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WIPO Whistleblowers Describe Technology Transfers

Former officials at the World Intellectual Property Organization (WIPO) got their day in court Feb. 24, or at least Congress, to air their complaints against Director-General Francis Gurry. In what one observer called political theater, members of three House Foreign Affairs Committee subcommittees were regaled with stories of illegal technology transfers to North Korea and Iran, secret meetings with Beijing and Moscow and retaliation against whistleblowers.

> Of most concern, but not fully resolved, was whether the transfer of high-end computer equipment to Pyongyang, which Gurry authorized, violated United Nations (UN) sanctions or U.S. export control laws.

The equipment, including a HP server, a printer worth $14,000, a 24-terabyte disk array and a SonicWall firewall, was "transferred ostensibly in order to support the North Korean patent office in its efforts to modernize its technology," former WIPO Deputy Director James Pooley explained at the hearing. When asked if this equipment could be bought legally in the U.S. or on Amazon, Pooley responded, "Yes, I suppose it could have been purchased in the U.S., but you can't buy it to send to North Korea. If you did, you'd go to prison for a long time."

In 2012, the UN Sanctions Committee found that the technical assistance to North Korea and Iran did not violate UN resolutions. UN lawyers "determined that when you parse the Security Council sanctions very carefully, the kind of equipment here was not radiation hardened or otherwise of the sort that would necessarily apply. There are lawyers who might disagree, but that was the finding," Pooley said.

U.S. Triumphant in Solar Panel Dispute with India

A World Trade Organization (WTO) dispute-settlement panel found in favor of the U.S. in a years-long dispute with India over the origin of solar cells and modules used in India's

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ramp-up of its domestic solar energy program. India's Jawaharlal Nehru National Solar Mission (NSM), which seeks to increase India's solar capacity to 100,000 megawatts by the year 2020, requires that 10% of the solar capacity target be built with domestically manufactured solar modules. NSM also offers up to Rs 1 crore (approximately $14,500) subsidy to solar developers who source from local manufacturers.

According to U.S. Trade Representative (USTR) Michael Froman, U.S. solar exports to India have fallen by more than 90% since India put the content requirement into place (see **WTTL**, Feb. 17, 2014, page 2). In the ruling circulated Feb. 24, the WTO panel found that India's local content requirement violated Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMs) and Article III:4 of the General Agreement on Tariffs and Trade. India will appeal the ruling, Tarun Kapoor, India's joint secretary in the Ministry of New and Renewable Energy, told The Economic Times.

> Environmental groups blasted the ruling as harming efforts to decelerate climate change. "The WTO ruling is a step in the wrong direction, away from the climate progress that the global community committed to achieve in December's Paris climate agreement," said Ilana Solomon, director of the Sierra Club's Responsible Trade Program, in a statement. "We cannot afford to let decades-old, over-reaching trade rules trump policies that can create new green jobs and accelerate the transition to 100% clean energy."

"The United States strongly supports the rapid deployment of solar energy around the world – including in India. But discriminatory policies in the clean energy space in fact undermine our efforts to promote clean energy by requiring the use of more expensive and less efficient equipment, raising the cost of generating clean energy and making it more difficult for clean energy sources to be competitive," Froman said following the ruling.

The U.S. initiated dispute proceedings at the WTO in February 2013. When the dispute could not be resolved through consultations with India, the WTO Dispute Settlement Body agreed in April 2014 to establish a panel to rule on the U.S. claims. A final report was issued to the U.S. and India in late August 2015, but both countries requested the release of the report as they tried unsuccessfully to reach a negotiated settlement.

U.S., EU Race Election Clock to Conclude TTIP Talks

Despite the political reality of the upcoming presidential election, negotiators for the European Union (EU) and U.S. say they are speeding up their efforts in order to reach an agreement on the Transatlantic Trade and Investment Partnership (TTIP) before President Obama's term expires.

Chief EU negotiator Ignacio Garcia Bercero confirmed to the press Feb. 26 that the 12th round of talks taking place in Brussels had been extended another week when public procurement and geographical indicators will be discussed. The negotiators' goal is to

have a draft deal ready by July, but several sticking points remain. Chief among the sticking points is the European Commission's goal of replacing the investor state dispute settlement (ISDS) system for an investment court system proposed by EU Trade Commissioner Cecilia Malmstrom (see **WTTL**, Nov. 16, page 8). Under the proposed court, the EU and U.S. would appoint 15 judges and an appeals panel comprised of six judges. How judges will be picked remains a point of contention.

> Critics of the existing ISDS say that private companies have too much power to sue governments. TransCanada is currently suing the U.S. government through ISDS for $15 billion over Obama's rejection of the Keystone XL pipeline.

"We still have a lot of work to do, but if we can sustain our current intensified engagement we can finish negotiations this year," said chief U.S. negotiator Dan Mullaney. Two more rounds of negotiations will be held before the self-imposed July deadline. Mullaney expressed confidence that a robust version of TTIP will be passed, telling the press, "We now have proposed texts in the vast majority of the negotiating areas."

Verification of Iran Deal Could Pose Challenges, GAO Says

While administration officials are hailing the success of the Iran nuclear deal, the International Atomic Energy Agency (IAEA) could face challenges in monitoring and verifying Iran's implementation of the Joint Comprehensive Plan of Action (JCPOA), according to a preliminary Government Accountability Office (GAO) report made public Feb. 23 (GAO-16-417).

These challenges include "(1) the inherent challenge of detecting undeclared nuclear materials and activities, (2) potential access challenges to sites in Iran, and (3) safeguards resource management challenges," the report said. GAO said it is not making recommendations at this time and expects to issue a final report later this year.

Despite these challenges, the IAEA issued its first quarterly report Feb. 26, hailing Iran's cooperation with agency inspectors. "The Agency continues to verify the non-diversion of declared nuclear material at the nuclear facilities and locations outside facilities where nuclear material is customarily used (LOFs) declared by Iran under its Safeguards Agreement. Agency activities under the Additional Protocol, to ascertain that there are no indications of undeclared nuclear material or activities in Iran commenced on 16 January 2016," the agency wrote.

Within the challenges, the GAO report found some positives. IAEA "has improved its capabilities in detecting undeclared activity. For example, according to U.S. government officials and national laboratory representatives, IAEA has adapted its inspector training program to focus on potential indicators of undeclared activity, beyond the agency's traditional safeguards focus on nuclear materials accountancy," it said. Budget constraints might also pose challenges, GAO found. While officials from State and Energy's National Nuclear Security Administration (NNSA) said that they are confident that IAEA would

obtain any funding it would need, "IAEA officials expressed concerns about the reliability of sustained extra-budgetary contributions for IAEA JCPOA activities due to possible donor fatigue in the long run, as IAEA will be conducting certain JCPOA verification activities for 10 or more years," the report said.

Opponents of the Iran nuclear deal were quick to respond to the report. "This preliminary report raises real concerns about putting our national security interests into the hands of a multilateral organization that – although doing its best to meet overburdening new requirements – does not have the capacity, in terms of staff and funding, nor the authorities, in terms of compelling Iran to comply, in order to meets its charge of monitoring and verifying Iran's commitment under the JCPOA," said Sen. Robert Menendez (D-N.J.) in a statement.

Experts Clash over China's Non-Market Economy Status

Chinese officials believe that a provision buried in Article 15 of China's Accession Protocol to the World Trade Organization (WTO) requires that the communist country be granted market economy status effective Dec. 11, 2016, at which point WTO members can no longer use surrogate costs and prices in antidumping cases. However, experts testifying before the U.S.-China Economic and Security Review Commission Feb. 24 differed in their interpretation of the text and whether China should be granted such status.

> Article 15(a)(ii) of the Protocol reads: "The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail." However, Article 15(d) reads: "In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession."

Gary Hufbauer, senior fellow at the Peterson Institute for International Economics, stated that though the U.S. could take a "case-by-case" position on which Chinese prices or costs meet market conditions, it would be better for the U.S. to not stand in the way of China being recognized as a "full-fledged market economy." Denying China full market economy status would throw a "very large irritant" into U.S.-China trade relations for "modest benefit to U.S. industries that initiate antidumping proceedings."

Alan Price, a partner at Wiley Rein LLP in Washington, took a decidedly different position, stating that China does not meet the requirements of market economy status under U.S., Canadian or European Union (EU) law and therefore should not be granted an unearned status and the benefits that come with it.

Expanding on Price's point, Bernard O'Connor, a trade lawyer based in Brussels, said, "The EU considers by law, black and white, China to be a non-market economy. It is written into our trade law." In O'Connor's estimation, Article 15(d) clearly states that China must prove itself to be a market economy, and therefore, it is not up to either the

U.S. or EU to grant market economy status unilaterally. The U.S., he added, should make its position known to the EU so that the EU's governing body does not grant market economy status to China. This would strengthen the U.S. and EU's position should litigation come before the WTO.

"The Canadians have already changed their law from granting automatic market economy status to not granting it and essentially aligning themselves with the U.S.," Price responded. But China has succeeded in getting New Zealand, Singapore, Malaysia and Australia to grant it market economy status, the former three in 2004 and the latter in 2005, he noted.

> "Under the law right now in the United States a company and can come in, an industry sector can come in and say 'we, ourselves, are not a market economy' and therefore get a separate determination. The last time anyone has come forward on this issue in the United States was in 2006 Lined Papers [case] and the Commerce Department decisively decided that China is not a market economy," Price said.

"The Chinese government has not come forward since then, a Chinese company has not come forward since then to ask that question, Chinese industrial sector has not come forward. China could come forward today if they thought they would meet the standards. They have not come forward in the U.S. and Britain. They came forward I think in…"

"- 2003 in the European Union," interjected O'Connor, who added that China's attempts to be granted market economy status by the EU were rejected in 2008 and 2011.

"The bottom line is China recognizes that it does not meet the standards that the U.S. has, that Canada has, other countries have to be considered a market economy. Therefore, the only argument is because this one sentence of this one provision of the protocol, which leaves the rest of Article 15 in place," said Price.

"Does that give [China] a legal right even though [they're] not really entitled and [they] don't meet the standards? To me, I'm happy to litigate the standards because they are in the wrong here because they have not followed through on a whole bunch of their commitments, they have not functioned as a market economy, and I think we have a reasonable case under the accession agreement to defend the U.S. position."

The experts agreed that China's status should be determined by the WTO. Hufbauer predicted that should the U.S. adopt a "mix and match" approach, China will initiate WTO litigation. In his estimation, the WTO Appellate Body would not rule until 2018.

Obama Tells Governors He's 'Optimistic' About TPP

President Obama is "cautiously optimistic" that Congress will pass the Trans-Pacific Partnership (TPP), he told the National Governors Association Feb. 22. Because labor

unions are not with him on his signature trade deal, Obama told the governors during their visit to the White House, he will have to "depend on a set of strong, pro-trade Democrats" and "Republicans, who historically, at least have been in favor of the free market and in favor of trade."

Obama said Senate Majority Leader Mitch McConnell (R-Ky.) and House Speaker Paul Ryan (R-Wisc.) support the trade deal, although they have "some concerns along the margins of the trade deal."

> Three days later, the U.S. Coalition for TPP announced that it expanded its leadership to include the American Farm Bureau Federation, the Business Roundtable, the Emergency Committee for American Trade, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

"The TPP is a strong agreement that will eliminate barriers to U.S. exports and set in place standards that will improve American competitiveness in a region where the United States has lost market share," the Coalition said in a statement. "It is critical that America move forward as soon as possible to open markets and level the playing field with our TPP partners."

Obama maintained that it is "indisputable" that the American worker will benefit from the implementation of TPP, which was signed in New Zealand Feb. 3. "Right now, there are 18,000 tariffs - taxes, essentially - on American goods and services that would all be eliminated. So if you've got a rancher in Colorado, they can sell beef to Japan in ways that they cannot do right now, and that is a huge market for them. If you are interested in selling cars in Southeast Asia, right now, oftentimes, they're going to slap a 70% tax on the value of the car, which means you're not competitive. We're going to bring those down," Obama told the governors.

Public Citizen, which staunchly opposes TPP, pushed back on the administration's 18,000 tax cuts figure. The nonprofit consumer rights advocacy group claims that the U.S. only sold goods to the five TPP nations that do not already have free trade agreements with the U.S. in less than 7,500 of the 18,000 categories. Of those 7,500 categories, nearly 50% had sales totaling less than $500,000, the group said in a statement.

But Obama told the governors that critics of TPP are really arguing against old trade deals. "I keep on explaining to them, look, I can't do anything about what may have happened 40, 30 years ago, but I can do something about what's going on right now. And, by the way, because Mexico and Canada are signatories to this deal, it actually does strengthen labor and environmental protections within NAFTA, which previously had been one of the main complaints of critics," he said.

Vice President Joe Biden traveled to Mexico Feb. 25 as head of the U.S. delegation for the third meeting of the U.S.-Mexico High Level Economic Dialogue (HLED). Representatives from State, Commerce, Treasury, Transportation, Agriculture and the White House's

Office of Information and Regulatory Affairs were present for the talks which focused on: modern borders, energy, workforce development, regulatory cooperation, regional and global leadership, and stakeholder engagement.

* * * Briefs * * *

ENTITY LIST: BIS in Federal Register Feb. 23 added eight persons in UAE to Entity List. Four additions "have been involved in supplying U.S.-origin items to persons designated by the Secretary of State as Foreign Terrorist Organizations (FTOs)," BIS said. Other four "prevented the successful accomplishment of end-use checks by BIS officials," notice said. Agency also removed nine entities in Ireland and UAE based on information provided by entities in their appeal request and further review conducted by End-User Review Committee. At same time, BIS revised six entries in Iran, Armenia, Greece, India, Pakistan and UK.

ALUMINUM: House Ways and Means Chair Kevin Brady (R-Texas) Feb. 24 asked ITC to conduct Section 332 investigation on global competitiveness of U.S. aluminum industry, including unwrought and wrought aluminum products. "A healthy and growing aluminum industry is not only important to our economy, but is also vital for our national defense," Brady wrote.

OFAC: CGG Services S.A., formerly known as CGG Veritas S.A. (CGG France), agreed Feb. 22 to pay $614,250 to settle OFAC charges of violating Cuba sanctions in 2010 and 2011. Company and U.S. affiliate allegedly exported spare parts and other equipment to three vessels in Cuba's territorial waters. In addition, Venezuelan subsidiary allegedly engaged in five transactions involving "processing of data from seismic surveys conducted in Cuba's Exclusive Economic Zone benefiting a Cuban company," OFAC said. CGG France did not voluntarily self-disclose violations, agency noted.

MORE OFAC: Halliburton Atlantic Limited (HAL), Cayman Island subsidiary of Halliburton Energy Services, Inc., agreed Feb. 25 to pay $304,706 to settle OFAC charges of violating Cuba sanctions in 2011. HAL allegedly exported goods and services in support of oil and gas exploration and drilling activities in Cabinda Onshore South Block oil concession in Angola. Cuba Petroleo, state-owned Cuban company also known as Cupet, held 5% interest in Concession, OFAC said. HAL voluntarily self-disclosed violation. Company "cooperated fully with OFAC to expeditiously resolve this matter and believes it took reasonable steps to comply with all applicable regulations," Emily Mir, Halliburton spokesperson, wrote in email to WTTL.

FALSE CLAIMS: Four import companies and their owners agreed Feb. 22 to pay $3 million to settle government complaint in Pittsburgh U.S. District Court under False Claims Act. Suit claimed their companies engaged in scheme to evade antidumping duties on 15 shipments of small-diameter graphite electrodes from China from December 2009 to March 2012. Ameri-Source International Inc. admitted it falsely declared imported cargo from China as being graphite rods greater than 16 inches in diameter. Ameri-Source Specialty Products Inc., Ameri-Source Holdings Inc., owners Ajay Goel and Thomas Diener, and related importer, SMC Machining LLC, "caused and conspired in the misrepresentation to evade duties," Justice said. Whistleblower Graphite Electrode Sales Inc. will receive approximately $480,000 as its share of settlement.

ASEAN: State Department Senior Advisor David H. Thorne will lead American Innovation Roadshow to Indonesia, Vietnam and Philippines March 2-11. Roadshow is one of first activities

under U.S.-ASEAN Connect (see **WTTL**, Feb. 22, page 8). Traveling with Thorne will be U.S. multinational companies, financial investors, and successful early stage U.S. companies.

WTO: WTO General Council Feb. 24 announced slate of new names to chair WTO bodies: Harald Neple (Norway), General Council; Xavier Carim (South Africa), Dispute Settlement Body; Irene B.K. Young (Hong Kong, China), Trade Policy Review Body; Hamish McCormick (Australia), Council for Trade in Goods; Gustavo Miguel Vanerio Balbela (Uruguay), Council for Trade in Services; Modest Jonathan Mero (Tanzania), Council for TRIPS; Christopher Onyanga Aparr (Uganda), Committee on Trade and Development; M. Shameem Ahsan (Bangladesh), Committee on Balance of Payments Restrictions; Inga Ernstone (Latvia), Committee on Budget, Finance and Administration; Héctor Casanueva (Chile), Committee on Trade and Environment; Daniel Blockert (Sweden), Committee on Regional Trade Agreements; Atanas Atanassov Paparizov (Bulgaria), Working Group on Trade, Debt and Finance; Luis Enrique Chavez Basagoitia (Peru), Working Group on Trade and Transfer of Technology; Esteban Conejos (Philippines), Preparatory Committee on Trade Facilitation; and Mame Baba Cisse (Senegal), Dispute Settlement Body Special Session.

CUBA: Working-level representatives from U.S. and Cuba held technical meeting in Havana Feb. 22-23 to "exchange information and best practices related to preventing cybercrime and online fraud, including in the areas of pharmaceutical fraud and illicit narcotics," State said in release. Participants also discussed "legal framework for investigating and penalizing cybercrime," it said.

PORK: U.S. pork producers can now ship certain raw and frozen pork products to South Africa, National Pork Producers Council (NPPC) announced Feb. 26. In January, Obama administration threatened to withdraw South Africa's benefits under Africa Growth and Opportunity Act (AGOA) but delayed effective date until mid-March (see **WTTL**, Jan. 18, page 6). "NPPC is pleased that South Africa has followed through with a commitment to open its market to U.S. pork. Now, we can sell safe, high-quality and affordable U.S. pork to more than 50 million new consumers," said NPPC President Dr. Ron Prestage in statement.

TRADE ENFORCEMENT: President Obama signed Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) Feb. 24. Legislation "represents an ambitious upgrade in our government's trade enforcement capabilities," noted lengthy White House fact sheet on trade enforcement record. Touted accomplishments include aggressively winning cases at WTO, highest antidumping and countervailing duties in years, labor rights enforcement, stepping up Customs inspections and increased funding for trade enforcement. In seeming coincidence, Senate Finance Committee will hold hearing March 3 to examine implementation of existing free trade agreements.

JAGUAR: Split Court of Appeals for Federal Circuit affirmed Feb. 2 CIT decision in support of Customs ruling denying refunds to Ford for adjusted estimated duty payments in *Ford Motor Company v. U.S.* "All of Ford's entries have now liquidated, and by filing a protest Ford has challenged the merits of those entries before Customs," wrote Appellate Judge Timothy Dyk for two of three-judge panel. "Section 1581(a) will be available for Ford's protest of its 2006 entries when Customs acts on that protest, which Customs has said it will do upon resolution of this appeal," he added. In dissent, CAFC Judge Pauline Newman said "procedures appear to be irregular." She noted that Ford overestimated value of Jaguar imports. "Indeed, the government does not dispute the merits of Ford's entitlement, after six years of this litigation. On the unanimous holding that Ford is not barred from receiving the refund, the appropriate judicial role is to order the refund, and close the case," she wrote.

GARLIC: CIT Judge Leo Gordon denied motion Feb. 11 for preliminary injunction from garlic importer to block Customs from requiring single transaction bonds (STBs) for imports because of insufficiency of continuous bond and potentially large duties that might be due. In addition, he chastised attorneys for plaintiff, International Premier Trading. "The court must add an additional consideration in the balancing of the equities. In this action the court has perceived a lack of candor on the part of counsel for Plaintiff," Gordon wrote (slip op. 16-13). "Despite representing the other plaintiffs in recent bond enhancement litigation…,counsel for Plaintiff in two conference calls and one hearing before the court maintained what the court believed was a feigned ignorance about the underlying facts behind Customs' decision to require the additional bonding for entries of garlic from the PRC," he stated. Plaintiff's attorney was Robert T. Hume, Hume & Associates, of El Prado, New Mexico.

BYRD AMENDMENT: In unusual three-judge review, CIT rejected Feb. 10 another constitutional challenge to Continued Dumping and Subsidy Offset Act of 2000 (CDSOA). Judges denied claims by Barden Corporation that it was denied due process protection because it didn't get share of Byrd payments under foreign acquisition provision in law. "The court determines that the acquisition provision of the CDSOA is supported by a rational basis and therefore satisfies the equal protection guarantee of the Constitution. The court determines that Barden lacks standing to challenge the CDSOA on due process retroactivity grounds and also lacks standing to assert claims relating to FYs 2010 and 2011," wrote CIT Judge Leo Gordon for himself, Chief Judge Timothy C. Stanceu and Senior Judge Gregory W. Carman (slip op. 16-12).

PERU: USTR Feb. 26 requested first verification under U.S.-Peru Trade Promotion Agreement (PTPA) that January 2015 timber shipment from Peru to U.S. complied with Peruvian forestry laws. Request based on "public reports that recent shipments by Oroza may contain timber products illegally harvested in Peru," USTR wrote. House Ways and Means Ranking Member Sander Levin (D-Mich.) called action "welcome step," but noted "much further work urgently needs to be done to ensure that Peru meets its obligations under its existing trade agreement." Sen. Ron Wyden (D-Ore.), who asked for action, said in statement he was "pleased that the United States is for the first time using these tools to stop trade in stolen timber from Peru."

JAPAN: Asian Export Control Seminar in Tokyo Feb. 23-25 assumed "heightened sense of urgency" given North Korea's recent nuclear and rocket tests, according to Jason Prince, partner at Holland and Hart, who attended conference. In opening remarks, Japan's State Minister of Economy, Trade and Industry Junji Suzuki pointed to tests as "examples of why Asian and other countries must redouble their collective efforts to ensure defense technology and hardware does not fall into the hands of North Korea's military," Prince wrote in email to WTTL.

EX-IM BANK: Ex-Im Bank Director of Global Business Development for Africa Rick Anguioni traveled to Angola Feb. 18 for meetings with government and banking officials in that country. U.S. and Angola signed memorandum of understanding in 2014. Since then, bank has helped Angola purchase Boeing aircraft and two U.S.-origin firetrucks.