Are WTO Dispute Settlement Proceedings Right For Your Company?

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Yours may be a company that has experienced difficulties in achieving full access to targeted foreign markets. The barriers your company is encountering may be, as most are, the result of government policies or actions, many of which are fruits of domestic political pressures. You may have been told that these government policies or practices are contrary to the "WTO obligations" of that country and that the U.S. government may be able to help. The ultimate lever, you are told, can be a dispute settlement proceeding at the WTO.

This scenario, along with others like it, raises a number of questions. Is the WTO – the World Trade Organization, which in 1995 became the successor to the GATT – relevant to your problem? Does WTO dispute settlement work for private parties? As a practical matter, how does it compare with the traditional alternatives of litigation, arbitration, ADR, possible business solutions, and just leaving the issue alone? Can the U.S. government really help? These, and others listed below, are appropriate questions for a company to ask in deciding how – or whether – to challenge barriers to entry into promising foreign markets.

A Case in Point: Argentine Duties. For one point of reference, you may wish to consider a WTO case brought by the United States against Argentina.

In September 1995, the Government of Argentina announced a sharp increase in its duties on hundreds of categories of imported textiles, apparel, and footwear. Some of the new duties amounted to more than double the maximum tariffs to which Argentina had agreed. In addition, Argentina imposed a three-percent surcharge on almost all imports.

A number of affected U.S. companies and the Office of the United States Trade Representative ("USTR") viewed Argentina's actions as inconsistent with its WTO commitments, specifically, the tariff concessions Argentina made the year before during the Uruguay Round. The United States complained to Argentine officials, but Argentina remained intransigent.

In October 1996, USTR initiated dispute settlement proceedings in the WTO. Over a period of several months, a WTO panel of three trade experts convened, heard the arguments of the parties, and issued an opinion finding the duties and tax to be in violation of WTO rules. Argentina appealed the ruling, but the WTO Appellate Body affirmed the panel's decision. Argentina then met with U.S. negotiators and agreed to lower its duties to the agreed maximum rate by October 1998 and to reduce its import tax from three percent to one-half of one percent by January 1999.

Not all WTO cases produce such favorable relief for aggrieved U.S. companies or industries. Overall, however, the relatively brief track record of WTO dispute settlement is encouraging. In a number of cases, USTR has obtained relief without having to initiate a formal WTO proceeding. In addition, the United States has filed nine cases that it has settled on favorable terms prior to a final WTO decision. In cases in which the United States has gone to a WTO panel and litigated the matter to conclusion, it has prevailed in nine cases and lost only two. In some of the disputes in which the United States has prevailed, though, the defeated government has yet to comply with the WTO's decision, leaving the United States and its affected industries waiting for meaningful relief in cases that otherwise are apparent victories.

To determine whether WTO dispute settlement, or the threat of it, can solve your company's foreign-trade problems, the following are among the questions you may wish to consider.

Is your complaint with a foreign government, rather than its private sector? The WTO deals exclusively with measures taken by foreign governments, and WTO cases are government-to-government disputes. International trade rules are broad: they cover not just tariffs and quotas, but also more subtle barriers such as government regulations and administrative practices that operate as impediments to trade. Generally, however, actions by private businesses remain beyond the scope of WTO rules. Thus, if it is action by an international competitor that is keeping your company out of a foreign market, the WTO will not be a source of relief.

Are you ready to take on a foreign government? Governments, like individuals and corporations, do not like to be sued. The prospect of an international tribunal passing judgment on a country's laws may raise issues of national pride and sovereignty. Accordingly, foreign governments will often fight back and may try to make life difficult for companies they see as responsible for WTO litigation. As a result, the business stakes for your company should be significant enough that it is prepared to stand behind a public accusation that a foreign government has failed to live up to its international treaty obligations.

Are your interests parallel with the interests of the U.S. Government? Any U.S. case brought to the WTO will be litigated by the U.S. government. U.S. government policies strongly favor the elimination of most foreign trade barriers, and USTR has aggressively challenged barriers that are inconsistent with WTO rules. At the same time, the U.S. government must deal with, and sometimes juggle, a broad set of policy concerns and national interests. Suing a trading partner usually means suing an ally and bringing friction to a relationship in which trade is but one consideration. A potential offensive case may have implications for cases that the United States is defending. For these reasons, considering how the interests of the U.S. government might differ from your company's interests is an essential preliminary step.

Will the U.S. Government take your case? As with commercial litigation or arbitration, an objective evaluation of the strength of your case is an important threshold consideration. If USTR is hesitant about taking on your cause, the reason may be that your case is not strong on the merits. The lens through which your case must be evaluated is not one of equity or U.S. law, but rather the detailed, sometimes arcane, provisions of applicable WTO provisions. If your case is solid, USTR is likely to be responsive. The United States has been the most active user of WTO dispute settlement proceedings, having initiated more than 40 cases since January 1995. Although USTR has fewer than 200 employees, it prides itself on *not* turning down cases due to limited resources. USTR is put in its most awkward position when it is subjected to intense political pressure to bring or defend a case that is weak on the merits.

Have You Considered the Loopholes? It is possible at the WTO to achieve a paper victory that doesn't alleviate your trade problem. Under WTO practice, a member-government whose measure has been found to be improper is requested to bring it into conformity with WTO rules. If that foreign government declines to do so, it may offer the U.S. government alternative compensation, or the United States may be permitted to take retaliatory action. Such compensation or retaliation must be comparable in value to the value of the trade involved in your dispute; however, it may be wholly unrelated to your complaint. A few current cases are raising this spectre. Alternatively, success can be incomplete. In the Argentine case discussed above, for example, the relief gained has reduced duties on exports of U.S. textile and apparel manufacturers, but not on exports of U.S. footwear companies. These companies must await the results of a second case filed against Argentina's footwear duties.

WTO litigation, which is still in its infancy, can be a powerful tool in opening foreign markets to U.S. companies, and can therefore add significant value for companies seeking to penetrate promising new markets. At the same time, it is substantially different from other, more conventional strategic tools, and using WTO rules and WTO dispute settlement effectively is still an emerging art form. To U.S. companies willing to become knowledgeable about WTO rules and skilled in taking advantage of WTO procedures, however, the potential benefit is improved competitiveness in global markets.

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