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Industry Ramps up Opposition to BIS Nominee

While BIS under secretary nominee Nazak Nikakhtar has been in an acting role for several months, members of the firearms industry “have serious reservations” about her nomination, considering the administration has yet to publish final rules on the transfer of U.S. Munitions List (USML) categories I-III (guns and ammunition) to Commerce jurisdiction.

Nikakhtar’s name was conspicuously absent from a committee vote in June on several other nominees (see **WTTL**, June 24, page 6). In an answer to Sen. Bob Menendez (D-N.J.) during her confirmation hearing on a question on 3-D gun blueprints and the firearms transfer, she said, “I am committed to working with every member of Congress.”

“It is likely industry will oppose her nomination if she comes up for a vote before the final rules are published. She is believed to be opposed to the reforms and working behind the scenes to block them. The rules should have been published four months ago. The industry’s patience on this issue has worn thin,” an industry executive told **WTTL**. Menendez in February put a “hold” on the transfers after receiving a 30-day formal 38(f) notice from State.

Another sticking point in Nikakhtar’s eventual confirmation may be the submitted but not yet public Section 232 report on auto imports, a congressional source told **WTTL**. Several senators expressed concern about that report at the hearing.

President Signals Huawei Breakthrough Without Specifics

If industry wants certainty on the status of Chinese trade and sanctions on Huawei, they’ll have to wait a little bit longer. Expectations of the meeting between the U.S. and Chinese leaders at the G20 meeting in Japan were high, with many expecting clarity, if

not a breakthrough. In remarks to the press at the end of the meeting June 28, President Trump said that U.S. companies would be able to sell to the Chinese company that the Bureau of Industry and Security (BIS) sanctioned in May, but at press time neither BIS nor the White House has released anything official or more specific.

BIS added Huawei and 68 non-U.S. affiliates to its Entity List May 15, effectively blocking all exports to the company (see **WTTL**, July 1, page 7). Five days later, BIS issued a narrow and temporary General License (GL), exempting transactions in four specific categories.

“I’ve agreed to allow them to continue to sell that product so American companies will continue. And they were having a problem. The companies were not exactly happy that they couldn’t sell because they had nothing to do with whatever was potentially happening with respect to Huawei. So I did do that,” Trump told reporters in Japan.

“U.S. companies can sell their equipment to Huawei. I’m talking about equipment where there is no great national emergency problem with it. But the U.S. companies can sell their equipment. So we have a lot of the great companies in, Silicon Valley and based in different parts of the country, that make extremely complex equipment. We’re letting them sell to Huawei,” he added.

However, by the end of the press conference, Trump seemed to hint that that easing of restrictions was still up for negotiation. “We agreed to leave that until the end. Huawei is a complicated situation. We agreed to leave that — we’re leaving Huawei toward the end. We’re going to see. We’ll see where we go with the trade agreement,” he said.

When reporters specifically asked him if the company was now removed from the Entity List, he hedged. “No, not at all. No, no. We’re going to be talking about Huawei, but we are going to be supplying equipment from our companies. Our companies make billions and billions of dollars’ worth of equipment. But we are not discussing Huawei with President Xi yet. I want to see — before we start getting into that, I want to see where we end up. We have to — we have a national security problem, which to me is paramount.”

Lawmakers and industry groups responded quickly to the president’s remarks. Sen. Marco Rubio (R-Fla.) suggested Congress could take action, tweeting: “If President Trump has in fact bargained away the recent restrictions on Huawei, then we will have to get those restrictions put back in place through legislation. And it will pass with a large veto-proof majority.”

“If President Trump has agreed to reverse recent sanctions against Huawei he has made a catastrophic mistake. It will destroy the credibility of his administration’s warnings about the threat posed by the company, no one will ever again take them seriously,” he added.

“The progress made today by President Trump and President Xi in Osaka is good news for the semiconductor industry, the overall tech sector, and the world’s two largest economies. We are encouraged the talks are restarting and additional tariffs are on hold and we look

forward to getting more detail on the president's remarks on Huawei," Semiconductor Industry Association (SIA) President & CEO John Neuffer said in a statement following the meeting.

USTR Targets More EU Products in Aircraft Dispute

In response to previous WTO rulings on European Union (EU) subsidies to Airbus, the U.S. Trade Representative (USTR) July 1 proposed a second list of \$4 billion worth of EU products "that could potentially be subject to additional duties in order to enforce U.S. rights."

The USTR in April proposed a list of \$21 billion worth of EU products to "which additional duties may be applied until the EU removes those subsidies" (see **WTTL**, April 15, page 5). The WTO Appellate Body (AB) confirmed March 28 that the U.S. provides subsidies to Boeing through tax concessions despite previous rulings in the long-standing dispute.

"In the event the Arbitrator issues its decision prior to completion of the public comment process on the supplemental list, the USTR may immediately impose increased duties on the products included in the initial list, and take further possible actions with respect to products on the supplemental list," USTR said in announcing the additional list. The supplemental list of 89 tariff subheadings includes cheese, olives, cherries, coffee, pasta and whiskey imported from any of 28 EU member countries.

As part of the investigation, USTR invited public comments on the proposed action, including: the specific products to be subject to increased duties; the level of the increase, if any, in the rate of duty; and whether increased duties on particular products might have an adverse effect upon U.S. stakeholders, including small businesses and consumers.

Administration Defends Constitutionality of Huawei Exclusion Policy

Trump administration lawyers are certainly getting practice defending U.S. policies in court. In a motion to dismiss filed July 3 in Sherman, Texas, U.S. District Court, the U.S. defended the constitutionality of the 2019 National Defense Authorization Act (NDAA) regarding its exclusion of Huawei and ZTE products.

Huawei requested a summary judgment in a motion filed in May (see **WTTL**, June 3, 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 the two companies.

U.S. lawyers took apart Huawei's major arguments against the act's provisions: that it is punitive and that it violates the Constitution's principles of due process and separation of powers. "That Section 889 furthers Congress's prophylactic purposes is clear: it serves to

protect the telecommunications systems of federal agencies, contractors, and grant and loan recipients against Chinese cyber-threats by regulating the extent to which those systems will incorporate telecommunications products that carry substantial risk of exploitation by the Chinese government,” the U.S. said in its motion.

“The statute does not constitute a ‘permanent blacklisting of Huawei,’ as Plaintiffs suggest,” U.S. lawyers added. “It prohibits the procurement of only those telecommunications products that constitute ‘substantial’ or ‘essential’ parts of any system and then, only equipment that can ‘route,’ ‘redirect,’ or ‘permit visibility into’ user data,” they argued.

“Huawei’s attacks on Section 889 as a violation of due process and separation of powers principles fare no better. Huawei’s due process argument is based on an erroneous standard—a purported rule against selective legislation—even though the Supreme Court has recognized the legitimacy of statutes that specifically identify and regulate parties or other subject matter,” the motion added. At press time, Huawei lawyers had not responded to the motion.

G20 Leaders Agree to Support Reform, Address Tensions

While most of the attention was focused on a much-anticipated meeting between the U.S. and Chinese presidents, the leaders of the G20 were in concert on the important issues of trade and investment. “Most importantly, trade and geopolitical tensions have intensified. We will continue to address these risks and stand ready to take further action,” the leaders noted in the final communique released June 29.

“We strive to realize a free, fair, non-discriminatory, transparent, predictable and stable trade and investment environment, and to keep our markets open. International trade and investment are important engines of growth, productivity, innovation, job creation and development,” the heads of state said.

As one would expect, the G20 trade and digital economy ministers who met in Japan three weeks earlier urged their respective leaders to deescalate trade tensions and collectively improve the trade and investment environment (see **WTTL**, June 17, page 2).

The leaders also reaffirmed their support for “the necessary reform” of the World Trade Organization (WTO) to improve its functions. “We agree that action is necessary regarding the functioning of the dispute settlement system consistent with the rules as negotiated by WTO members. Furthermore, we recognize the complementary roles of bilateral and regional free trade agreements that are WTO-consistent. We will work to ensure a level playing field to foster an enabling business environment,” the leaders added.

WTO Director-General Roberto Azevedo expressly welcomed the commitment to WTO reform. Speaking at the close of the summit, Azevedo said, “Leaders have again recognized the importance of the WTO by reaffirming their support for its necessary reform so its

functions can be improved. Importantly, the leaders also addressed the critical situation in the WTO dispute settlement system by agreeing that action is necessary regarding the functioning of the system consistent with the rules negotiated by WTO members.”

U.S. Requests WTO Consultations with India over Tariffs

Another day, another WTO dispute over retaliatory tariffs. The U.S. July 4 requested consultations with India over several tranches of tariffs the South Asian country imposed on U.S. goods in response to U.S. policy, including duties on steel and aluminum imports.

“India does not impose the additional duties measure on like products originating in the territory of any other WTO Member. India also appears to be applying rates of duty to U.S. imports greater than the rates of duty set out in India’s schedule of concessions,” the request noted.

India imposed the latest tranche of tariffs in response to the U.S. decision to remove the country from the Generalized System of Preferences (GSP) in May (see **WTTL**, June 10, page 9). In addition to India, the U.S. has initiated WTO dispute proceedings against similar actions taken by the China, the European Union, Turkey and Russia.

In January, the WTO Dispute Settlement Body agreed to the U.S.’ second request to establish a panel to rule on similar retaliatory duties Turkey imposed on certain U.S. imports. Also, the NAFTA partners ended further WTO proceedings when the U.S. lifted the steel and aluminum duties on imports from Canada and Mexico, and the two countries in turn lifted their countermeasures against U.S. imports.

Prior to Portal, Section 232 Exclusion Requests Stuck in Backlog

The process for adjudicating Section 232 product exclusion requests has created a backlog, requests are processed slower than expected and responses miss statutory deadlines, Commerce Inspector General’s office (OIG) found in an audit of one year of exclusion data released July 1 (OIG-19-017-M).

In June, Commerce launched an online portal to replace regulations.gov for exclusion requests, objections to exclusion requests, rebuttals and surrebuttals (counter-rebuttals) in connection with the steel and aluminum tariffs (see **WTTL**, June 10, page 10). The department created the portal to “streamline the exclusions process while enhancing data integrity and quality controls,” it said in the interim final rule.

Several factors contributed to the backlog and slow processing of exclusion request, including BIS’ underestimating of requests and the government shutdown, the OIG noted. “Prior to the implementation of the exclusion process, BIS estimated it would receive only 4,500 exclusion requests (and 1,500 objections) for both steel and aluminum tariffs,” it said. As of March 2019, firms have submitted more than 78,000 exclusion requests (or

more than 17 times the estimate), the report noted. During the government shutdown in December and January, the number of exclusion requests pending grew almost 19% (from almost 33,000 to more than 39,000 requests), it said.

Responses to many of those requests missed statutory deadlines. “Of requests submitted between March and October 2018, BIS has completed almost 60% without objections within 90 days. On the other hand, most requests with objections are not completed within the maximum 106-day period” specified in the September 2018 rule that added a rebuttal and surrebuttal procedure to the process.

* * * **Briefs** * * *

TRADE FIGURES: Merchandise exports in May fell 2.6% from year ago to \$140.8 billion, Commerce reported July 3. Services exports gained 1.5% to \$69.8 billion from May 2018. Goods imports grew 2.7% from May 2018 to \$217.0 billion, as services imports jumped 5.8% to \$49.2 billion.

EXPORT ENFORCEMENT: Los Angeles-area resident Yi-Chi Shih was found guilty June 26 after six-week trial in Los Angeles U.S. District Court of conspiracy to violate International Emergency Economic Powers Act (IEEPA) and 17 other charges for role in scheme to illegally obtain technology and integrated circuits with military applications and export to China without required license. Scheme involved defrauding U.S. company of “proprietary, export-controlled technology associated with its monolithic microwave integrated circuit (MMIC) design services,” criminal complaint noted. Chips allegedly were shipped to Chengdu GaStone Technology Company (CGTC), Chinese company on BIS Entity List. Shih and co-defendant Kiet Ahn Mai of Pasadena were arrested in January 2018 (see **WTTL**, Jan. 29, 2018, page 7). Mai pleaded guilty in December 2018 to smuggling and is scheduled to be sentenced Sept. 19.

MORE EXPORT ENFORCEMENT: Fla. residents John James Peterson and Brunella Zuppone were arrested June 26 and charged in Miami U.S. District Court with conspiracy to violate Arms Export Control Act (AECA) and attempts to illegally export thousands of AR-15 assault rifle parts to Argentine weapons trafficking organization without State licenses.

EVEN MORE EXPORT ENFORCEMENT: Indictment against Alex Yun Cheong Yue of South El Monte, Calif., was unsealed June 27 in Boston U.S. District Court on charges of illegally exporting cesium atomic clocks to Hong Kong in 2016 without Commerce license. Wai Kay Victor Zee of Hong Kong, along with his company, Premium Tech Systems, Ltd were also charged. Cesium atomic clocks are classified under ECCN 3A002 and controlled for anti-terrorism and national security reasons.

REBAR: CAFC July 2 affirmed CIT ruling on Commerce decision that company’s “stakes are clearly within the scope of an antidumping duty order covering rebar [steel concrete reinforcing bar] from China,” Circuit Judge Richard Taranto wrote for three-judge panel in *Quiedan Company v. U.S.* “There is no dispute that Quiedan’s stakes are made from rebar by cutting a long bar to a desired length and sharpening the result to a point at one end through stamping, followed by removal of burrs from the point,” he noted.

VENEZUELA: OFAC July 3 designated Cuban state-run oil import and export company Cuba-metals for continued importation of oil from Venezuela. At same time, agency delisted PB

Tankers S.p.A., which it designated April 12 for operating in Venezuela's oil sector (see *WTTL*, April 15, page 8). Following company's designation, PB Tankers terminated its charter agreement with Cubametales. "Likewise, PB Tankers took additional steps to increase scrutiny of its business operations to prevent future sanctionable activity," OFAC noted. Decision is "reminder that positive changes in behavior can result in the lifting of sanctions," Treasury Secretary Steven Mnuchin said in statement.

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