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Huawei Questions Constitutionality of U.S. Exclusion Policy

When in doubt, take your case to the courts. In a motion filed May 28 in Sherman, Texas, U.S. District Court, Huawei asked for a summary judgment on the constitutionality of the 2019 National Defense Authorization Act (NDAA). In addition, Huawei officials questioned the effectiveness of the company's addition to the Bureau of Industry and Security (BIS) Entity List.

BIS added Huawei and 68 non-U.S. affiliates to the Entity List May 15, then issued a narrow and temporary General License (GL) five days later (see **WTTL**, May 27, page 1). Section 889 of the 2019 NDAA prohibits the Defense secretary from procuring or obtaining, as well as entering into, extending or renewing a contract with an entity that uses telecom equipment or services produced by Huawei or ZTE.

Arguing the merits of its case, Huawei contends "Congress itself has unilaterally adjudicated the statute's application—with no opportunity for exercise of executive judgment, no executive consultation, no process for Huawei, no subsequent judicial review, and no opportunity for reconsideration. In other words, rather than allow the executive and the courts to perform their constitutional functions, Congress has excluded them and has itself unconstitutionally adjudicated Huawei's guilt and blacklisted it," the motion said.

Banning Huawei using cybersecurity as an excuse "will do nothing to make networks more secure. They provide a false sense of security, and distract attention from the real challenges we face," said Song Liuping, Huawei's chief legal officer, in a press conference the day after the filing. Song also addressed the company's addition to the Entity List. "This sets a dangerous precedent. Today it's telecoms and Huawei. Tomorrow it could be your industry, your company, your consumers," he said.

Trump's Tariffs Throw USMCA Deal into Uncertainty

Current trade politics have gone beyond the question of is this a long-term strategy, or simply a moment's whim? On the same day the administration formally started the clock

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on implementing the updated U.S.-Mexico-Canada (USMCA) agreement by notifying Congress of its intent, the White House said it was imposing tariffs on all Mexican imports to tide the flow of illegal migrants.

All this happened while VP Mike Pence was in Canada, meeting with Prime Minister Justin Trudeau. The day before the meeting, Trudeau introduced legislation to ratify the new NAFTA in his own parliament. In response, Pence said, "I can assure you that the President and I are working with members of the United States Congress to pass the USMCA and pass the USMCA this summer."

At press time, Mexican Foreign Minister Marcelo Ebrard was on his way to Washington to meet with Secretary of State Mike Pompeo to try to resolve this trade impasse. A summit is scheduled for June 5, Ebrard tweeted May 31. "The treatment of Mexico is unfair and has no economic sense for anyone," he added (via Twitter translation).

As usual, the president announced his policy first via Twitter. "On June 10th, the United States will impose a 5% Tariff on all goods coming into our Country from Mexico, until such time as illegal migrants coming through Mexico, and into our Country, STOP. The Tariff will gradually increase until the Illegal Immigration problem is remedied... at which time the Tariffs will be removed," he tweeted.

His tweets were quickly followed by a formal White House statement, explaining his supposed authority under the International Emergency Economic Powers Act (IEEPA) to impose the tariffs and the trajectory of the tariffs. "If the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in our sole discretion and judgment, the tariffs will be removed," he said.

If the crisis persists, however, the tariffs will be raised to 10% July 1. "Similarly, if Mexico still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory" into the U.S., tariffs will be increased to 15% Aug. 1, 20% Sept. 1, and to 25% Oct. 1, the White House said.

"Tariffs will permanently remain at the 25% level unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory. Workers who come to our country through the legal admissions process, including those working on farms, ranches, and in other businesses, will be allowed easy passage," the president said.

Democratic lawmakers were already reeling at the announcement of the clock to ratify the new NAFTA, since many have insisted on changes to the text, to strengthen enforcement and other changes. The Ways and Means trade subcommittee held a hearing on enforcement in the new trade deal May 22 (see **WTTL**, May 27, page 4).

"The current agreement does not adequately protect American workers and the environment, limits Congress' ability to address rising U.S. health care costs in the future, and fails to provide effective enforcement tools," Ways and Means Committee Chairman

Richard Neal (D-Ma.) said in response to the administration's letter. "The premature submission of a draft statement of administrative action has no impact on that outstanding work or the timeline moving forward," he added.

House Speaker Nancy Pelosi (D-Calif.) echoed Neal's sentiment. The action "indicates a lack of knowledge on the part of the Administration on the policy and process to pass a trade agreement," she added. "A new trade agreement without enforcement is not progress for the American worker, just a press release for the President," the speaker noted.

Lawmakers, Business Groups Denounce Potential Mexican Tariffs

Senate Finance Committee Chairman Chuck Grassley (R-Iowa) called the potential tariffs on all Mexican imports "a misuse of presidential tariff authority and counter to congressional intent. Following through on this threat would seriously jeopardize passage of USMCA, a central campaign pledge of President Trump's and what could be a big victory for the country."

"Donald Trump has no credibility when it comes to America's national security and no coherent plan when it comes to trade," Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) said. "The tariffs he's proposing are paid by American consumers, and the retaliation we should expect from Mexico will harm American workers."

Legal observers and business groups also responded quickly and unanimously to denounce the tariffs. Former Mexican trade negotiator Kenneth Smith Ramos pointed out that the tariffs would violate NAFTA as well as WTO commitments. "Considering that Mexico exports upwards of \$350 billion USD to the U.S., Mexico's retaliation against such a measure would be off the charts," he tweeted.

Georgetown University Law professor Jennifer Hillman questioned the legal authority to impose the tariffs at all. "Even IEEPA says Pres shall consult [with] Congress BEFORE exercising IEEPA authority 'in every possible instance' and IEEPA mostly speaks to blocking financial transactions and FDI [foreign direct investment]. And no matter what domestic law is used, these tariffs on Mexico are a total violation of MFN and our tariff bindings, so are illegal," she tweeted.

"Imposing tariffs on goods from Mexico is exactly the wrong move. These tariffs will be paid by American families and businesses without doing a thing to solve the very real problems at the border. Instead, Congress and the president need to work together to address the serious problems at the border," Neil Bradley, U.S. Chamber of Commerce executive VP and chief policy officer, noted.

"Last night's action to raise tariffs on all imports from Mexico was a dangerous and destabilizing move that will damage both Mexico and the United States. The President should reconsider the wisdom of this measure before it causes any real damage," National Foreign Trade Council (NFTC) President Rufus Yerxa said in a statement.

U.S., Japan to Accelerate Trade Talks

With one eye on the 2020 election clock and the other on a willing partner with whom he can chalk one-up for trade deals, President Trump is stampeding his way to a possible Tokyo-Washington trade pact on or before the June G20 meeting in Japan.

The U.S. administration appears inching closer to what it's demanding from Japan: access for U.S. beef, creation of jobs in the U.S. by Japanese automakers, and access by U.S. to both in Japan. The word came during a joint press availability May 27 with Japanese Prime Minister Shinzo Abe, who said he had given the go-ahead for "accelerated discussions" between Japanese Economy Minister Motegi and U.S. Trade Representative (USTR) Lighthizer.

"In September, President Trump and I agreed on a joint statement including auto and auto parts. Currently, based upon the joint statement of September, Minister Motegi and Ambassador Lighthizer are discussing and talking about this matter. So, we agreed to accelerate the talk as such, and that was the agreement I reached with President Trump," Abe told a press briefing.

In 2017, the U.S. had a \$68.9 billion trade deficit with Japan, the third-largest after China and Mexico. Trump's focus is to increase U.S. agriculture exports to Japan and increase automobile production and jobs in the U.S. He now has concessions on beef with more expected to follow (see **WTTL**, May 20, page 6). "Just over one week ago, U.S. beef gained full access to Japanese markets for the first time since 2003. We hope to have even more to announce on the trade very, very soon," Trump said.

More than a week before the heads of state were scheduled to meet, Trump extended the deadline for the start of auto tariffs on both Japan and the European Union (EU) by six months (see **WTTL**, May 20, page 3).

Japanese automaker Toyota plans to invest about \$13 billion between 2017 and 2021. Abe reiterated that since Trump came to office, "Japanese companies decided on new investment to the tune of \$24 billion to the United States, thereby creating 45,000 new jobs. [During] tax reform that President conducted — thanks to that, automotive and energy related to Japanese companies are making investments in Ohio, Pennsylvania, Michigan, Alabama and Kentucky, and others. They have decided to make new investments." These are key electoral states if the president is going to win a second term.

The prime minister seemed to imply that there would be an agreement when Trump returns for the G20 meeting in Osaka in June. "For the success of G20 Summit, U.S.-Japan cooperation is indispensable. I will continue to collaborate closely with President Trump," the Prime Minister said.

But the dialogue became both divisive and tense when Abe was asked by a reporter, whether since Japan has signed the Trans-Pacific Partnership (TPP), he would be constrained by that tariff arrangement. He ducked the question altogether, but Trump could barely contain his disdain for the multilateral deal.

“I wanted to add, though, that — very importantly — I have nothing to do with TPP. Okay? I’m not bound by anything that anybody else signs with respect to the United States. TPP would’ve destroyed our automobile industry and many of our manufacturers. We are not involved in TPP. So, what other countries agreed to is not binding at all on the United States,” the president argued.

When Trump came to office, he rejected all multilateral trade arrangements such as TPP and the Trans-Atlantic Trade and Investment Partnership (TTIP) that the Obama administration started, in favor of bilateral deals. Japan took a different road. Along with 10 partners, it signed the TPP and is bound by its tariff provisions.

Before departing Japan, Trump visited U.S. troops and applauded Japan’s decision to purchase 105 U.S. stealth bombers. The purchase would make Japan the largest owner of American stealth bombers by any ally. “In 2018, Japan was one of the world’s top purchasers of American defense equipment, and it has just announced its intent to purchase 105 brand-new F-35 stealth aircraft. Stealth because, the fact is, you can’t see them,” the president said.

U.S. Gets Lectured on WTO Stalemate

In a week where other government officials used farewell speeches to drop the mic, World Trade Organization (WTO) representatives May 28 heard an earful about the impending deadline to resolve the stalemate over the Appellate Body (AB). It all started when the U.S. once again said at a meeting of the WTO Dispute Settlement Body (DSB) that it was not in the position to support a proposal from 75 other WTO members calling for the start of the selection process to fill AB vacancies.

In his farewell speech at the DSB meeting, departing AB member Peter Van den Bossche lamented the increasing likelihood that “the current crisis” will not be resolved by Dec. 11, after which time the body will no longer be able to hear and decide new appeals. “One can predict with confidence that, once the Appellate Body is paralyzed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding. Why would WTO members still engage in panel proceedings if panel reports are likely to remain unadopted and thus not legally binding?” Van den Bossche said.

The WTO dispute settlement system “was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system,” he added.

At the same meeting, the U.S. blocked the EU’s first request for a panel to rule on U.S. antidumping and countervailing duties on imported ripe olives from Spain. Consultations in March failed to resolve the dispute, thus prompting the EU to request the establishment of a panel. The EU first requested WTO dispute consultations in January (see

WTTL, Feb. 4, page 6). In a tweet at the time, EU Trade Commissioner Cecilia Malmstrom called the duties “unjustified, unwarranted and go against [WTO] rules.”

In addition, China declined to appeal two previous panel rulings: one on China's administration of tariff rate quotas (TRQs) on imports of wheat, rice, and corn, and the other on Beijing's subsidies for agricultural producers (see WTTL, April 22, page 4). On the latter, China said it needed a “reasonable period of time” to implement the ruling; the U.S. said it is ready to work with China. The next DSB meeting is scheduled for June 24.

Ex-Im Board Raises Dollar Limit for Transactions

After all this time, let's hope they served breakfast. At its first meeting since July 2015, the newly confirmed Export-Import (Ex-Im) Bank board May 30 increased the dollar amount of short- and medium-term transactions eligible for individual delegated authority (IDA) to \$25 million from the previous limit of \$10 million.

The full Senate May 8 confirmed three Export-Import (Ex-Im) Bank board members, including a new Ex-Im president, restoring the quorum (see WTTL, May 13, page 4). Now fully functioning, the board formally replaced the Audit Committee with a new Risk Management Committee that Congress established in 2015 legislation and that has a larger scope of responsibility.

At the same time, the board formally approved Lisa Terry as chief ethics officer and Kenneth Tinsley as chief risk officer. Both officers were appointed in 2016, but could not be approved until the board met. Terry joined Ex-Im from the U.S. Office of Special Counsel and previously served as the bank's assistant general counsel for administration from 2006-2013 (see WTTL, Oct. 24, 2016, page 7). Tinsley joined Ex-Im in November 1979 and has been acting senior chief risk officer since January 2016.

“These roles are critical to carrying out the reforms of bank that were mandated under the 2015 charter. I am committed to fully reopening, reforming, and reauthorizing the bank so that we keep American taxpayers' interests paramount in executing Ex-Im's mission of growing jobs through exporting,” Ex-Im President Kimberly Reed said in a statement.

* * * Briefs * * *

SANCTIONS: OFAC May 28 issued Finding of Violation to State Street Bank and Trust Co. (SSBT) for violating Iran sanctions. Between January 2012 and September 2015, SSBT processed at least 45 pension payments totaling \$11,365.44 to retirement plan participant who was U.S. citizen with U.S. bank account, but who was resident in Iran. Bank voluntarily self-disclosed matter to OFAC.

FCPA: Jose Manuel Gonzalez Testino (Gonzalez) of Miami, dual U.S.-Venezuelan citizen, pleaded guilty May 29 in Houston U.S. District Court to violating Foreign Corrupt Practices Act (FCPA) for paying \$629,000 in bribes to former official of Venezuela's state-owned energy company, Petroleos de Venezuela S.A. (PDVSA), in exchange for favorable business treatment. He was arrested in

July in Miami (see **WTTL**, Aug. 6, 2018, page 7). Justice has charged 21 individuals in larger investigation of PDVSA bribery. Most recently, indictment against Rafael Enrique Pinto Franceschi (Pinto) of Miami and Franz Herman Muller Huber (Muller) of Weston, Fla., was unsealed in February (see **WTTL**, March 4, page 6). Pinto and Muller were sales representative and president of Miami-based PDVSA supplier, respectively.

ANTIBOYCOTT: Zurn Industries agreed May 20 to pay \$54,000 civil penalty to settle 27 BIS charges that it violated antiboycott regulations. Company allegedly failed to report receipt of request to engage in restrictive trade practice or foreign boycott from January 2011 through November 2014 during transactions with Qatar and UAE. Parent company Rexnord settled separate antiboycott charges in October 2011 (see **WTTL**, Nov. 14, 2011, page 4).

CURRENCY: Treasury in semiannual report May 28 again found no major trading partner met criteria for currency manipulation in 2018. At same time, department maintained “Monitoring List” of partners that “merit close attention to their currency practices,” including China, Germany, Ireland, Italy, Japan, Korea, Malaysia, Singapore and Vietnam. “Treasury will continue its enhanced bilateral engagement with China regarding exchange rate issues, given that the RMB has fallen against the dollar by eight percent over the last year in the context of an extremely large and widening bilateral trade surplus,” Treasury Secretary Steven Mnuchin said in statement. Commerce May 23 proposed to impose countervailing duties on countries that act to undervalue their currency (see **WTTL**, May 27, page 1).

STEEL PIPE: In 4-0 “sunset” vote March May 29, ITC said revoking antidumping and countervailing duty orders on imports of circular welded carbon-quality steel pipe from China would renew injury to U.S. industry. Commissioner Meredith Broadbent did not participate in reviews.

GLYCINE: In 5-0 final vote May 29, ITC found U.S. industry is materially injured by dumped imports of glycine from India and Japan and subsidized imports from China and India.

SECTION 232: As expected, administration May 28 asked Supreme Court to reject American Institute for International Steel (AIIS) and two members’ petition for writ of certiorari before judgment in Section 232 case. “Neither the magnitude of the tariffs, nor the fact that those tariffs affect importers and consumers, creates an exigent circumstance warranting the Court’s immediate intervention,” brief said. National Foreign Trade Council (NFTC) May 16 filed amicus brief in case (see **WTTL**, May 20, page 7). AIIS filed writ in April in advance of CAFC judgment on appeal. Two CIT judges in March upheld constitutionality of Section 232 steel and aluminum tariffs.

TRADE PEOPLE: United Steelworkers (USW) International President Leo Gerard will retire in mid-July, union announced May 29. Gerard, who has been in post since 2001, will be replaced by USW International Vice President Tom Conway, who has served since 2005. “Conway has led the charge on trade issues affecting these sectors, including the union’s efforts in trade enforcement. He also spearheaded the USW’s efforts in fighting to bring change to the nation’s trade and manufacturing policies,” USW said in announcement.