Forbes

# The China Enforcement Puzzle

Phil Levy

February 28, 2019

Few rallying cries in trade are as popular as "enforcement!" This resonance suggests a pervasive suspicion that culprits – especially China – have not been playing by the rules, and that they have been getting away with it.

But how does this happen? If we imagine a chain linking U.S. aspirations on trade and the ultimate results, which is the weak link that keeps on breaking? It will be hard to have any confidence we're fixing the problem if we haven't actually identified it.

Trade agreements, such as those overseen by the World Trade Organization, generally make some provision for settling disputes. If the United States, for example, believes that China has violated its commitments at the WTO, it can press a case to get the Chinese to change their behavior or face punishment.

If this mechanism does not seem to be working, there are several stages to check for problems:

1. It's too difficult to get satisfaction when cases are won

Suppose the United States wins a complaint at the WTO – as it often Are the Chinese sufficiently respectful of WTO decisions? Do they comply?

According to Simon Lester, a legal scholar at the Cato Institute, the Chinese are roughly as dutiful about compliance as other major countries are. That is, they are not perfect, but most of the time they bring their policies in line with WTO findings.

Thus, this is unlikely to be the crucial weak link.

2. It's too difficult to bring cases

Perhaps there are injustices going on, but it is too difficult to press complaints against them because of cumbersome or demanding rules. This seemed to be part of the U.S. government's motivation in considering a renewed China "safeguard" – a procedure that would allow for easier reimposition of protectionist barriers when harm occurs from China trade.

Although the Trump administration likes to claim that it is the first to take such issues seriously, this actually reprises a policy from China's initial agreement to join the WTO in 2001 (known as the 421 safeguard).

That history is instructive, since the original safeguard didn't work very well. Even though it seemed to offer easy protection for companies whose complaints cleared a low hurdle, it was only applied once in the United States. Five applications were rejected by the George W. Bush administration. I sat on two of these panels; in those cases it turned out that protection against

China would not solve the problems at hand. The Obama administration had decried this "lack of enforcement" and agreed to put protection on the import of Chinese tires in 2009. A subsequent study found that policy to have been extraordinarily costly and ineffective. Even under generous assumptions, it cost over $1 billion to save (maybe) 1,200 jobs.

Thus, a revival of the China safeguard would be unlikely to solve perceived China enforcement problems.

3. It's too difficult to win cases

A persistent difficulty with pressing and winning trade cases against China has been the unwillingness of businesses to stand up and be public with their complaints. Given the discretion China retains in granting favors and market access, few businesses want to engage in public attacks against the Chinese state.

This is a difficult problem. Trade disputes are won with data and examples, not through vague, generic complaints. Businesses need to provide those examples or cases will be difficult to win.

S. Trade Representative Robert Lighthizer has suggested one remedy for this – perhaps businesses could complain anonymously. The U.S. government could then decide whether the complaints have merit and could apply protection if they do.

The problem with this approach is that it is entirely reliant on the wisdom and impartiality of the Trump administration. Not only would this be installing the complainant as judge and jury, but it would also be empowering an administration that has shown itself willing to be exceedingly *flexible* in its legal interpretations in order to justify protectionism, e.g. arguing that steel imports from countries like Canada pose a national security threat.

A final possibility to consider is that there is no weak link; the problem is not with the enforcement mechanism at all, but rather with incomplete and outdated agreements. The disconnect between outcomes and aspirations may be because existing trade agreements do not reflect our aspirations. This disconnect can be seen most clearly in the area of subsidies and state-owned enterprises. Those practices are often perceived as unfair, yet they frequently do not violate any agreement.

If the problem is inadequate agreements, then the remedy is very different: a constructive diplomacy, including the creation of new institutions such as a bilateral investment treaty (BIT) with China; the Trans-Pacific Partnership (TPP, with a chapter on state-owned enterprises); and a strengthening of the rules of the World Trade Organization (WTO). The Trump administration abandoned negotiations of a BIT with China, dumped the TPP, and has been attacking the WTO.

There are important gaps between U.S. aspirations for Chinese behavior and the current reality. The United States does reasonably well enforcing existing agreements, but those existing agreements are inadequate to meet U.S. needs. That means, though, that in its eagerness to apply trade barriers and its aversion to multilateral solutions, the Trump administration has been pushing hard in the wrong direction.