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The China-US Trade War

Law360, New York (January 06, 2010) -- On Jan. 4, The Washington Post headlined on Page 2, with a Beijing dateline, "U.S. and China in a snowballing trade fight." The article followed two others prominently presented with similar messages on Jan. 1 and 3, one bannered with the same wintry theme ("U.S.-China relations set for chill, experts say").

The Washington Post is not accustomed to covering international trade, let alone with major articles. Meanwhile, Nobel Prize-winning economist Paul Krugman was anticipating and endorsing in The New York Times on New Year's Eve more trade remedy actions against China.

Trade remedy petitions are not prepared overnight. Nor are they, at least in the United States, the products of coordinated policy. Companies and industries decide that they are facing unfair international competition and that they could benefit from a trade action.

Such decisions are not reached easily because trade actions are expensive and take a lot of time and attention. Whereas steel companies may orchestrate petitions because they may bring complaints about different products they make, their actions are independent of the manufacturers of non-steel products.

Hence, the perception of a coordinated attack on Chinese goods is understandable (it requires only several petitions close in proximity on the calendar), but it does not correspond to a national trade policy.

Contributing to the perception of a coordinated attack on Chinese goods are the results of petitions. Most, but not all, result in affirmative determinations from both the Department of Commerce ("Commerce") and the International Trade Commission and the imposition of duties. A constant anti-China roar from Congress contributes.

Nonetheless, the process is anchored in the independent initiatives of the American private sector, not in the coordination of the government.

China's initiation of trade investigations now projects a reflection of the American process, but with insufficient transparency to be entirely persuasive that the new wave is without political motive.

China's Ministry of Commerce ("MOFCOM") says it is receiving petitions from private enterprises and trade associations, is analyzing them and deciding whether to initiate investigations, exactly like the process in the United States. However, MOFCOM announces the filing of a petition only upon the initiation of an investigation.

Some Chinese lawyers say these petitions may be the product of MOFCOM itself, and that their dating is unreliable. Because MOFCOM does not reveal the existence of the petition until it decides whether to investigate, there is no way to know.

However, in the United States, Commerce must initiate an investigation within 20 days of the filing of a petition, which is a public document upon filing, Commerce cannot schedule initiations of investigations for political purpose. By contrast, MOFCOM retains complete control of its schedule and therefore can initiate investigations according to a political calendar.

American officials are talking about "inevitable" and "normal" conflicts in a growing trade relationship. China has a different view. It sees nothing inevitable or normal in the cases being brought against its goods, even though the United States has not been as aggressive in challenging Chinese exports as have been the European Union and India.

Nor does it accept the results. One of the Washington Post articles, for example, was headlined, "China denounces U.S. trade ruling on steel pipes," and Chinese Ambassador to the United States Zhou Wenzhong called the tires safeguard signed by President Obama in September "a very dangerous precedent."

Tit for Tat

Were there "tit for tat" in this story, it would be almost entirely in the "tat." The United States is doing what it has always done, initiating countervailing duty and antidumping investigations on virtually every petition Commerce receives.

Commerce is acting as it has always acted, protecting U.S. industries by giving them the benefit of almost every doubt and zealously defending the indefensible, such as the practice of zeroing that has been struck down repeatedly by the World Trade Organization.

Commerce has been neither diplomatic nor delicate in its treatment of China. In published determinations it has accused Chinese officials of deceptive practices and misinformation. It has ignored expert testimony. It has cancelled verifications based on suspicions. It has refused to listen to government witnesses. China has ample reason to be distressed by Commerce conduct.

Notwithstanding its experience, China has complained little, if at all, about Commerce's brass-knuckles treatment. There have been no official protests and no reports of unofficial complaints. The Chinese government has not challenged Commerce's conduct and determinations in U.S. courts. Conspicuously, China has reserved its public protest for denunciation of President Obama, and of the ITC, where it has declined to appear.

The president and the ITC, unlike Commerce, have not displayed animus toward China. In the tires safeguard, the president adhered closely to the terms of the accession protocol China had signed while fashioning a measure of relief designed to disadvantage Chinese exports without putting them out of business.

Chinese commentators have suggested that Democrats, faithful to trade unions, are more protectionist than Republicans, but the ITC, with three Republican commissioners, has been consistently unanimous in its conclusions about injury caused by Chinese imports.

Chinese complaints, thus, do not seem aimed at changing results. They have not changed the course of U.S. actions, nor could they, inasmuch as the petitions do not arise from any particular policy except Commerce's likely findings supporting petitioners.

The "tat" for the continuing American trade actions seems more apparent. Instead of contesting each trade action within the rules and laws, China has opted to take its own initiatives. Although they are not necessarily linked to American actions, it appears that China wants them interpreted this way.

It was not possible, for example, for retaliatory petitions to have been readied within 48 hours of the president's safeguard decision, yet Chinese statements frequently invoke the tire duties as a starting point for apparent retaliation.

Ariana Eunjung Cha linked the tires safeguard directly to Chinese reactions in The Washington Post. First she said that the safeguard "struck an emotional nerve." She reported, "On Internet bulletin boards, public sentiment about the United States turned ugly."

Then she reported on the Chinese Ambassador's warning that the safeguard is a "dangerous precedent," followed by, "Two days later, China accused the United States of predatorily 'dumping' chicken products and auto parts into the Chinese market and warned that it could impose its own tariffs."

"Then," she added, "in October, China made good on that threat by hitting the United States with duties of as much as 36 percent on certain nylon exports."

With Chinese proceedings less than transparent, it is possible that the Chinese investigations were retaliatory. Ms. Cha's subsequent statement, however, does not follow:

“On Nov. 4 and 5, the United States went on the offensive again — slapping antidumping duties on Chinese-made steel pipe and launching two more probes of Chinese imports.”

Breathlessly, now with the accumulating evidence of tit-for-tat, she adds, “Barely 24 hours later, the Chinese announced they had opened an investigation into U.S.-made passenger cars.”

The United States is not capable of the tit-for-tat this imagined trade war requires, if for no other reason than it does not control the timing and subject matter of petitions. The ITC does not have the capacity to orchestrate hearing and determination dates according to actions in China.

Nor have all the ITC determinations been affirmative, and in the one instance where Chinese interests (but not the Chinese government) have challenged the legality of agency actions, the Court of International Trade handed them a partial victory.

China, by contrast with the United States, may be capable of retaliatory actions, although such capability ought not be exaggerated. Bureaucracies share the same infirmities everywhere. They all move slowly, and they all have difficulty with deadlines. There is surely more coincidence than conspiracy in the timing of apparently reciprocal actions, although retaliation is not impossible.

There is, in the telling, nonetheless encouragement. Commerce has been consistent in rewarding U.S. petitioners. Congress has incited petitions. Professor Krugman, generally supportive of free trade, has declared protectionism justified, even warranted. Seen from Beijing, this apparent pattern could be seen as a policy requiring response.

The Tires Trigger and Chinese Conduct

Since accession to the WTO, China has been participating in trade disputes according to the rules, but less than fully.

Unlike other countries, China is not appearing before the ITC. It is not appealing adverse agency determinations in U.S. courts. It is not pursuing administrative reviews of countervailing duty orders, when final duties are determined and set for collection. It is not even answering questionnaires in administrative reviews in support of its own companies.

Instead, China is counting on the WTO for trade vindication, a strategic choice almost certain to disappoint.

The prevailing excuse for China's incomplete commitment to the legal process, and its rising anger over American actions, continues to be President Obama's safeguard decision. The complaint focuses on the proposition that China "did nothing wrong."

The safeguard exception in the WTO, however, expressly requires that nothing wrong be done. It exists strictly as a response to an unexpected and disruptive surge in imports.

China's handling of the safeguard, like its handling of some of the other trade disputes, has displayed little strategic thinking. China did not present President Obama with a cogent legal argument as to why no duties should have been imposed on Chinese commercial tires, that there was no industry adjustment plan and, therefore, no remedy could serve the law's object and purpose.

Instead, China argued that the president, a Democrat elected with union support, should respect the decision of U.S. industry to offshore jobs to China.

China's reaction to the ITC steel pipes decision has a similarly tone-deaf political character. Steven Mufson reported on New Year's Day in The Washington Post, "China's Ministry of Commerce said that China was 'strongly dissatisfied' with the U.S. International Trade Commission's Wednesday ruling that Chinese subsidized imports had harmed or threaten to harm U.S. steel pipe manufacturers ... The Commerce Ministry said that the ITC's ruling was 'wrong ...'"

Yet, MOFCOM did not present its case to the ITC. Commissioner Lane, extraordinarily, told the lead counsel for the Chinese industry during a public hearing that she did not think he was answering her questions and insisted on directing questions to the second chair.

China's unhappiness, then, with U.S. trade actions may be the legitimate result of a pattern of petitions and decisions, but the only event deviant from the past has been the one safeguard action. It has proven not to be the "precedent" of which the Chinese Ambassador warned. No other safeguard action has been brought, even though the core injury complaint against steel pipes was about a surge.

The Bigger Picture

China is participating just enough in trade disputes arising in the United States to be informed and to complain, but not enough to prevail. Respondents to trade remedy petitions in the United States hope, but do not expect, to prevail at the ITC. They have little hope at Commerce except to build a record for appeal.

Respondents, therefore, who do not appear at the ITC and do not appeal Commerce determinations do not expect ever to prevail. China's choice of partial participation must be for some other reason.

China's reasons may be detectable in the countervailing duty petition against U.S. automobiles. The trade issue in the petition is that the U.S. industry is at least as much the beneficiary of state support as any Chinese industry, such that there is no reason for the United States to persist in treating China as a nonmarket economy.

The grander strategic issue appears to be in the petition that the U.S. automobile industry, like the United States more generally, is in decline, whereas the Chinese industry, and China more generally, are ascending.

Trade disputes, as seen in the automobile petition, are expressions of China's greater vision, as outlets for China to assert itself and to take on the United States as no other countries have been willing to do.

As long as the United States continues business as usual, with agencies favoring domestic producers against Chinese imports, Chinese frustration will grow. Although a better answer, if China were focused on free and fair trade, would be to test the legal system, so far China prefers, apparently, to use trade as a soapbox for a bigger message.

Should China and the United States persist on these paths, the media will persist in seeing a trade war, reading into calendar coincidences strategic conspiracies. It may be the read China wants, and Congress might want it as well.

The deteriorating atmosphere may then impact other critical bilateral and global issues. Consequently, it is important for China and the United States to pull back and think strategically together. Otherwise, toxic trade could pollute everything that concerns them.

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