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Former Pentagon Official Tapped to be BIS Under Secretary

In the end, it was a surprise. President Biden July 15 nominated former Pentagon official Alan Estevez to be Bureau of Industry and Security (BIS) under secretary, ending months of rumors and speculation. While Estevez has little public record on export controls or China policy, observers note his level-headed temperament and long history of management and government service will make him a good leader for BIS.

> Estevez joined Deloitte Consulting as a national security strategy and logistics executive in June 2017 after a 36-year career with Defense. Most recently, he served as the principal deputy under secretary (acquisition, technology & logistics) from 2013 to 2017, serving as the Defense representative to the Committee on Foreign Investment in the U.S. (CFIUS) between 2012 and 2016.

"Alan led acquisition, contracting, and logistics support for multiple complex operations and today works with a range of clients to help innovate and transform their own capabilities," according to his LinkedIn bio. While a few other names had been rumored to be on the short list for the under secretary job, Estevez's most important qualification could be his silence.

"He's not going to say anything," one observer told WTTL. "He'll have a grace period," the observer added, but his job will be to distill the administration's larger policy view and implement the bigger picture, not dictate a specific policy agenda. Another source told WTTL that "his obviousness is that he should be confirmable."

Hong Kong Operations Face Risks, Agencies Advise

Why stop at one business advisory when two is better. Three days after the administration warned companies about doing business in Xinjiang, agencies July 16 warned firms of the

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growing risks of operating in Hong Kong, especially with the passage of the recent National Security Law (NSL). This new legal landscape "could adversely affect businesses and individuals operating in Hong Kong. As a result of these changes, they should be aware of potential reputational, regulatory, financial, and, in certain instances, legal risks associated with their Hong Kong operations," State, Commerce, Homeland Security and Treasury advised.

> The Biden administration July 13 updated its advisory on the risks for businesses with potential exposure in their supply chain to entities engaged in human rights abuses in Xinjiang (see related story, page 4).

"These risks fall into four categories: risks for businesses following the imposition of the NSL; data privacy risks; risks regarding transparency and access to critical business information; and risks for businesses with exposure to sanctioned Hong Kong or PRC entities or individuals," the agencies warned. At the same time, Treasury's Office of Foreign Assets Control (OFAC) added seven individuals, all deputy directors at China's Hong Kong liaison office, to its list of Specially Designated Nationals (SDN).

Chinese officials warned of possible retaliation. "The U.S. should adhere to international law and basic norms governing international relations, stop meddling in Hong Kong affairs in any form and stop interfering in China's domestic affairs. China will respond strongly to possible U.S. measures," Foreign Ministry Spokesperson Zhao Lijian told reporters.

Appeals Court Reverses CIT Decision on Section 232 Duties

In a case that is sure to cause a bit of whiplash in the trade world, the Court of Appeals for the Federal Circuit (CAFC) July 13 reversed a July 2020 Court of International Trade (CIT) ruling that Section 232 duties on Turkish steel are unlawful. The CIT found that the proclamation was made beyond the 90-day timeframe set in the statute and without the "procedurally proper finding" of national security concerns (see **WTTL**, July 20, 2020, page 2).

"The President did not depart from the Secretary's finding of a national-security threat; indeed, the President specifically adhered to the Secretary's underlying finding of the target capacity-utilization level that was the rationale for the predicate threat finding. Moreover, the President made the determination that further import restrictions were needed to achieve that level in a short period after the Secretary's finding and after the initial presidential action." Circuit Judge Richard Taranto wrote for the majority in *Transpacific Steel LLC v. U.S.*

"Nor did the President violate Transpacific's equal-protection rights in issuing Proclamation 9772. The most demanding standard that could apply here is the undemanding rational-basis standard. The President's decision to take one of a number of possible steps to achieve the goal of increasing utilization of domestic steel plants' capacity to try to improve their sustainability for national-security reasons meets that standard," Taranto added. Circuit Judge Jimmie Reyna disagreed with the panel's ruling. "The majority expands Congress's narrow delegation of authority, vitiating Congress's own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff," he wrote in his dissent.

In addition, Section 232's "legislative history shows that Congress intended, for good reason, to end the Executive Branch's historical practice of perpetually modifying earlier actions without obtaining a new report from the Secretary of Commerce and without reporting to Congress," Reyna added.

"It remains to be seen how this decision will impact other ongoing litigation. With respect to the challenges to duties on derivative steel and aluminum products, this may impact arguments around the timing of those duties. Separate from the timing issues, however, is the question of what constitutes a derivative product that can be covered by Section 232 duties," Lawrence Friedman of Barnes Richardson law firm wrote in a blog post.

Merkel, Biden Hash Out Energy Project, China Trade Deal

In their last meeting as heads of government, President Biden welcomed German Chancellor Angela Merkel to the White House July 15, affirming her advocacy for the transatlantic partnership and multilateral cooperation. Top of the agenda were cementing Russian security challenges, the Nord Stream 2 energy project and efforts to deal with China's rising influence.

> Citing the need to rebuild European relationships, the U.S. in May backed off imposing sanctions on a Russian company, its CEO Matthias Warnig and its corporate officers for construction of the Nord Stream 2 pipeline, which was 95% completed at the beginning of the Biden administration (see **WTTL**, May 24, page 4).

On the pipeline, a senior administration official told reporters the day before the visit that the disagreements have been put to bed. Biden's waiver in May created the diplomatic space for behind-the-scenes ongoing discussions with both State and National Security playing a major role. This point was reiterated by both leaders at a joint press conference after the meeting.

"We stand together and will continue to stand together to defend our Eastern Flank allies at NATO against Russian aggression…while I reiterated my concerns about Nord Stream 2, Chancellor Merkel and I are absolutely united in our conviction that Russia must not be allowed to use energy as a weapon to coerce or threaten its neighbors," Biden said.

"And today, we're launching a climate and energy partnership to support energy security and the development of sustainable energy, sustainable energy technologies, and emerging economies, including in Central Europe and Ukraine," Biden added.

Merkel said that although she and Biden came differently to this issue, they remained united and committed to prevent Russian dissension. “We’ve come to different assessments as to what this project entails. But let me say very clearly: Our idea is and remains that Ukraine remains a transit country for natural gas; that Ukraine, just as any other country in the world, has a right to territorial sovereignty, which is why we’ve become engaged and continue to be engaged in the Minsk Process,” Merkel reiterated.

> “We will be actively acting should Russia not respect this right of Ukraine that it has as a transit country. So Nord Stream 2 is an additional project and certainly not a project to replace any kind of transit through Ukraine. Anything else would obviously create a lot of tension. And we’re also talking about how we can actually make this very clear together,” she said.

At the White House, Merkel expanded on Biden’s caution at the G7, NATO and the European Union (EU)-U.S. Summit. She said that free democratic societies should stand up for human rights and make their voices heard when China tramples both. But she also “talked about the many facets of cooperation and also of competition with China, be it in the economic area, be it on climate protection, be it in the military sector and on security.”

On the EU-China trade agreement, Merkel said, “China, in many areas, is our competitor; that trade with China needs to rest on the assumption that we have a level playing field so that we all play by the same rules, have the same standards. That, incidentally, was also the driving force behind the EU-China Agreement on trade that they abide by the core labor norms” of the International Labor Organization (ILO).

“And then there are interests, obviously — sometimes divergent interests, but sometimes common interests. But we also have, obviously, areas where American companies compete with European companies, and we have to accept that. But I think, basically, the rules as to how we deal with China ought to rest and do rest on our shared values,” Merkel added.

Administration Updates Business Risk Advisory on Xinjiang

The Biden administration July 13 updated its advisory on the risks for businesses with potential exposure in their supply chain to entities engaged in human rights abuses in the Xinjiang Uyghur Autonomous Region (Xinjiang). The previous administration issued the original advisory in July 2020.

“Given the severity and extent of these abuses, including widespread, state-sponsored forced labor and intrusive surveillance taking place amid ongoing genocide and crimes against humanity in Xinjiang, businesses and individuals that do not exit supply chains, ventures, and/or investments connected to Xinjiang could run a high risk of violating U.S. law,” the updated advisory cosigned by State, Commerce, Homeland Security, Labor, Treasury and the U.S. Trade Representative (USTR), said.

The European Commission also published “a Guidance on due diligence to help EU companies to address the risk of forced labour in their operations and supply chains, in line with international standards." The EU Guidance also "provides an overview of EU and international instruments on responsible business conduct that are relevant for combatting forced labour," the commission noted.

> Just days earlier, BIS added to its Entity List 14 Chinese entities that "have enabled Beijing's campaign of repression, mass detention, and high-technology surveillance" in Xinjiang (see **WTTL**, July 12, page 1). This is in addition to the five other Xinjiang-based companies added in June.

The Senate the next day passed by voice vote the Uyghur Forced Labor Prevention Act (S. 65), which calls for sanctions on those responsible for forced labor in Xinjiang or engaged in importing goods produced with forced labor. "No American corporation should profit from these abuses. No American consumers should be inadvertently purchasing products from slave labor," Sen. Jeff Merkley (D-Ore.) said in a statement.

Chinese officials continued to denounce both the business advisory and the legislation. "The true intention of the U.S. moves to hype up this issue is to undermine Xinjiang's prosperity and stability and deprive the people in Xinjiang of the right to subsistence, employment and development," Foreign Ministry Spokesperson Zhao Lijian told reporters July 15.

Report on Auto Imports Finally Gets Green Light

It just took two years and an election. Commerce July 6 issued the Section 232 report on the effect of autos and auto parts on U.S. national security that the previous administration wrote in February 2019 but never released to the public or to Congress. Still outstanding are four other 232 reports, on uranium ore, titanium sponge, transformers and their components, and vanadium.

During her eventually ill-fated confirmation hearing, former acting BIS under secretary Nazak Nikakhtar answered questions on the report, in which she participated (see **WTTL**, June 10, 2019, page 3). At the time, Sen. Pat Toomey (R-Pa.) called it "highly objectionable" that the report had not yet been made public and said it was hard to understand how to judge her credentials without seeing the report.

"On the basis of the facts considered in this investigation, the Secretary finds that the impact of excessive imports on the domestic automobile and automobile parts industry and the serious effects resulting from the consequent displacement of production in the United States is causing a "weakening of our internal economy [that] may impair the national security," the report notes.

In a sentence that could have been written in 1984, the secretary wrote: "The United States' automobile industry's technological leadership in innovation is quickly diminishing." The report continued: "Significant import penetration over the course of the past three decades has severely weakened the U.S. automotive industry, as Americanowned production of automobiles and automobile parts has been reduced by imports and the domestic manufacturing base has weakened." With the release of the auto report, Toomey doesn't quite say "I told you so." Instead, "a quick glance confirms what we expected: The justification for these tariffs was so entirely unfounded that even the authors were too embarrassed to let it see the light of day," Toomey said in a statement. "It was wholly unacceptable that the previous administration defied federal law and refused to release this report," he added.

G20 Countries Agree to Global Tax Plan

The Group of 20 (G20) leading economies July 11 became the latest supporters of the 15% global minimum tax plan first approved by the G7 and the Organization of Economic Cooperation and Development (OECD). The "new" approach could put fights over digital service taxes (DSTs) in the rearview mirror.

> Republican lawmakers who are key to approving and writing U.S. tax policy raised major objections to the global tax plan (see **WTTL**, July 12, page 2). A central part of the minimum tax agreement was for Europe to give up its push for a digital tax, for which both the Biden administration and several Republicans have argued. Apparently, they both got what they wanted. At the G20 press conference, Treasury Secretary Janet Yellen agreed that they did.

"So, the agreement that we've reached in the OECD framework discussion calls on countries to agree to dismantle existing digital taxes that the United States has regarded as discriminatory and to refrain from erecting similar measures in the future. So, it's really up to the European Commission and the members of the European Union to decide how to proceed, but those countries have agreed to avoid putting in place in the future and to dismantle taxes that are discriminatory against U.S. firms," Yellen said.

"Our mission with respect to international tax, one of the most important parts of that mission is trying to design a global system that will arrest the race to the bottom in corporate taxation, will put tax shelters out of business, and enable all of us to fairly tax these corporations so that we get the revenues that are needed for everyone, including the corporations themselves, to benefit from being in an environment that's well equipped with modern infrastructure and supports," the secretary said.

The most important thing, she said, is to stop country-shopping by corporations to escape paying their fair share of taxes. "We need to put an end to corporations shifting capital income to low tax jurisdictions, and to accounting gimmicks that allow them to avoid paying their fair share. We need to ensure that the globalized economy does not continue to shortchange our middle classes so that it can remain open and free, thereby encouraging economic growth and business certainty. This race to the bottom must end, and working together we can ensure that it does."

On July 6, days before leaving for the G20 meeting, Yellen spoke with Europe's digital czar and top privacy chief Margrethe Vestager. According to a department readout, "the secretary discussed international taxation issues and welcomed the shared goals of the United States and European Union to make the international tax system more equitable and to end the global race to the bottom on corporate taxes."

* * * Briefs * * *

EXPORT ENFORCEMENT: Chinese citizen Ge Songtao, chairman of Shanghai Breeze Technology, was sentenced July 14 in Jacksonville, Fla., U.S. District Court to 42 months in prison for conspiracy to unlawfully smuggle military-style inflatable boats, with Evinrude MFE military outboard motors, to China from September 2018 through October 2019. Ge pleaded guilty in November (see **WTTL**, Nov. 9, 2020, page 5). Ge, Yang Yang of Jacksonville and two others, including Yang's husband, active-duty U.S. Navy officer, and Chinese national, were indicted in October 2019. All four were charged with conspiring to submit false export information and to fraudulently attempt to export articles from U.S. Yang and Zheng Yan previously were sentenced to time served. Trial of remaining co-defendant Fan Yang is scheduled to begin Aug. 2.

MORE EXPORT ENFORCEMENT: Indictment against former Corning scientist Ji Wang was unsealed July 7 in Rochester, N.Y., U.S. District Court on charges of illegally exporting technical data regarding fiber laser manufacturing to China. On two trips to China in 2017, Wang "brought with him a laptop that contained technology pertaining to the DARPA project that was controlled for export to China for national security reasons" under ECCN 6E001, indictment noted.

USTR: Senate Finance Committee July 13 approved nominations of Sarah Bianchi and Jayme White to be deputy USTRs, in 27-1 and 25-3 votes, respectively. "The Senate should swiftly vote to confirm [nominees] so that they can get to work for the American people, especially as our nation continues to recover from an unprecedented health and economic crisis," Committee Chair Ron Wyden (D-Ore.) said in statement.

VENEZUELA: OFAC July 12 issued Venezuela General License (GL) 40, authorizing certain transactions involving exportation or reexportation of liquefied petroleum gas to Venezuela through July 8, 2022. For purposes of GL, term liquefied petroleum gas refers "a group of hydrocarbon gases, primarily propane, normal butane, and isobutane, derived from crude oil refining or natural gas processing. These gases may be marketed individually or mixed. They can be liquefied through pressurization (without requiring cryogenic refrigeration) for convenience of transportation or storage. The definition excludes ethane and olefins," OFAC said in FAQ.

VIETNAM: More than 70 business groups July 14 urged USTR not to impose Section 301 tariffs on Vietnamese imports due to currency manipulation. "Imposing Section 301 tariffs at a time when Treasury recently stated Vietnam is not manipulating its currency would undermine efforts to develop a more coherent framework for financial diplomacy. Such a move would leave foreign governments understandably confused — and less likely to heed Washington's advice," groups wrote. Previous administration punted retaliatory action in January but said country's policies "are unreasonable and burden or restrict U.S. commerce" (see **WTTL**, Jan. 18, page 1).

RUSSIA: In Federal Register July 19 BIS adds six Russian companies operating in technology sector "that support Russian intelligence services" under recent EO, notice said. OFAC designates entities at same time. In April Biden administration imposed additional financial sanctions on Russia in response to at least three aggressive actions (see **WTTL**, April 19, page 1).

HAPPY BIRTHDAY: In advance of anniversary of European court decision, 20 tech industry groups July 14 urged Commerce Secretary Gina Raimondo and European Justice Commissioner for Didier Reynders to "swiftly ensure an agreement for secure transatlantic dataflows that in turn will strengthen trade, investment, technological cooperation, and reinvigorate the transatlantic partnership," groups wrote. Two officials continued talks on U.S.-EU Privacy Shield during G7 meetings in June (see **WTTL**, June 21, page 5).

RASPBERRIES: "When you're being stalked by an angry mob with raspberries, the first thing to do is to release a tiger." In Section 232 report on individually quick frozen (IQF) and non-IQF raspberries, ITC found that "reducing imports would have increased revenue (i.e., gross sales) for Washington processors. The non-IQF market faced faster-growing import competition than the IQF market during the period of analysis," report released July 9 said. USTR requested report in April 2020 after industry group cited unfair practices (see **WTTL**, April 20, 2020, page 5).

STEEL: CAFC July 15 affirmed-in-part, reversed-in-part, and remanded CIT decision on Commerce's final determination in antidumping duty investigation covering welded line pipe from South Korea. "The evidence and arguments before us call into question whether Commerce's application of the Cohen's d test to the data in this case violated the assumptions of normality, sufficient observation size, and roughly equal variances associated with that test," Circuit Judge William Bryson wrote for three-judge panel in *Stupp Corporation v. U.S.* "It seems likely that Commerce's application of the Cohen's d test had a material impact on the results of the less-than-fair-value investigation in this case," he added.

NOMINATIONS: President Biden July 13 announced intent to nominate Lisa Wang to be Commerce assistant secretary for enforcement and compliance. She has been partner with Picard, Kentz and Rowe LLP since 2016, and previously served as senior attorney in Office of Chief Counsel for Trade Enforcement and Compliance at Commerce, and as assistant general counsel in USTR's office. Michael Wessel, member of U.S.-China Economic and Security Review Commission, called nomination "another sign of commitment of Biden to stand up for workers and domestic industry" in tweet.