

USAPC Washington Report
September 2009

Interview with Amb. Susan C. Schwab
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USAPC: In August, a World Trade Organization (WTO) dispute settlement panel found that major Chinese restrictions on the importation and distribution of foreign copyrighted materials run afoul of China's WTO obligations. The United States originally filed this case during your tenure as the U.S. Trade Representative.

In practical terms, how much of a victory was this for the United States and what does this finding portend for the future of trade enforcement cases against China?

Schwab: This was one of several cases we took to the WTO and where the WTO has issued findings against China. There was the auto parts case,¹ the first IPR [intellectual property rights] case,² and now this case. China lost all three of those cases, and the question now is what happens next. The jury is still out on whether we are able to resolve the underlying IP problems.

But so far, this has been a healthy process. When the United States initially began filing WTO cases against China, the Chinese leadership took offense. They seemed to regard these actions as threats to Chinese nationalism. Over time, however, I think Chinese leaders have discovered that a robust dispute settlement mechanism is really in their interests, as well.

First, there are countries all over the world filing cases against China, primarily dumping and subsidy cases. China has an opportunity to go to the WTO dispute settlement mechanism if it believes that those cases are being filed unfairly. So China is starting to use the mechanisms of the WTO to defend its exports. China even is filing its own cases against other countries, including the United States. China is taking a more business-like approach to the cases and to the dispute settlement process. I think that is a good longer-term implication of this recent finding.

Second, Chinese authorities are finding they can use the WTO findings to pursue domestic reforms that for political reasons have been difficult for them to implement. Quite frankly, this also has been the case in the United States. If you look at WTO findings against the

¹ On December 15, 2008, the WTO Appellate Body confirmed that China's discriminatory taxation of U.S. auto parts was inconsistent with Beijing's WTO obligations. Five months earlier, the WTO dispute settlement panel had found that China's regulations imposed an internal charge on U.S. auto parts resulting in unlawful discrimination under WTO rules. The WTO Dispute Settlement Body ultimately adopted the Appellate Body Report. China, in turn, was obliged to announce its intentions to bring its tax laws into compliance with its WTO obligations or face a punitive U.S. response. In late August 2009, Chinese officials informed the Office of the U.S. Trade Representative that effective September 1, 2009 Beijing will eliminate the discriminatory charges that it had been imposing on imported auto parts.

² On January 26, 2009, a WTO dispute settlement panel found that important aspects of China's intellectual property rights (IPR) regime are inconsistent with Beijing's obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In April 2007, Washington filed a WTO complaint against China arguing that Beijing (1) failed to provide copyright protection to products that did not meet China's "content review" (censorship) standards; (2) improperly allowed counterfeit goods seized by China's customs authorities to enter the Chinese market once the infringing trademark was removed; and (3) wrongfully created legal thresholds that had to be met before pursuing criminal prosecution of counterfeiting and piracy. In the January 26 decision, the WTO panel basically ruled in favor of the United States on the first two claims. With respect to the third, however, the international trade law body agreed with Washington that Beijing cannot set its thresholds for prosecution of piracy and counterfeiting so high as to ignore the realities of the marketplace. However, the WTO found that it needed more evidence in order to conclude that thresholds for prosecution in China's criminal law are overly high.

United States, for example, the Foreign Sales Corporation (FSC) case³ or the so-called Byrd Amendment,⁴ it was very hard for the Bush administration to go back to Congress and un-do those pieces of law.

But the Bush administration did just that. It was the right thing to do, both on the merits and because we lost at the WTO. If it hadn't been for the WTO dispute settlement process, it is a real question as to whether we would have been able to revise those laws. I still happen to think that FSC was probably legal under the WTO. But we lost the case, and you do what you have to do to preserve the system. You just need to make sure that the system is fair to everyone.

Let's go back then to the Chinese case. What are the implications? If the Chinese ultimately do nothing in these cases or offer to do something that is so superficial that it clearly is not going to resolve the underlying problems and we end up retaliating, then I think everyone has lost. The only lesson for Chinese exporters and Chinese authorities would be that if one does not comply with dispute settlement findings, it hurts; that there is pain associated with lack of compliance. But so far, so good – we think the auto parts case is resolved, just as we were able to settle earlier cases involving illegal subsidies and financial information services.

In the case of IPR, it would be a win for both sides if the outcome ultimately is an agreement between the United States and China about changes to the latter's system for protecting intellectual property. It is a success if there is settlement of the cases that results in better protection of intellectual property and less protectionism practiced by Chinese authorities when it comes to importation of foreign movies, books, DVDs, and so forth. It depends on how the cases play out and how serious and sincere both sides are in terms of resolving the real problems faced by IP owners in China.

I know that the U.S. interests in the IPR cases -- the MPAA [Motion Picture Association of America], the Association of American Publishers, and the RIAA [Recording Industry Association of America] -- are sincerely committed to resolving the problems. They didn't want the cases as an excuse for the United States to retaliate against China. And I believe it is in China's interest to resolve those problems. If you listen to Chinese officials, they do not want their country to be a haven for IP pirates. That's what they say. So now they have an opportunity to do something about it.

USAPC: During the 1980s and 1990s, the United States and Japan were embroiled in numerous trade disputes. But U.S.-Japan relations ultimately have withstood trade-related rancor owing in no small part to the underlying political and security alliance.

³ The Foreign Sales Corporation (FSC) provisions of the U.S. tax code were enacted in 1984 to replace the Domestic International Sales Corporation (DISC) provisions. Both were aimed at providing U.S. firms with tax exemptions on export income. In 1998, the EU filed a WTO case against the FSC on grounds that it served as an illegal export subsidy that gave U.S. exporters an unfair competitive advantage. A WTO dispute settlement panel ultimately ruled in favor of the EU, and the WTO Appellate Body confirmed this finding. Congress repealed the FSC provisions in 2004.

⁴ The Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), commonly known as the Byrd Amendment after its sponsor, Senator Robert Byrd (D., West Virginia), called for duties on imports that the U.S. government determined to be subsidized or unfairly priced to be distributed to the U.S. companies that originally filed the unfair pricing complaints. Previously, those funds were deposited in the U.S. treasury. The EU filed a WTO case against CDSOA, arguing that this law was inconsistent with WTO rules and an illegal response to dumping and subsidization. In January 2003, the WTO Appellate Body upheld a finding by a dispute settlement panel in September 2002 that the CDSOA, indeed, violated WTO rules. In December 2005, Congress passed legislation that repealed the CDSOA, but the bill included a transition clause that allowed for the continued distribution to of dumping and countervailing duties to U.S. petitioners up to September 30, 2007.

We do not have a comparable foundation for relations with China. How can we keep U.S.-China relations on some semblance of an even keel against a backdrop of rising trade-related pressures?

Schwab: The United States and China obviously have a very different relationship than the United States and Japan and the United States and the EU. It is a relationship, though, that is maturing. The depth of communication has improved markedly. We had the U.S.-China Strategic Economic Dialogue under the Bush administration. The Obama administration now has the U.S.-China Strategic and Economic Dialogue. So there is a lot of dialogue going on, and a lot of shared interests – as well as some differences. Fair enough. You have to deal with the differences like adults.

I think that as long as both sides approach these issues responsibly then, yes, the relationship clearly can withstand trade-related pressures. And, as I indicated in my answer to your first question, we can capitalize on some of these cases.

What does that entail? First and foremost, it means that both countries have to be rigorous in their self-awareness about protectionism. The United States cannot be doing things unilaterally that are protectionist and inconsistent with our WTO obligations. Similarly, Chinese authorities should not take actions that are contrary to either the letter or the spirit of their country's WTO obligations.

Both countries need each other's markets and money and will continue to need each other's markets and money for the foreseeable future. So that is a very significant tie that binds. It is a shared interest in not having one market or the other shut down or both shut down because both sides would be hurt.

And so, first, we have to be careful not to do things domestically that are contrary to our WTO obligations to each other. And second, when there are disputes, they need to produce a positive outcome rather than a negative outcome. If the outcome of a dispute, as I alluded to, is retaliation – which it can and should be if you get to the end of the line and nothing has been fixed -- you have lost the opportunity to implement reforms and to help the real victims of an unfair trade practice.

USAPC: Many U.S. trading partners are pursuing their own Free Trade Agreements (FTAs) with key Asian nations, such as Korea and the nations of ASEAN [Association of Southeast Asian Nations]. The U.S.-Korea FTA, for one, remains stalled in Congress owing to lawmakers' concerns about the treatment of certain sectors.

In economic terms, how badly disadvantaged would be United States be by the conclusion of these other FTAs? Are we seriously missing the boat?

Schwab: This is a serious problem for the United States. We are in danger of shooting ourselves in the foot. Korea is an important market. The Asia Pacific region holds multiple important markets for the United States. U.S. industry, agriculture, and services are actively engaged in this part of the world.

If we sit on hands much longer with respect to these FTAs -- and not just the KORUS FTA [U.S.-Korea Free Trade Agreement], but also the agreements with Colombia and Panama – other countries will take advantage of that, conclude their own deals, and we will be disadvantaged. It won't be a neutral outcome. It will be a negative outcome for U.S. exporters.

The obvious question is will U.S. manufacturers then feel that they must start investing and producing in Asian countries to take advantage of these networks of FTAs when they would rather be producing in the United States and exporting to these Asian countries? That is a distinct possibility, and we will have brought that on ourselves by not moving the KORUS FTA and other trade agreements.

USAPC: How would you evaluate the prospects for a U.S.-Japan FTA? Or will Japan's resistance to liberalizing its agricultural sector forever stand in the way of such an agreement?

Schwab: That is a difficult question to address in light of recent elections in Japan that have produced an important change in leadership. Let's see what the new Hatoyama government is willing to do.

Japan also is in danger of missing the boat on trade because it cannot appear to do a deal with any country that is a competitive agricultural exporter. Yes, there are countries that are exporters of manufactured goods that will do deals with Japan. However, some of the most interesting markets for Japan happen to be countries that also produce agricultural commodities. Japan, in its effort to protect its highly political, but largely inefficient farm sector, also is in danger of missing the trade boat.

But at this stage it still is hard to know that the new Japanese administration will do. And, quite frankly, it is hard to know what the Obama administration is going to do with its trade policy because, as we speak, that still is very unclear, so we'll see.

USAPC: About a year ago, Washington announced that it would begin negotiations to join the Trans-Pacific Strategic Economic Partnership (TPP) agreement, a FTA between Singapore, Chile, New Zealand, and Brunei Darussalam. Some trade analysts have expressed optimism that the TPP could serve as a catalyst for a broader regional trade accord. How would you evaluate those prospects?

Schwab: When we launched the TPP negotiations, indeed, it was under the assumption that this would be a springboard for a broader Asia Pacific trade agreement. This was a starting point because there was a group of countries that had come together with a very open but incomplete free trade agreement which they were interested in building upon in terms of adding provisions pertaining to services and investment as well as including more countries.

And so, if you think about the conversations we had at the APEC summits in 2007 and 2008 about the creation of an Asia Pacific trade agreement along the lines of the FTAAP [Free Trade Area of the Asia Pacific],⁵ we determined that one could either (1) start with a core agreement and build out from there, (2) develop an agreement from a blank sheet, or (3) begin with a network of bilateral or regional deals and try to knit them together. Those are three different paths to realize an Asia Pacific trade agreement.

The TPP is a path that I think has a great deal of potential. However, it is too early to know if the Obama administration will proceed with this or go in a different direction.

⁵ The proposed Free Trade Area of the Asia Pacific (FTAAP) is aimed at further integrating the economies of the Asia Pacific by liberalizing trade and investment practices among the 21 member economies of APEC.

USAPC: With respect to APEC, what do you see as its greatest value? Do you think it has the potential to serve as a fulcrum for regional economic integration via initiatives like the FTAAP? Or, do you think it is more realistically viewed as a consultative entity that builds confidence and allows for discussions and relationship-building between the senior officials and heads of state of the 21 Asia Pacific economies?

Schwab: I think its value lies in both areas. Up to this point, it has been more the latter than the former. On the other hand, if you look at some of the real accomplishments of APEC, they are rather boring to describe, but have made a difference in terms of the impact on actual trade. They evolved under the radar screen, but they actually are quite significant.

For example, one of APEC's initiatives has aimed to reduce the transaction costs involved in moving goods. That is very significant. It saves everybody money. It saves consumers money, it saves producers money, it saves governments money. The length of time a product sits on a dock adds to the cost of that product – to everyone.

So there are things like that being done in APEC. APEC members work on developing FTA model chapters or so-called pathfinder initiatives. They have an impact on actual trade and investment, but their impact is hard to measure and perhaps not readily apparent.

And things take a while to happen in APEC. It's a big group – there are 21 economies. On the other hand, you have the right 21 economies represented.

USAPC: There are serious trade ramifications from certain provisions in the climate change legislation that passed the House and is pending in the Senate. How would you propose addressing the problem of carbon leakage in a way that does not violate of U.S. international trade commitments?

Schwab: First and foremost, unless you are able to reach some accommodation with China and India about their appropriate contribution to the solving the problem of climate change, it is going to be very hard to imagine any outcome that will be effective. If you look at the Kyoto accord, even without the United States, very, very few countries met their commitments. And some that supposedly have met their commitments have done so in ways that arguably have not done anything to really remedy climate change. So the approach the Bush administration took was not to act unilaterally, but to try to act in concert with other developed countries and the advanced developing countries.

The Obama administration apparently has decided to act more unilaterally through the legislative process. It is unclear what the final bill will look like. But I think it would be a mistake not to be worried right now and not to be actively calling upon the trade ministers to consider the trade and competitiveness implications of a climate change regime -- because there definitely are trade and competitiveness implications.

The risk will be that countries will want to be free riders on the system, and yes, the developed countries have the largest obligation here. But unless and until India and China are prepared to take some degree of meaningful responsibility, it is going to be hard to reach a positive outcome. And then, of course, there is the risk that cap and trade legislation becomes a convenient excuse for protectionist action.

USAPC: Some trade experts have been critical of what they refer to as the “centrality” of FTAs in U.S. trade policy. These critics have proposed that U.S. trade policy

should be re-oriented away from FTAs and focused more on promoting industries with growth potential for the United States, such as environment, energy, and medical technology.

Two questions: (1) What is your response to the critique about the Bush administration's "over-reliance" on pursuing gold-standard FTA's, and (2) Would it be wise for the United States switch gears and pursue multilateral accords similar to the WTO's Information Technology Agreement in the absence of movement on a multilateral trade agreement?

Schwab: Concerning the latter question, I think this is a "both and" proposition, not an "either or" approach. With respect to the sectoral approach, if one goes back two or three years, the environmental goods and services agreement that the Bush administration launched with our EU counterparts and worked hard to bring China on board would eliminate tariffs globally on at least 47 clean energy technologies and products that the World Bank identified as being of critical interest.

We have estimated that through such an agreement, which would eliminate tariffs on items such as photovoltaic cells, solar panels, scrubbers, and so forth, we could increase trade in those products by up to 14 percent annually -- which also would have a real, near-term impact on climate change. That agreement has not yet been pursued by the new team, but we certainly pressed hard for it.

By the way, we also advocated expanding the ITA. In that case, though, the EU had begun to raise tariffs on certain products the U.S. China, Japan, and other trading partners agree are already covered under the original ITA. So that continues to be a problem. Nevertheless, we felt it was important to expand the ITA to cover newer technologies.

That said, the world is negotiating bilateral and regional deals. I don't happen to think there is any magic in regional deals. I think plurilateral agreements among like-minded countries, like the TPP, make a huge amount of sense. I think bilateral trade agreements with large and growing markets, like Korea, make a huge amount of sense in and of themselves. It's sort of a Willy Sutton issue: You go where the money is.

Those are the deals you ought to be negotiating, and if you are not negotiating those deals, your trading partners are. And the minute that they negotiate bilateral or regional deals that leave us out, not only do we lose the opportunity of having a preferential trade arrangement with rapidly emerging markets for U.S. exports, but our producers become disadvantaged relative to their European and/or Japanese and/or ASEAN and/or Australian competitors.

USAPC: How about the criticism that the centrality of FTAs in U.S. trade policy ultimately has not served this country well in terms of bottom line economic benefits?

Schwab: I think all you have to do is look at the trade data. U.S. exports to our FTA partners increased 40 percent faster than our exports to the rest of the world. If you look at the last ten or eleven FTAs that were negotiated under the Bush administration, as opposed to the more mature ones, U.S. exports increased 80 percent faster than our exports to the rest of the world. Well, I'm sorry, but those are material benefits. Those are real benefits. And there are small, medium, and large U.S. companies that are manufacturers or service providers or agricultural producers that have the sales to those markets to prove it.

The issue of centrality of FTAs to a trade policy is arguably different. You must pick the right countries with which to negotiate your bilateral, regional, or plurilateral deals, just as you have to pick the right sectors for sector-wide deals. But the fact of the matter is you need a proactive trade policy. And sitting on your hands is not a proactive trade policy. As I said earlier, the United States risks missing the boat.

I would argue that during the Bush administration, the multilateral side of the equation was as important, if not more important than bilateral, regional, or sectoral accords. I certainly spent more time as USTR on the Doha Round [of multilateral trade negotiations] than I did on the bilateral deals, and we negotiated quite a number of bilaterals during my tenure and moved many of them through the Congress. But we spent untold man years on the Doha Round, which clearly was central to the Bush administration's trade policy. To my mind, strong multilateral deals are always preferable to bilateral or regional ones. But the Doha Round still languishes and at least our FTAs continue to move us in the right direction.

The new administration has to figure out what it wants to do on trade policy, beyond enforcement. And I certainly support enforcement. We were very active in terms of enforcement. All these Chinese cases we are discussing now were filed during the Bush administration across the range of potential trade policy initiatives. The new administration has to figure out whether or not it wants to be proactive on trade policy.