

Trump May Get Rude Awakening In China Trade Talks

By Alex Lawson

Law360 (December 6, 2018, 6:03 PM EST) -- President Donald Trump has been taking a victory lap in the wake of his summit with Chinese President Xi Jinping by promising to deliver a bounty of new concessions to U.S. businesses, but the two sides are still far apart on a concrete agreement, and bridging that gap may prove more difficult than Trump anticipates.

Trump and Xi have agreed to hit pause on their escalating tariff battle and hold deeper negotiations covering a litany of U.S. concerns over the next 90 days. But the days following the meeting have featured mixed messaging from the White House and perfunctory statements from China about what comes next.

Former U.S. Trade Representative Mickey Kantor, now a Mayer Brown LLP partner, said that he is skeptical of a meaningful new agreement with China at this stage of the game.

"On today's facts, I would say the prospects are bleak," Kantor told Law360. "The U.S. has been unclear as to what we want or how we would get there. The Chinese have been vague as well. This is going to be a very difficult and complicated negotiation, but we have to move forward very quickly."

Kantor added that the White House's uneven follow-up on the China talks, which was followed by the stock market tumbling, suggests that the administration has considerable work to do in order to have productive sessions with Beijing.

"The messaging over the last few days has been close to disastrous," he said. "It's amazing to me that within the White House itself, they can't get the story straight as to what happened in the meeting, what our position is, what we want, or how we're going to move forward."

According to the White House, the talks will focus on forced technology transfer, intellectual property protection, nontariff barriers, cyberintrusions and cybertheft, services and agriculture. It was China's positions in many of those areas that led to the administration imposing tariffs on roughly \$250 billion worth of Chinese goods over the last several months.

China has already committed to ramping up its purchases of certain U.S. energy and agricultural goods, most likely in the form of liquefied natural gas and soybeans, as a gesture of good faith.

But one-off, sector-specific purchases at the direction of the government are not the same as fully

liberalized trade with China. And because the Trump administration threw down a gauntlet calling out China for its technology and IP rules in its Section 301 report from March, it is only by that metric that they can claim meaningful success, according to former Deputy U.S. Trade Representative Robert Holleyman.

"Those are the most challenging issues, but they are the ones that impact America's future and not just short-term gains," Holleyman, now a partner at Crowell & Moring LLP, told Law360. "Once the U.S. started down this path, there can be no success without addressing the fundamental problems the U.S. identified in its 301 report."

U.S. Trade Representative Robert Lighthizer will spearhead the talks for the Trump administration, and the president has directed him and other officials to be vigilant as they monitor China's commitments and implementation efforts.

In many ways, the Trump White House is now doing what it criticized past administrations for doing: engaging with China on a diplomatic level to enact meaningful reforms. The difference now is that the effort will come only after months of each side lobbying tit-for-tat tariffs on each other's shipments.

Those duties, and the threat of more to come if the talks don't produce results, are unlikely to improve the dynamic at the negotiating table.

"It makes for a poison atmosphere," Kantor said of the duties. "You're not going to get there by swinging a sledgehammer; this is time for a surgeon with a scalpel."

Making significant changes within 90 days to Chinese government policy that has bedeviled U.S. businesses for decades is unlikely, but even Trump has suggested that the talks could be extended if he feels they are heading on the right trajectory.

But despite Trump's momentary attempt at diplomacy, he has continued to rattle the tariff saber, saying this week that he is a "Tariff Man" at heart who views the imposition of duties as a central component of his economic philosophy.

Former Australian Prime Minister Kevin Rudd, now president of the Asia Society Institute think tank, said in a speech on Wednesday that the 90-day window at least buys Trump time to survey the global landscape and decide on what next steps are prudent with regard to China.

Rudd also said that the timing of the Trump-Xi ceasefire will give both sides a chance to update the rest of the globe on their potential progress at the World Economic Forum in Davos, Switzerland, in January.

"China has sought to mobilize global sentiment in support of its efforts to uphold the global economic and environmental order," Rudd said. "A major Chinese announcement on trade liberalization across the board, not just on a bilateral basis with the U.S., could indeed take the world by storm."

--Editing by Brian Baresch and Alanna Weissman.