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Are Private Sector WTO Litigators At Risk Under Logan Act?

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There is renewed interest in compliance with a series of U.S. national security laws designed to protect the United States from having its own citizens collaborate with foreign governments to undermine U.S. law. The most well-known among them is the Foreign Agents Registration Act (FARA),[1] which was first enacted in 1938 and seeks to ensure that all persons acting politically or quasi-politically on behalf of foreign entities in the United States properly disclose their activities to the U.S. government. A lesser-known but much older cousin is the Logan Act.[2] The Logan Act provides that:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.[3]

At its core, the Logan Act prohibits American citizens from working with foreign governments in disputes against the United States. One court described the act as the "converse" of FARA.[4] According to that court, the Logan Act "deals with citizens of the United States who attempt to conduct correspondence with foreign governments. {FARA} affects agents of foreign principals who carry on certain specified activities in the United States."[5]

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The Logan Act dates back to 1799 and was enacted after a U.S. citizen intervened in a dispute between the United States and France. The Logan Act is little used, with few indictments and no discernible record of convictions.[6] Nevertheless, the judiciary has explained that while the act has not been used with any frequency, it remains in effect. The court in Waldron v. British Petroleum quoted Shakespeare to explain the ongoing vitality of the act: "The law hath not been dead, though it hath slept."[7]

Since the World Trade Organization was founded in 1995, numerous U.S. law firms and American lawyers have represented foreign governments in disputes against the United States. There is a legitimate question, however, as to whether this representation falls within the prohibitions of the Logan Act. At least some of the lawyers are citizens of the United States, who carry on correspondence with a foreign government with intent to influence the measures or conduct of a foreign government in relation to disputes with the United States.[8] Indeed, the very purpose of WTO disputes against the United States is to defeat "measures of the United States."

It is no secret that some of the disputes staffed by American lawyers have resulted in findings that U.S. measures are inconsistent with U.S. WTO obligations, leading to changes to U.S. law. There are even suggestions that American firms have, on their own, developed claims against American measures, and then been retained by foreign governments to pursue those claims. The current administration's concern with the WTO dispute settlement system stems in large part from the view that the WTO has erred in finding so many of these measures, particularly trade remedy measures, inconsistent with American WTO obligations.

Although courts have upheld the Logan Act as current law, they have also raised questions about whether its provisions are sufficiently vague that they require clarification. The Waldron court raised the question of whether the use of the terms "defeat" and "measures" are so vague as be inconsistent with the Sixth Amendment.[9] The court concluded that it did not need to resolve any constitutional issues at that time.[10]

For purposes of WTO litigation, however, these terms seem to be anything but vague. To the contrary, they mirror the vernacular of WTO litigation. The agreement that governs WTO litigation is entitled "The Understanding on Rules and Procedures Governing the Settlement of ***Disputes***." Complaints (known in WTO parlance as consultation and panel requests,) are required to identify "the ***measures*** at issue."[11] If a breach is found, the dispute settlement body will recommend that the member "bring the measure into conformity" with the agreement found to be breached.[12] In preparing these disputes, American firms have not struggled to identify measures; quite the opposite, given their success in having U.S. measures found inconsistent with U.S. WTO obligations. Thus, even if the Logan Act were arguably too vague in some contexts, WTO dispute settlement — perhaps uniquely — does not appear to be one of them.

Moreover, consistent with its concern about correspondence between U.S. citizens and foreign governments, the Logan Act is expressly extraterritorial. It covers "{a}ny Citizen of the United States, ***wherever he may be*** ..."[13] As a result, even American lawyers resident in Geneva would be encompassed by any proscriptions in the act.

Some might contend that the Logan Act does not, or should not, cover lawyers. The plain language of the statute contains no such exemption. FARA, by contrast, has an exemption for lawyers — but only to represent countries before "any court of law or any agency of the Government of the United States ..."[14] Indeed, FARA had to be amended in 1966 to include such an exemption after the Supreme Court had found that none existed.[15]

Some might argue that the Logan Act, if read literally, would preclude foreign government representation by American lawyers in the United States, before U.S. courts and agencies. However, reading the Logan Act together with FARA indicates that Congress was not interested in prohibiting such representation; it would be odd for Congress to include a disclosure requirement for activity that is prohibited.

Whether the Logan Act applies to lawyers is not a novel question, though it has not been definitively adjudicated. The Congressional Research Service notes that the issue of whether the Logan Act prohibits counsel from corresponding with a foreign government on behalf of a client has arisen in a military court proceeding, and the court rejected the argument. In that case, the appellant's lawyer, citing the Logan Act, had refused to engage in negotiations with Germany over its potential exercise of jurisdiction.[16] The appellate court declined to take a position on the relationship between the Logan Act and counsel.[17]

The renewed interest in our national security laws, and particularly their restraints on U.S. citizen engagement with foreign governments, suggests that, before representing foreign governments in disputes against the U.S. government before foreign tribunals, American lawyers evaluate the risks.

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[1] 22 U.S.C. § 611 et seq.

[2] 18 U.S.C. § 953.

[3] Id.

[4] United States v. Peace Information Center, 97 F.Supp. 225, 261 (D.D.C. 1951).

[5] Id.

[6] Michael V. Seitzinger, Conducting Foreign Relations without Authority: The Logan Act, Congressional Research Service, (Mar. 11, 2015), at 3.

[7] Waldron v. British Petroleum, 231 F.Supp. 72, 89 n.30 (S.D.N.Y. 1964).

[8] An interesting question is whether the firms, as well, would be considered "citizens" for purposes of the Logan Act.

[9] Waldron, 231 F.Supp. at 89 n.30.

[10] Id at 89.

[11] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 2, 1869 U.N.T.S. 401, Articles 4.4 and 6.2 (emphasis added).

[12] Id. at Article 19.

[13] 18 U.S.C. § 953 (emphasis added).

[14] 22 U.S.C. § 613(g).

[15] Rabinowitz v. Kennedy, 376 U.S. 605 (1964).

[16] Michael V. Seitzinger, Conducting Foreign Relations without Authority: The Logan Act, Congressional Research Service, (Mar. 11, 2015), at 8.

[17] United States v. James T. Murphy, 50 M.J. 4 (C.A.A.F. Dec. 16, 1998), (available at http://www.armfor.uscourts.gov/newcaaf/opinions/1999Term/64,926.htm).