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U.S., China Hail Deal to Avert New Tariffs

Like Charlie Brown dealing with Lucy and the football, trade groups and officials might be tired of getting their hopes up on a U.S.-China trade deal, only to be knocked down once again. But hope sprung eternal late Dec. 12 when officials announced a “phase one” deal to avoid additional 15% tariffs that were scheduled to begin three days later.

Of course, the president tweeted the details: “We have agreed to a very large Phase One Deal with China. They have agreed to many structural changes and massive purchases of Agricultural Product, Energy, and Manufactured Goods, plus much more. The 25% Tariffs will remain as is, with 7 1/2% put on much of the remainder.”

“The Penalty Tariffs set for December 15th will not be charged because of the fact that we made the deal. We will begin negotiations on the Phase Two Deal immediately, rather than waiting until after the 2020 Election. This is an amazing deal for all,” Trump added. The Federal Register notice formally lifting the tariffs will be published. Dec. 18.

A U.S. Trade Representative (USTR) fact sheet outlined seven substantive chapters in the deal: intellectual property, technology transfer, agriculture, financial services, currency, expanding trade and dispute resolution. Specifically, “the Expanding Trade chapter includes commitments from China to import various U.S. goods and services over the next two years in a total amount that exceeds China’s annual level of imports for those goods and services in 2017 by no less than \$200 billion,” it noted.

Lawmakers, Trade Groups Welcome Deal, Urge Skepticism

Trade groups such as American Apparel & Footwear Association (AAFA) welcomed the U.S.-China deal to avert new tariffs, but reminded the administration of existing tariffs. “American businesses, American consumers, and American workers are still being hammered – at an unacceptably high level – by tariffs imposed on U.S. imports from

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China and, in retaliation, by China's imports from the U.S. The administration has imposed one of the largest consumer and manufacturing taxes in American history, most of which remains in place following this agreement," AAFA president and CEO Rick Helfenbein said in a statement.

Among those not jumping for joy was Sen. Chris Murphy (D-Conn.) who added 2+2 and didn't get 4. "Here's some back of the napkin math on China deal: China agrees to buy \$50B of ag products next year, increase of \$29B from pre-tariff trade. Tariffs cost U.S. farmers \$11B. Then taxpayers put up \$28B in emergency ag payouts. So we lost/spent \$39B. Gained \$29B. Nice work!" he tweeted.

Other observers took wait-and-see attitude about Lucy and the football. "Aside from a cessation of continued escalation, there is not much worth cheering. There is still significant ambiguity about what is in the deal but based on what we can surmise, it is unclear if the struggles of the past two and a half years have been worth it. The costs have been substantial and far reaching, the benefits narrow and ephemeral," Scott Kennedy, senior adviser to Center for Strategic and International Studies (CSIS).

Robert Daly, director of the Wilson Center's Kissinger Institute, also warned against hopes for any future deals. "The fighters have retreated to their corners and may not return to the ring. The Trump administration is calling this 'Phase One' of a trade deal with China, but there is little reason to expect a phase two or three. The Chinese side has already won a respite from continual American threats and appears to have done so without offering any terms it wasn't prepared to give in 2017," he wrote in an email.

Menendez Renews Hold on USML Firearms Rules

Just days before the deadline on the 30-day formal 38(f) notice from State, Sen. Bob Menendez (D-N.J.) Dec. 10 renewed his "hold" on long-awaited firearms rules transferring items from U.S. Munitions List (USML) categories I (firearms), II (guns and armament) and III (ammunition) to Commerce jurisdiction. At the same time, the official conference report of the 2020 National Defense Authorization Act (NDAA) will not include a House amendment prohibiting the transfers.

Export control agencies sent the final rules to Congress Nov. 13 (see **WTTL**, Nov. 18, page 1). Specifically, the Bureau of Industry and Security (BIS) revised the final rules to address the publication of technology for 3D printing firearms, while State made no changes.

"Moving such firearms from the USML to the CCL would effectively eliminate congressional oversight and potential disapproval of exports of these weapons by eliminating this congressional reporting requirement, and would be directly contrary to congressional intent," Menendez wrote in a letter to Secretary of State Mike Pompeo Dec. 10. Menendez acknowledged changes Commerce made to address concerns on 3D printing. "That does seek to address my previously expressed concern, and I will not insist on this to lift my

hold. However, I note that this improvement could easily be undone through a simple regulatory change in the future that would not even require congressional notification or review.”

Senate Majority Leader Mitch McConnell filed cloture on the NDAA conference report Dec. 12. The Senate will return Dec. 16 to resume consideration with a vote on cloture that evening. The House approved the firearms amendment in a 225-205 vote in July (see **WTTL**, July 15, page 2).

Other provisions that differed between the House and Senate in the final conference report include: an amendment that would prohibit for the next year export licenses to governments of Saudi Arabia and United Arab Emirates of any air to ground munitions, components or related services; and an amendment on arms transfers to Cyprus.

Conflicting provisions also include: one that would modify the conditions for removal of Huawei from the Bureau on Industry and Security (BIS) Entity List and add a reporting requirement for Huawei export licenses; a provision requiring the president to submit annual reports to Congress on ZTE's compliance with its 2018 settlement with BIS; and one that would require a report on the threat posed by the export of certain satellites to entities with certain beneficial ownership status.

A group of more than 35 peace and human rights groups, including the Arms Control Association and Global Exchange, called the conference results “disastrous.” The conference report “has been so severely stripped of vital House-passed provisions essential to keeping the current administration in check that it no longer represents a compromise, but a near complete capitulation,” the groups wrote in a joint statement.

White House Sends New USMCA Implementing Bill to Congress

In a trade deal that stubborn progressives can love and stalwart business groups can reconsider, the White House Dec. 13 sent Congress an implementing bill for the newly renegotiated U.S.-Mexico-Canada (USMCA) agreement. Changes from the deal originally signed in November 2018 include state-to-state dispute settlement, labor, environment, intellectual property (IP) and automotive rules of origin.

Mexican, Canadian and U.S officials announced the deal three days earlier (see **WTTL**, Dec. 2, page 2). USTR Robert Lighthizer called it “an historic agreement” in a statement. “After working with Republicans, Democrats, and many other stakeholders for the past two years we have created a deal that will benefit American workers, farmers, and ranchers for years to come. This will be the model for American trade deals going forward,” he said.

Specifically, the IP changes “will affect certain patent and pharmaceutical provisions. Importantly, the parties have agreed to remove the obligation to provide 10 years of data protection for biologics, meaning that Canada will no longer need to amend its domestic regime of eight years in this area,” according to a Canadian government summary. The

biologics provision was a major sticking point in the Trans-Pacific Partnership (TPP) negotiations, but at that time U.S. officials insisted on longer protection. The labor chapter “has been further strengthened so that the parties have increased flexibility to pursue violations of the Agreement under the dispute settlement mechanism,” the Canadian summary said. The new deal removes the “requirement that violations be committed ‘through a sustained and recurring course of action or inaction’ when it relates to violence against workers,” it added.

In addition, “the burden of proof has been reversed, in that failure to comply with an obligation in the chapter is now presumed to be ‘in a manner affecting trade or investment between the parties,’ unless the defending party can demonstrate otherwise,” the summary said. The House Ways and Means Committee will hold a markup Dec. 17 with a potential floor vote two days later.

The labor changes led Sens. Ron Wyden (D-Ore.) and Sherrod Brown (D-Ohio), who never voted for a previous trade agreement, to announce their support for the deal. “The Brown-Wyden anti-offshoring provision is a worker-empowering, corporation-scaring enforcement innovation that amounts to the strongest-ever labor enforcement in a U.S. trade deal, and that’s why this will be the first trade agreement I’ve ever voted for,” Brown said in a statement.

Even the AFL-CIO, which had long opposed the deal, joined the train of support. “Working people are responsible for a deal that is a vast improvement over both the original NAFTA and the flawed proposal brought forward in 2017. For the first time, there truly will be enforceable labor standards—including a process that allows for the inspections of factories and facilities that are not living up to their obligations,” AFL-CIO President Richard Trumka said in a statement.

In contrast, industry groups expressed concern over changes to the deal. The Pass USMCA Coalition, which formed in February expressly to advocate for swift passage of the deal, said it was “reviewing the changes that have been made” to the text, especially the “unnecessary decision to strip certain [IP] protections,” the group said. “This major change is especially disappointing, as American trade negotiators had an opportunity to set the gold standard for promoting and protecting American innovation in trade deals,” it said.

“The announcement made today puts politics over patients. Eliminating the biologics provision in the USMCA removes vital protections for innovators while doing nothing to help U.S. patients afford their medicines or access future treatments and cures. The only winners today are foreign governments who want to steal American [IP] and free ride on America’s global leadership in biopharmaceutical research and development,” PhRMA president and CEO Stephen Ubl said.

Agriculture and textile groups were happy the deal was moving ahead after months of lobbying. “We are very happy to hear a bipartisan compromise has been achieved, and we now encourage our Congressional leaders to swiftly ratify this agreement by bringing it to vote,” said American Soybean Association (ASA) President Davie Stephens. “This deal is a positive for U.S. soybean farmers,” he concluded.

And Then There Was One on WTO Appellate Body

After many months of members' proposals and U.S. obstruction, the end of the road for a functioning World Trade Organization (WTO) Appellate Body (AB) has come and gone. Two AB members' tenure ended Dec. 10, leaving only a single member: Hong Zhao of China. At this point, the body is no longer able to hear any new appeals, as a quorum of three members is needed to do so.

Work will continue in three cases for which hearings have been completed. These include the U.S case on supercalendered paper (DSSOS); Russia's case on railway equipment (DS499) and the Australian case on tobacco plain packaging (DS441/DS435). Two of these may be completed by press time, and the plain packaging case "is scheduled to be finished by late March 2020," according to a Dec. 12 letter from soon to be former AB member Thomas Graham.

At the same time, the European Union (EU) created the position of Chief Trade Enforcement Officer as part of a proposal "that will allow the [EU] to protect its trade interests despite the paralysis of the multilateral dispute settlement system," the EU announced Dec. 12. The proposal "will enable the EU to react even if the WTO is not delivering a final ruling at the appellate level because the other WTO member blocks the dispute procedure by appealing into the void," it added.

Never one to miss a chance to make a statement, Senate Finance Committee Chairman Chuck Grassley (R-Iowa) said he wished the U.S. concerns could have been resolved. "The WTO's success depends on members acknowledging its shortcomings and working together to address our goals to strengthen the institution. The work to restore the Appellate Body should continue in earnest with the shared goal among all members of getting WTO dispute settlement back on track in 2020," the senator said.

Advocacy group Public Citizen, which has been arguing against WTO "overreach" since 1999, played a bit of "I told you so." The shutdown of the WTO's "enforcement regime comes after decades of the WTO's negotiating function failing to deliver needed reforms to scale back the organization's anti-democratic overreach into scores of countries' domestic policies," the group said in a blog post.

The U.S. Chamber of Commerce urged "all parties to redouble their efforts to address the important issues the U.S. has raised regarding the functioning of the Appellate Body. The goal must be to revive it in a more responsive and focused form in keeping with the objectives established by the U.S. and other members when the WTO was created nearly three decades ago," U.S. Chamber Executive VP Myron Brilliant said in a statement.

Justice Revises Policy on Voluntary Disclosures

U.S. firms should now have more clarity on the criteria used in "determining an appropriate resolution for an organization that makes a voluntary self-disclosure (VSD)"

in export control and sanctions cases, Justice's National Security Division (NSD) said in a revised VSD policy issued Dec. 13. "When a company (1) voluntarily self-discloses export control or sanctions violations to CES, (2) fully cooperates, and (3) timely and appropriately remediates ... there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors," the division wrote. The new policy is a change from guidance NSD issued in October 2016, which did not provide such a presumption, it said (see **WTTL**, Oct. 17, 2016, page 6).

In the new policy, the division also provides "examples of aggravating factors that represent elevated threats to the national security and that, if present to a substantial degree, could result in a more stringent resolution for an organization that has engaged in criminal export control and/or sanctions violations," it said. These include "exports of items that are particularly sensitive or to end users that are of heightened concern; repeated violations; involvement of senior management; and significant profit," it added.

If, due to aggravating factors, a different criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the department: will accord or recommend a fine at least 50% less than otherwise would be available; and "will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program," the NSD policy said.

Wassenaar Plenary Addresses Cyber Software, Cryptography

At the Wassenaar Arrangement's (WA) annual plenary Dec. 4-5, members agreed to relax some controls, including "certain laminates and commercial components with embedded cryptography," the plenary chair said in a statement. The changes "further clarified existing controls regarding ballistic protection, optical sensors, ball bearings, and inorganic fibrous and filamentary materials," the chair noted.

At the same time, participating states "adopted new export controls in a number of areas, such as cyber-warfare software, communications monitoring, digital investigative tools/forensic systems, sub-orbital aerospace vehicles, technology for the production of substrates for high-end integrated circuits, hybrid machine tools, and lithography equipment and technology."

Specifically, under Munitions List item 21, "'software' specially designed or modified for the conduct of military offensive cyber operations" will be controlled, including "'software' designed to destroy, damage, degrade or disrupt systems, equipment or 'software', specified by the Munitions List, cyber reconnaissance and cyber command and control 'software', therefor."

Members also updated the "Best Practices for Exports of Small Arms and Light Weapons" last amended in 2007, and "Best Practices for Disposal of Surplus/Demilitarized Military Equipment," which was originally adopted in 2000. Like last year, members made no

changes to computer controls in Category 4, leaving the Adjusted Peak Performance (APP) at 29 Weighted TeraFLOPS (WT).

* * * **Briefs** * * *

YARN: In 5-0 final vote Dec. 12, ITC found U.S. industry is materially injured by dumped and subsidized imports of polyester textured yarn from China and India. Commission also made negative finding on critical circumstances for imports from China.

NOMINATIONS: Senate Banking Committee Dec. 10 approved nominations of Peter Coniglio to be Ex-Im Bank inspector general in voice vote and Mitchell Silk to be assistant Treasury secretary for international markets and development in 16-9 roll call vote. Committee held hearing Nov. 20 (see **WTTL**, Nov. 25, page 9).

MORE NOMINATIONS: President Dec. 10 announced intent to nominate Jessie Liu, currently U.S. attorney for D.C., to be Treasury under secretary for terrorism and financial crimes, replacing Sigal Mandelker, who announced plans to step down in October. Liu previously served as Treasury deputy general counsel and in Justice National Security Division.

NICARAGUA: Treasury's Office of Foreign Assets Control (OFAC) Dec. 12 designated Rafael Antonio Ortega Murillo, son of Nicaraguan president and VP, and two companies he owns or controls. At same time, agency designated Distribuidor Nicaraguense de Petroleo S.A. (DNP), chain of gas stations controlled by Ortega family. "Treasury is targeting Rafael and the companies he owns and uses to launder money to prop up the Ortega regime at the expense of the Nicaraguan people," said Secretary Steven Mnuchin said in statement. OFAC in June designated four Nicaraguan government officials, including president of Nicaraguan National Assembly, general director of Institute of Tele-communications and Postal Service and health and transportation ministers (see **WTTL**, June 24, page 7).

SOLAR: USTR Dec. 9 requested ITC analyze "probable economic effect" on domestic crystalline silicon photovoltaic cells and module manufacturing industry of increasing safeguard tariff-rate quota level from current 2.5 gigawatts (GW) to 4,5 or 6 GW "without other changes to the remedy."

CUBA SANCTIONS: Allianz Global Risks U.S. Insurance Company (AGR US), wholly owned subsidiary of German firm Allianz SE, agreed Dec. 9 to pay OFAC \$170,535 civil penalty to settle 6,474 charges of violating Cuba sanctions. Between August 2010 and January 2015, AGR Canada "fronted travel insurance policies that included occasional coverage relating to Canadian residents' travel to Cuba," OFAC noted... At same time, Chubb Limited agreed to pay OFAC \$66,212 to settle 20,291 charges that predecessor ACE Limited (ACE) violated Cuba sanctions. Between January 2010 and December 2014, ACE Europe processed 20,218 premium payments "for Cuba-related travel insurance coverage of insureds' travel to Cuba, as well as 73 Cuba-related claims payments paid out under these coverages," agency said. Both AGR US and Chubb voluntarily self-disclosed apparent violations.

BEEF: In light of agreement to increase U.S.' duty-free share of EU beef market, USTR Dec. 13 determined not to reinstate action to request WTO authorization to suspend concessions in dispute. Under August deal, American ranchers will have initial tariff-rate quota (TRQ) of 18,500 metric tons, which will increase to 35,000 metric tons over next seven years. (see **WTTL**, Aug. 5, page 1). USTR began WTO proceeding in December 2016.

IRAN: OFAC Dec. 11 designated Iranian shipping network, including businessman Abdolhossein Khedri and two of his companies, and three Mahan Air general sales agents (GSA) based in UAE and Hong Kong. Treasury designated Iranian airline Mahan Air in 2011. Gatewick LLC, Mahan Air's freight and cargo GSA in Dubai, UAE, agreed in August 2014 to pay BIS \$40,000 civil penalty for shipping 2,300 EAR99 computer motherboards to Mahan Airways (see **WTTL**, Sept. 1, 2014, page 8)...At same time, State designated Islamic Republic of Iran Shipping Lines (IRISL) and its China-based subsidiary, E-Sail Shipping Company, effective June 8, 2020. "To allow exporters of humanitarian goods to Iran sufficient time to find alternate shipping methods, the designations for IRISL and E-Sail Shipping Company Ltd will have a brief wind-down period," Secretary of State Mike Pompeo said in press statement. OFAC designated IRISL and E-Sail in November 2018 (see **WTTL**, Nov. 12, 2018, page 4).

GARAGE DOOR OPENERS: CAFC Dec. 12 reversed-in-part and vacated-in-part ITC decision on imported garage door opener products that infringe U.S. patent. Commission erred in its construction of "wall console," Circuit Judge Alan Lourie wrote for three-judge panel in *Techtronic Indus. Co. v. ITC*. "We conclude that the '319 patent disavows wall consoles lacking a passive infrared detector. Accordingly, we reverse the Commission's claim construction order and hold that the term 'wall console' in each of the '319 patent claims is properly construed as 'wall-mounted control unit including a passive infrared detector,'" he added. Accordingly, court reversed its final determination of infringement and vacated limited exclusion orders.

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