

How The US Plans To Enforce Its New Trade Deal With China

By **Alex Lawson**

Law360 (January 15, 2020, 8:16 PM EST) -- The preliminary U.S.-China trade deal signed Wednesday will allow the U.S. to swiftly punish Beijing if the agreement is violated, as the White House looks to correct past administrations' struggles to secure meaningful reforms in China.

The "phase one" trade accord requires China to make a litany of reforms in areas ranging from intellectual property and technology transfer to market access improvements for financial services and agricultural products. But the administration is not taking China at its word, arming the deal with an enforcement mechanism that will cut across all of its chapters.

"The agreement provides 'teeth' that have not been in place with China outside of their World Trade Organization commitments," former Deputy U.S. Trade Representative Robert Holleyman said. "To the extent that obligations are covered in this agreement, this enables an escalation and process for resolution that will be valuable."

The deal's dispute resolution system is relatively straightforward. If the U.S. or China believes that the other country has violated some portion of the agreement, the deal calls for them to hold bilateral meetings, first among technical-level officials, then at the deputy level, and finally the ministerial level to resolve the dispute.

If no resolution is reached, the complaining country will be allowed to impose tariffs or other penalties against the accused country that are "proportional" to the damage caused by the violation. If the accused country considers those penalties to be done in "good faith," it cannot retaliate. If it believes the action is in bad faith, the accused country must withdraw from the deal.

Entirely Bilateral

Unlike the dispute settlement systems at the WTO and past U.S. trade agreements, the U.S.-China deal envisions disputes being settled purely on a bilateral basis with no third-party arbitrators.

That development is not surprising, given the Trump administration's rancor against the WTO's Appellate Body, which it views as encroaching on U.S. sovereignty, particularly in disputes with China.

Nevertheless, the approach does raise questions about the workability of the system. Without a third party to determine whether penalties handed down by complaining countries are "proportional" and

done in “good faith,” disputes between the two countries could quickly become intractable, according to former White House trade adviser Philip Levy.

“Many trade agreements make serious efforts to have some impartiality in there. ... We try to find someone who is going to be impartial to help us settle this thing, which makes you doubt how this is going to work,” Levy said.

The purely bilateral arrangement also presents challenges regarding the transparency of the dispute settlement process. The deal stipulates that complaints and their accompanying documents “shall not be shared” with the public unless both sides agree to do so.

The enforcement mechanism is arguably the centerpiece of the entire agreement, and having it take place behind closed doors could make it difficult for the administration to show that the deal is working as intended.

“The absence of a transparent process means that Congress — and likely many in the U.S. — will continue to have questions about implementation of the agreement,” Holleyman said. “It is progress tempered with a reality driven by China’s domestic sensitivities.”

Moving Quickly

While the lack of a third-party arbitrator raises some concerns, it will also enable the dispute resolution process to move much more quickly. The enforcement chapter is designed to resolve disputes relatively swiftly by setting firm timelines and casting aside the WTO model of arbitration that can take many years to complete.

Specifically, the deal calls for up to 75 days worth of consultation among the three different levels of trade personnel for each country. From there, a senior White House official said on Wednesday that there would be 10 to 15 days’ worth of consultations on potential penalties, meaning that claims could be settled in roughly 90 days’ time.

A White House fact sheet described the dispute resolution process as “an arrangement to ensure the effective implementation of the agreement and to allow the parties to resolve disputes in a fair and expeditious manner.”

Managing Tensions

Beyond the terms of the dispute resolution system, the rest of the enforcement chapter looks to provide both countries with an opportunity to extinguish any conflicts before they even bubble up. The agreement calls for the two governments to set up a Trade Framework Group that will monitor the implementation of the deal and identify any potential points of friction.

The deal also requires each country to set up a Bilateral Evaluation and Dispute Resolution Office to serve as the central repository for all complaints under the agreement. Those offices will be tasked with attempting to resolve disputes, looping in other wings of the government when necessary.

“They want to snuff things out, and the idea is you go through this process and you may not have to retaliate if you fix the problem,” Akin Gump Strauss Hauer & Feld LLP and former U.S. trade official Clete Willems said.

Even if disputes are unresolved and one country has to impose a penalty against the other, the deal is designed to keep disputes from spiraling out of control.

When hit with a penalty that it considers to be done in “bad faith,” the accused country may not strike back against the complaining country, but rather must withdraw from the deal entirely. This will force accused countries to decide whether it is worth abandoning the entire agreement just to start a new trade fight.

“If we decide to take action against China for a violation of the agreement, they will have to make an assessment as to whether they want to stay in the agreement or not,” a senior White House official told reporters on Wednesday. “There are obviously broader interests that would keep them in the agreement rather than getting out.”

Still, the deal will require a great deal of political harmony between the U.S. and China. That kind of harmony has been difficult to come by over the past three years, and the agreement that now stands as the centerpiece of the Trump administration’s trade agenda could crumble if the two parties’ newfound goodwill should falter.

“This ‘nuclear option’ has the potential to eviscerate the entire agreement,” Holleyman said. “If the parties comply with their obligations, the risk is low. At the same time, this requires the continuing good faith by both parties for this to work.”

--Editing by Philip Shea and Alanna Weissman.