier data”. He called for equipment makers, network operators and governments to work together to devise unified standards to manage cyber security risks, as that is everyone’s concern. “The U.S. security accusation on our 5G has no evidence — nothing. The irony is that the U.S. cloud act... allowed their entities to access data across borders.”