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China Complies with WTO Ruling on Rare Earth Restrictions

After a long , losing World Trade Organization (WTO) fight over its restrictions on rare earth exports, China revised its regulations Dec. 31 to permit the licensing of these minerals. Beijing lost its last attempt to preserve its restrictions when the WTO Appellate Body upheld a dispute-settlement panel's ruling that the old requirements violated WTO rules and China's WTO accession agreement (see **WTTL**, Aug. 11, page 7).

The new rules allow the licensing of rare earths along with other Chinese products that require export licenses. Rare earths, as of Jan. 1, are among products that can be exported under license on the strength of an export contract without needing the approval of the Ministry of Commerce.

"We've been fighting this case for years, and this is a major victory for American workers and our manufacturers," said Sen. Debbie Stabenow (D-Mich.) in a statement. "I am glad the Chinese government is finally lifting its illegal restrictions on the export of rare earth minerals. We play by the rules, so China needs to start playing by the rules and stop trying to rig the system," she said.

Although it cited other reasons for why China had violated its WTO commitments, the Appellate Body basically agreed with the earlier panel ruling that Beijing's export duties and quotas on various rare earths, tungsten and molybdenum constitute a breach of WTO rules and the Chinese had failed to justify those measures as legitimate conservation or environmental protection measures. The U.S. and EU had first sought consultations with China on the export restrictions in March 2012.

Cuba Legislation in Congress Seen as Problematic

Now that the surprise of President Obama's announced change in Cuba policy has faded, the hard work of implementing not-yet-published regulations begins. At this point, however, it does not appear the White House is ready to push for legislation to lift the full embargo on travel and trade (see **WTTL**, Dec. 22, page 1). With Congress divided over Cuba policy and the president's agenda in general, Obama may be wary of seeking Cuba legislation when he has other more-pressing items on this trade list, including Trade Promotion Authority and two ongoing multilateral trade negotiations. At an event

in Washington to launch the U.S. Agriculture Coalition for Cuba Jan. 8, Agriculture Secretary Tom Vilsack was cautious in stating the administration's views on legislation. President Obama "has done what he can to address some of the barriers to expanded agricultural exports to Cuba, but we still have legislative hurdles to cross. The President and this administration look forward to engaging with Congress in an honest and serious debate about what we can do to promote positive change in Cuba," Vilsack said.

A bipartisan line of lawmakers speaking at the news conference supported ending the statutory embargo but were candid about the chance for legislative changes. "I don't think it's going to be easy, I think it's going to be very difficult," said Rep. Sam Farr (D-Calif.). He also announced a new House Cuba working group to pick up where a previous group stopped. "We had a lot of policy, but it was very difficult to move it. Cuban-Americans were in key positions, they could use procedural blocks. Those things will still be possible, but you can overcome them by the will of the people and the politics of American interests," he said.

While saying Cuba is not a partisan issue, Sen. Amy Klobuchar (D-Minn.) urged Congress to avoid "obstructive actions like blocking the confirmation of an ambassador or the funding for diplomatic activities." She said Congress "should conduct reasonable oversight to ensure our policies are enhancing our economic interests." Klobuchar also acknowledged that before passing any legislation, Congress also needs to see positive steps from Havana. Cuba "must take serious steps to reform politically and economically. We need to see substantial improvement in the Cuban government's respect for democracy and human rights," she said.

Sen. Jerry Moran (R-Kansas) prioritized the changes that could be implemented by the administration. He said Treasury should "alter their regulations, to redefine when cash up front has to be delivered" to permit farm exports. "I would encourage them to go ahead and change the regulations back to the way they were for several years, where banks can issue a letter of credit, and let's begin this process," Moran added. "Then Congress will work on the broader issues of how we alter the statutory provisions relating to the embargo," he said.

Although Cuba only has 11.3 million people, the market for U.S. goods could be sizable, some suggest. The nonprofit group Progressive Economy in a blog post Jan. 7 estimated the two-way goods trade could be as much as \$100 billion, if trade went back to the pre-embargo levels of the 1950s when Cuba accounted for 3% of U.S. exports and imports.

More realistically, trade could reach levels similar to other Caribbean nations. "At current levels of Cuban trade, and assuming the U.S. share might be similar to the shares for Jamaica, Trinidad, Haiti, and the D.R. [Dominican Republic], U.S. exports to Cuba might be \$6 billion or so, and imports \$4 billion," it added. If U.S. agriculture exports reached the worldwide average of 8% of all exports and U.S. farm goods reached \$1.2 billion, "total goods exports would be around \$15 billion, comparable with Chile, Israel, and Italy and above Russia," the group said.

Separately, House Foreign Affairs Committee Chairman Ed Royce (R-Calif.) and Ranking Member Eliot Engel (D-N.Y.) wrote to Secretary of State John Kerry Jan. 8, urging the administration to release the names and current status of the 53 Cuban political prisoners Havana committed to releasing during talks to normalize diplomatic relations. "We think

you will agree that the United States-Cuba relationship cannot near its considerable potential until the fundamental human rights of the Cuban people are respected by their government,” they wrote.

Vietnam Seeks Appeal of WTO Ruling on Shrimp

Vietnam asked the World Trade Organization (WTO) Appellate Body Jan. 6 to review a dispute-settlement panel’s ruling that dismissed many of its key complaints against the U.S. antidumping order on shrimp from Vietnam. The U.S. is likely shortly to file its own appeal of the portions of the panel report that it lost (see **WTTL**, Nov. 24, page 8). The panel’s mixed findings rejected several of Hanoi’s complaints about U.S. administrative reviews and its sunset review of the order.

Among the issues Vietnam wants the Appellate Body to review are the panel’s finding that it failed to show that Section 129(c)(1) of the U.S. Uruguay Round Agreements Act (URAA) constitutes an “as such” inconsistency with WTO rules by limiting administrative redeterminations to implement adverse panel recommendations and rulings.

“The conclusion and recommendation regarding Section 129(c)(1) constitutes egregious error by the Panel in its examination, understanding, and application of the evidence before it and in its interpretation of this provision of U.S. law,” Vietnam argued. “As such, Viet Nam was denied an objective examination as required by Article 11 of the DSU of the meaning of Section 129(c)(1). The examination by the Panel was neither rigorous nor comprehensive as required by WTO jurisprudence,” it said.

Progressives, Labor Groups Ramp up Calls to Defeat Fast Track

With Congress back, progressives are stepping up their opposition to U.S. trade negotiations and renewal of the “fast track” trade promotion authority (TPA). At an event in Washington Jan. 8, congressional Democrats and union, consumer and environmental groups repeated calls to defeat TPA unless there is more Congressional participation.

Despite this opposition, Sen. Orrin Hatch (R-Utah), who became chairman of the Senate Finance Committee Jan. 7, hinted that a bill is coming. “We must act to tear down barriers to international trade and increase market access for American goods and services,” he said in a statement.

“At the same time, we need to promote and enforce robust international trade rules, including strong intellectual property rights protections, so that our domestic innovators and job creators can reap the benefits of their competitive advantage and creativity. The renewal of bipartisan, job-creating Trade Promotion Authority will jumpstart a strong trade agenda that can help put America back to work,” he said. Hatch, former Finance Chair Max Baucus and former Ways and Means Chair Dave Camp introduced legislation in 2014 (S. 1900) that was never brought to the floor for a vote.

Rep. Rosa DeLauro (D-Conn), the organizer of the Democratic press conference, noted Hatch’s statement, telling reporters that opposition “will be forthcoming” now that a bill is imminent. “It may be brought up, but I believe we can defeat it,” she said. DeLauro

based her confidence on the fact that 151 House Democrats and 22 Republicans, mostly Tea Party members, told President Obama in November 2013 they would vote against fast track. However, some of those who signed the letter, such as former Rep. Michele Bachmann (R-Minn.), are no longer in the House. Since then, Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) said he was working on his own version of fast track, which he called “smart track” (see **WTTL**, Nov. 10, page 4).

Progressives want the new version to look similar to the demands of more than 550 nonprofit organizations, who wrote a letter to Wyden in September to reassert their opposition to the TPA working its way through Congress.

The groups said a fast-track bill that would meet their demands would include: congressional role in selecting appropriate trade partners; mandatory negotiating objectives; enhanced transparency to ensure meaningful congressional and public input; congressional certification that trade goals have been met before trade negotiations are concluded; and congressional approval of trade agreements and authorization for the executive branch; and a “mechanism for a sizeable minority of the House or Senate to obtain a vote on a resolution to remove an agreement from expedited consideration.” In addition, they said “trade negotiating authority must be considered in conjunction with related trade and economic policy legislation.”

EU Releases TTIP Proposals But No Surprises

In an effort to counter complaints about the lack of transparency in negotiations on a Transatlantic Trade and Investment Partnership (TTIP), the European Union (EU) Jan. 7 released a batch of legal texts and position papers that it has presented to the U.S. in the talks. The material, along with plain-language fact sheets on each section, provides little new about EU positions and doesn’t reveal any agreements yet reached.

“I’m delighted that we can start the new year by clearly demonstrating through our actions the commitment we made to greater transparency just over a month ago,” said EU Trade Commissioner Cecilia Malmström in a statement (see **WTTL**, Dec. 3, page 4). “Today’s publication of our specific legal proposals in the context of TTIP marks another first in EU trade policy,” she added.

Not to be out-transparented by the EU, the U.S. Trade Representative’s (USTR) office issued a fact sheet of its own Jan. 9 defending its record on transparency. “The Obama Administration has taken unprecedented steps to increase transparency and diversify the voices involved in America’s trade policy. Those steps have resulted in more public dialogue and outreach on trade agreements like the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP) than on any other free trade agreements in history,” it wrote but without releasing the texts of its proposals.

The EU material covers 24 potential TTIP chapters and is grouped in three parts: market access, regulatory cooperation and rules. The textual proposals set out how the EU wants a final deal to read, line by line. The position papers identify what it wants to achieve in each chapter. The eight textual proposals cover competition, food safety and animal and plant health, customs issues, technical barriers to trade, small and medium-sized enterprises, and government-to-government dispute settlement. Also released were

position papers on engineering, vehicles and sustainable development. EU provided a fact sheet on investor-state dispute settlement (ISDS) on which no positions have been presented yet. Each of the fact sheets includes sections commenting on “sensitive or controversial issues.” These sections reflect topics that have long been the subject of concern of TTIP critics on both sides of the Atlantic.

For all of its transparency, the EU held back on providing EU positions on tariff cutting. “For this pillar, we’ll keep negotiating documents confidential,” it said. “We want to reach the best possible final deal for everyone in the EU. To do that we need to strike the right balance between what each side wants,” it said. “That means offering concessions to each other at different stages in the talks, being able to do so in confidence.” it added.

Not surprisingly, the papers make clear that the EU intends to maintain its current policies on genetically modified organisms (GMOs). “Growing genetically modified organisms is subject to an authorisation process in line with EU law. TTIP will not change this law. EU countries must also agree to any growing of GM plants. This will not change through TTIP,” it stated.

The papers also noted the EU’s intent to press for protection of geographic indicators (GIs). “We want key improvements in the U.S. system, such as protection for an agreed list of EU GIs and enforcement of rules against their misuse,” one fact sheet said.

On regulatory coherence, the EU said “no textual proposals have been presented.” It said U.S. and EU regulators have focused on agreeing to overall goals for each industry. “They haven’t yet made detailed proposals showing how these goals could be reached in a final agreement,” it said. Nonetheless, the EU identified its positions on such regulatory areas as cosmetics, medical devices, pharmaceuticals and chemicals.

“TTIP will not amend the EU’s list of 1372 banned substances. For new substances, the EU and the U.S. could benefit from sharing scientific assessments that could lead to new bans or restrictions,” the EU argued. For medical devices, it said it doesn’t want to harmonize regulations. “In TTIP we want to streamline the approval processes, for example, by having a common application form when applying for approval of a new medical device. Manufacturers could apply simultaneously for approval in the EU and U.S. and make new devices available to patients more quickly,” it explained.

On the protection of European culture, the EU said it wants TTIP to allow “member states to take any measures they wish e.g. to impose quotas for EU productions.” The EU also said “data protection standards won’t be part of TTIP negotiations. TTIP will make sure that the EU’s data protection laws prevail over any commitments.”

Sugar Suspension Agreement Leaves Sour Taste for Refiners

The suspension agreement reached in December between Commerce and Mexican sugar growers to suspend antidumping and countervailing duty cases against imports of sugar from Mexico has left out “destination refineries,” according to groundbreaking petitions filed with the International Trade Commission (ITC). AmCane Sugar LLC and Imperial Sugar Company filed petitions Jan. 8 asking ITC to initiate an investigation to determine whether the agreement eliminated completely the injurious effect of sugar

imports. “While AmCane supports, in principle, the settlement of this trade litigation through suspension agreements, it believes the agreements accepted by Commerce here fall short of statutory requirements and indeed will exacerbate, rather than completely eliminating, injury associated with the subject imports,” said the petition of AmCane, a cane sugar refinery in Taylor, Mich.

“Agreements of this particular type permit the continuation of some dumping and subsidization and, therefore, are permitted only if they completely eliminate the injurious effect of the subject imports. In order for the agreements to remain in place, the Commission must find that there would be ‘no discernable [sic] injurious effect’ by reason of the amount of net subsidy or dumping permitted by the agreements,” wrote Imperial, a subsidiary of Louis Dreyfus Commodities LLC, based in Sugar Land, Texas.

Imperial said it completed responses to ITC questionnaires in the preliminary phase of investigations and filed a notice of appearance in the final phase of investigations. AmCane and Imperial were not among the original petitioners to the investigation, but have the right as domestic producers of a “like product” to request a review of the deal. The petitions are the first of their kind, one source said. “The process is non-existent; the ITC has never done it,” he added.

Commerce announced the final suspension deal Dec. 19, late on a Friday night, despite opposition from U.S. sugar users and even some producers (see **WTTL**, Dec. 22, page 14). U.S. companies that depend on Mexican imports dislike the deals, but even supporters of the agreements urged changes in comments Commerce posted in November.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: N.Y. retailer B&H Foto & Electronics Corp. agreed to pay \$275,000 civil penalty to settle 50 BIS charges of exporting optical sighting devices without licenses to various countries, including Russia, Kazakhstan, Hong Kong, Saudi Arabia and South Africa, from March 2009 through November 2012. Devices were classified under ECCN 0A987 and worth about \$23,000. B&H neither admitted nor denied charges.

SENATE FINANCE COMMITTEE: As expected, Senate Republican Conference selected Sen. Orrin Hatch (R-Utah) to be chairman of Senate Finance Committee Jan. 8. In statement on his plans, Hatch cited tax reform, international trade, healthcare and safety-net programs.

HOUSE WAYS AND MEANS: Committee Democrats chose Rep. Charles Rangel (D-N.Y.) to be ranking member of trade subcommittee. In December, Republicans tapped Rep. Pat Tiberi (R-Ohio) to chair subcommittee. Tiberi (pronounced Tee-berry) has been on Ways and Means since 2007 and was elected to Congress in 2000.

CIT: In slew of names sent to Senate Jan. 7, President Obama re-nominated Jeanne Davidson to be judge of Court of International Trade, replacing Donald C. Pogue, who retired. Davidson, who is director of Justice’s offices of foreign litigation and international legal assistance as well as international trade field office, has represented government in scores of trade cases at CIT and CAFC. Previously, she served as USTR associate general counsel. She has J.D. from NYU School of Law and A.B. from University of California at Berkeley. Obama originally named Davidson in August 2014 (see **WTTL**, Sept. 1, page 9).

CAFC: Obama also re-nominated Jan. 7 Kara Farnandez Stoll to be judge of Court of Appeals for Federal Circuit, replacing Randall R. Rader, who retired in June 2014. Stoll has been

partner at Finnegan, Henderson, Farabow, Garrett and Dunner since 1998. She worked as a patent examiner after college. Stoll received her B.S. in electrical engineering from Michigan State University and her J.D. from Georgetown University Law School. Obama originally announced Stoll nomination in November 2014.

TRADE PEOPLE: More renominations sent to Senate Jan. 8 include Treasury Assistant Secretary for International Markets and Development Marisa Lago to be deputy USTR, replacing Miriam Sapiro (see WTTL, Nov. 17, page 6)... Obama also renominated Washington lawyer Daniel Marti to be White House intellectual property enforcement coordinator, replacing Victoria Angelica Espinel, who is now head of Business Software Alliance (BSA).

WEST COAST PORTS: U.S. Federal Mediation and Conciliation Service (FMCS) announced Jan. 5 that it has agreed to request from International Longshore and Warehouse Union and Pacific Maritime Association to step in as mediator in contract dispute that has threatened to shut down ports. “As is agency practice, the FMCS is not releasing information regarding future meeting dates and locations. In addition, the FMCS will have no further comment at this time regarding the status or substance of the negotiations,” agency said. Statement from American Apparel & Footwear Association President Juanita Duggan said “industry is having critical product deliveries delayed by three to four weeks as result of the labor dispute.”

TRADE FIGURES: U.S. merchandise exports in November decreased .02% from year ago to \$136.7 billion, Commerce reported Jan. 7. Services exports gained 2.5% to \$59.6 billion from same month in 2013. Goods imports went up 1.8% from November 2013 to \$195.0 billion, as services imports increased 2.5% to \$40.35 billion. Resulting reduction in trade deficit was due mainly to drop in petroleum deficit (\$11.4 billion), which was lowest since December 2003 (\$11.0 billion). Crude oil imports (189 million barrels) were lowest since February 1994 (177 million barrels). Meanwhile, imports of consumer goods (\$48.5 billion) were highest on record.

CALCIUM HYPOCHLORITE: ITC made final 6-0 determination Jan. 8 that imports of dumped and subsidized imports of calcium hypochlorite from China are injuring U.S. industry.

FCPA: Dmitrij Harder of Huntingdon Valley, Pa., owner of financial consulting firm Chestnut Consulting Group, Inc., was indicted Jan. 6 in Philadelphia U.S. District Court on charges of violating the Foreign Corrupt Practices Act and money laundering. From 2007 through 2009, Harder allegedly paid approximately \$3.5 million in bribes to influence applications submitted to European Bank for Reconstruction and Development.

ANTIBOYCOTT: Infinova, security products manufacturer in Monmouth Junction, N.J., agreed to pay BIS \$12,800 civil penalty Jan. 5 to settle six charges of violating antiboycott regulations. It allegedly furnished information about business relationships with boycotted countries or blacklisted persons and failed to report receipt of requests to engage in restrictive trade practice in letters of credit from UAE from 2009 to 2011.

SDN FORMAT: OFAC Jan. 5 announced new format for Specially Designated Nationals and Blocked Persons (SDN) List, which “incorporates a variety of features that ensure maximum flexibility for sanctions list creators, while also limiting the need for future changes to the underlying data specification due to the standard’s adaptability,” OFAC said. New capabilities include: new metadata, non-Latin language scripts, data dictionary of all valid look-up values, and “feature identifier” functionality, OFAC noted. New XML file will not replace existing SDN.xml file which will remain in production, it added.

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