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Outside Counsel .....

## U.S.-China Litigation in the World Trade Organization

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The World Trade Organization dispute resolution system is widely used and is a litigation-oriented process. It is at the core of global trade relations today. Both the United States and China have been aggressive users of it. Each country has shown a willingness to address contentious issues. This has been to the benefit of both. As newer trade issues arise this process will be indispensable in keeping U.S.-China trade relations on a stable course.

### BACKGROUND

The World Trade Organization (WTO) negotiates and adjudicates global trade rules. The dispute resolution system is at the heart of the WTO today. It is the judicial system of the WTO and of the global trading system.

The WTO and its dispute resolution system are the successor to the older, much weaker GATT system, and came into existence in 1995. For the first time in history, there is now a multilateral system that resolves trade disputes with binding decisions enforceable by sanctions. There is nothing else like this in the international economic arena today.

The basis of the dispute resolution system is the WTO's "Dispute Settlement Understanding," one of the multilateral agreements that came into force in 1995. It establishes compulsory jurisdiction, binding decisions, and trade sanctions to enforce those decisions. The dispute resolution system applies all the rules found in the whole range of WTO trade agreements relating to agriculture, intellectual property, subsidies, services, investment measures, merchandise trade, among others.

The United States has filed various actions against China concerning what it considers improper export subsidies and failure to enforce intellectual property rights. On the other hand, China has filed actions against the United States for their imposition of antidumping duties and safeguard tariffs. Most trade cases before the WTO involve "trade remedy legislation" authorizing dumping, subsidies, and safeguard measures. The dispute resolution system is widely used by many states, but most WTO litigation involves that between the United States and the EU. However, the most politicized and high-profile litigation involves the United States and China.

The actual dispute resolution process combines traditional negotiations and litigation and is relatively simple and quick. From start to finish this entire process takes 12 to 15 months. States file a request for consultation which involves confidential diplomatic negotiations between the parties. If consultation does not result in a settlement, the complaining party may request the establishment of a panel to hear the case. This is where the litigation takes place. However, the majority of cases requesting consultation are resolved without ever going through the full litigation process.

Panel members are trade experts selected by the WTO and then chosen by the parties. The cases are decided by the panelists and not juries—a seeming adaptation of the civil-law approach to litigation. For a very long time these proceedings were closed and did not allow amicus briefs, but this has now changed.

Parties may appeal the decision of the panel to the Appellate Body which is composed of members selected by the WTO. Determinations by both the panel and Appellate Body are required to be adopted by the Dispute Settlement Body, essentially the entire membership of the WTO. In reality this adoption has proven to be automatic. When a decision is finalized, the losing party is required to bring its offending measure into compliance with the decision (technically, a recommendation) which allows it to formulate the specifics of its compliance.

If there is a failure to comply after a reasonable time, the complaining party may request the panel to authorize imposition of sanctions on the losing state. Most often, these sanctions are tariff surcharges on imports from the responding state until the offending measure is removed. Requests for sanctions have been very rare and, even when authorized, they have not often been imposed. States are no longer allowed to unilaterally impose trade sanctions on others unless authorized by the WTO. Only multilateral trade sanctions as authorized by the WTO are lawful under global trade law today.

### **BUSH AND OBAMA**

During the last presidential election, President Barack Obama made much of his record for bringing legal actions against China and his aggressiveness in the WTO legal process as a means of enforcing global trade obligations.

It is interesting to note that President Bill Clinton actually brought a far larger number of cases before the

WTO than either President George W. Bush or President Obama. Over eight years, Clinton brought 69 cases, whereas Bush brought 24 cases. In four years, Obama brought only 11 cases.

Comparing Bush's eight years and Obama's first four years, it is clear that Obama has been more aggressive than his predecessor.

What is most interesting is that Obama was much more focused on China in WTO litigation than Bush. Bush brought a total of 24 cases; only seven were directed against China. Obama brought 13 cases; eight of them were against China. It is fair to conclude that Obama was very aggressive against China in his four years. I would also add that he was hyper-focused on this litigation. (WTO website, "Disputes from Countries/Territories," (Aug. 1, 2013).

### **CHINA IN THE WTO**

China has brought 11 actions against WTO members. It brought eight cases against the United States and three against the EU. However, China has been brought before the WTO more often than it has brought cases. The cases brought by China almost exclusively involved dumping and safeguard issues. "Dumping" refers to the sale of goods below fair market value and "safeguards" to actions countering a surge of imports. China argued that the United States improperly imposed dumping duties on the import of various products into the United States since they were not being sold at less than fair value. It also contended that the United States incorrectly imposed safeguard duties on import of steel and tires from China since there was no surge of such imports into the United States. The cases brought by the United States involved, among other issues, intellectual property rights, dumping, and export controls. In the 11 decided cases involving the United States and China, the United States won a total of eight cases, whereas China won three.

One of the highest-profile trade issues, the valuation of the yuan, has not been submitted by the Obama administration to the WTO, despite significant demands from Congress and the public. Many in Congress contend that the yuan is undervalued against the dollar, thus allowing Chinese imports into the United States at a cheaper price. In my opinion, both the Bush and the Obama administrations understand that the WTO agreements were never intended to cover this type

of currency-exchange issue. Similarly, no cases have been filed by China against the United States concerning U.S. restrictions on Chinese direct investment in the United States when based upon claims of national security. The WTO provides architecture for global trade relations. The WTO's central mandate is trade, not finance or investment.

## OBSERVATIONS

The Obama administration has not filed a new case against China since the 2012 election. In contrast, both the EU<sup>1</sup> and Japan<sup>2</sup> have filed actions. Moreover, China has filed a recent action against the EU.<sup>3</sup>

Some observers argue that constant litigation is corrosive to the international trading system. For example, one commentator laments the fact that "more and more of the work of trade relations has shifted away from negotiations and towards litigation and arbitration."<sup>4</sup>

However, others have taken a more nuanced approach. An earlier skeptic recently stated, "In fact, the situation is more complex, and less worrying, than it might appear...[A] heartening amount of the litigation has actually been aimed at preventing arbitrary trade restrictions in the future... Much is aimed at obtaining rulings preventing others using 'trade defense' instruments, such as antidumping and countervailing duties as a politicized tool of arbitrary retaliation."<sup>5</sup>

I view U.S.-China litigation in the WTO as validating the strength and critical importance of the WTO and its dispute resolution system. China is now the second-largest economy in the world. It is expected that disputes increase with trade flows. The strength of the international system is not the absence of disputes, but the way in which they are resolved. The failure of the WTO to conclude the Doha round of negotiations, the current round of multilateral negotiations that was authorized in 2001 and aimed at the formulation of new trade rules to assist developing countries, only highlights the growth and immense historical significance of the dispute resolution system.

An examination of the cases involving China shows the trade disputes that arise between it and the United States are submitted to the WTO and are resolved, either by diplomatic negotiations in the consultation stage or in the litigation phase. No

enforcement actions by either country asking for sanctions have been filed under Article 22 of the Dispute Settlement Understanding.

The primary focus of China's litigation in the WTO has been the United States. Nevertheless, China is paying an increasing amount of attention to the EU and other countries.<sup>6</sup> China's use of the dispute resolution system and observance of its decisions are beneficial developments in promoting a rules-based global trading system. It shows a growing acceptance of global trade rules by China. This represents an understanding that to benefit from the global trading system it needs to follow the rules of the road.

## CONCLUSIONS

The WTO Annual Report for 2013<sup>7</sup> concluded, "In sum, WTO dispute settlement activity increased markedly in 2012. It is clear that WTO members, both developed and developing, continue to have a high degree of confidence in the WTO dispute-settlement mechanism to resolve their disputes in a fair and efficient manner. It is also evident that members are confident that the system is capable of adjudicating a wide variety of disputes covering significant questions and complex issues."<sup>8</sup>

It is worthwhile to note the recent observation by Pascal Lamy, Director General of the WTO.<sup>9</sup> He argued that trade frictions are a statistical proportion of trade volumes, whereas trade disputes are a statistical proportion of trade frictions. He brushed off concerns about the increasing number of trade disputes between the United States and China. He contended that the WTO mechanism takes the heat out of disputes by utilizing a process that is rules-based, predictable, and respected.<sup>10</sup>

While inheriting a complex trade situation,<sup>11</sup> the Obama administration has clearly put trade at the heart of its second-term agenda.<sup>12</sup> This policy includes negotiating the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). However, at the core of the administration's trade policy is its insistence on greater trade enforcement by U.S. trade agencies and the WTO, particularly with China. What is the point of negotiating rules if they are not enforced? New Secretary of State John Kerry succinctly stated, "Foreign policy is economic policy."<sup>13</sup>

The 2012 Report to Congress on China's WTO Compliance by the USTR stated clearly the central position of WTO litigation in U.S.-China trade relations: "When trade frictions have arisen, the United States has preferred to pursue dialogue with China to resolve them. However, when dialogue with China has not led to the resolution of key trade issues, the United States has not hesitated to invoke the WTO's dispute settlement mechanism. In fact, the United States has used this mechanism against China more than any other WTO member."<sup>14</sup> This policy is set to continue under the newly appointed USTR, Michael Forman, a former member of the National Security Council.<sup>15</sup>

Newer trade issues are emerging swiftly. For example, the EU just filed the first case in the WTO against the Russian Federation.<sup>16</sup> (The Russian Federation joined the WTO last year.) A recent WTO panel, "Defining the Future Trade Issues," released its report in April of this year.<sup>17</sup> It enumerated nine issues, including competition policy, international investment, currencies, labor, climate change, corruption,<sup>18</sup> and coherence of international economic rules.

To this list, I would add the issue of cyberespionage for commercial and economic gain as a new front in global trade wars. The Obama administration has suggested<sup>19</sup> that trade tools should be used, which would possibly involve WTO litigation.<sup>20</sup> In addition to this newer issue, I would add two additional ones: foreign direct investment and taxation. Growing foreign investment by Chinese companies has raised questions of national security.<sup>21</sup> Tax avoidance has become the scourge of many countries and international organizations.<sup>22</sup>

Challenges remain and are expected to continue. Those relating to the most important bilateral trade relations in the world today between the United States and China are set to grow as trade develops even more. Global transactions in a multijurisdictional world need a mechanism to resolve a wide range of business, trade, and economic issues.<sup>23</sup> In an increasingly interconnected trading system and a less hierarchical political system, cooperation through diplomacy and adjudication is preferable to outright power-politics confrontation. Each country has shown that it is willing to work with the other to apply the rules of global trade, which will need to continue as new disputes arise and newer trade issues emerge.

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