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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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UK Issues Guidance on Controls on Cybersecurity Items

The United Kingdom's Export Control Organisation (ECO) issued guidance Aug. 10 on what items are controlled under its cybersecurity regulations and what's not controlled. Faced with many of the same industry complaints as U.S. regulators, the ECO has attempted to make it clear how controls implementing Wassenaar Arrangement rules on intrusion software products will be applied (see **WTTL**, Aug. 3, page 1).

> "The controls do not apply to intrusion software itself; instead they have been deliberately designed to apply to the tools for interacting with intrusion software and to related 'technology'," the advice states. "There are exemptions for software that is generally available for retail purchase and for software and technology that is in the public domain. Where an item is controlled a licence will only be required for export outside the EU, and a special licence applies for exports to Australia, Canada, Japan, New Zealand, Norway, Switzerland and the USA," it adds.

The guidance advises exporters to be aware of license exemptions, General Software Note (GSN), and General Technology Note (GTN), before considering specific controls. "Where items meet these exemptions there is no need to consider control text," it says.

"The first important point to note is that 'intrusion software' itself is not controlled. Rather, related items specially designed to interact with intrusion software in the ways specified are controlled; and 'technology' for the 'development'/'production'/'use' of those items, or for the 'development' of intrusion software itself, is controlled," the ECO advises. This means "equipment and software control entries 4A005 and 4D004 apply to items such as malware command and control servers, malware build tools, and software to use or serve exploits, rather than the actual malware binaries or exploits," it says.

Divided CAFC Upholds ITC's "Induced Infringement" Order

In a rare en banc ruling, a divided Court of Appeals for the Federal Circuit (CAFC) Aug. 10 reversed an earlier divided three-judge panel and upheld the International Trade Commission's (ITC) interpretation of "induced infringement" in the enforcement of a Section 337 patent-infringement case. In an ironic turnabout-is-fair-play twist, the majority

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opinion, backed by six CAFC judges, was written by Appellate Judge Jimmie Reyna, who wrote the dissent in the previous ruling, while the dissenting opinion, supported by four judges, was written by CAFC Judge Kathleen O'Malley, who wrote the majority opinion in the first case. At issue in *Suprema v. ITC* is an ITC Section 337 ruling involving biometric fingerprint scanners from Korea (see **WTTL**, Dec. 23, 2013, page 3).

> The scanners needed separate software that did not come with the device to violate one of the patents. The commission found that the exporter did not make or sell this software but instead shipped each scanner with a "software development kit" that could be used for developing custom programs that control scanner functions.

The ITC also found that the exporter, Suprema, Inc., "willfully blinded" itself to the infringing actions of the importer, Mentalix, Inc., and induced Mentalix to infringe the patent of the petitioner, Cross Match Technologies, Inc. The commission then issued a limited exclusion order. In 2013, a three-judge CAFC panel reversed the ITC, but after Cross Match sought the en banc review of the decision, the court vacated that decision.

"The Commission's interpretation is consistent with the statutory text, for reasons we have already suggested. Induced infringement is one kind of infringement, and when it is accomplished by supplying an article, the article supplied can be an 'article that infringes' if the other requirements of inducement are met," Reyna wrote.

"Liability for inducement must be predicated on a finding of direct infringement. Yet direct infringement commonly occurs after inducement," he wrote (citations omitted). "Liability for inducement nevertheless attaches as of the time of the inducing activity, provided that direct infringement eventually occurs," he explained.

"The Commission's interpretation recognizes that the acts necessary for induced infringement, including acts of direct infringement, may not occur simultaneously at the time of importation. In many cases, such acts cannot occur at the time of importation. In that context, the Commission's interpretation that Section 337 grants it authority to prevent importation of articles that have been part of inducement as an unfair trade act is consistent with the statutory phrase 'articles that infringe'," he added.

"For nearly 35 years, the Commission has embraced its Congressional grant as bestowing authority to investigate and take action under Section 337 based on induced infringement," Reyna noted. At least since 1980, the ITC has determined that inducement could be remedied by an exclusion order, he noted. "Congress has not upset the Commission's consistent interpretation of Section 337. Indeed, Congress introduced the current statutory language in 1988, after the Commission had adopted this interpretation," he added.

In her 30-page dissent, which was longer than Reyna's 27-page opinion, O'Malley contended that 19 U.S.C. Section 1337 "unambiguously fails to provide the Commission with the authority the majority endows on it." She disagreed with the majority's reliance on the *Chevron* doctrine to give deference to the ITC's interpretation of the statute. O'Malley also cited the 2014 Supreme Court ruling in *Limelight Networks, Inc. v. Akamai Techs, Inc.*, as linking induced infringement to direct infringement.

"The language of the statute is unambiguous—the Commission lacks the power under Section 1337(a)(1)(B)(i) to enter an exclusion order on the basis of infringement of a

method claim when the underlying direct infringement occurs post-importation," O'Malley asserted. "There is simply no evidence of any pre-1988 Commission practice equivalent to the Commission's actions here," she added. "Finally, we must not forget that there is a forum that can provide an appropriate remedy for allegations of induced infringement of method claims based on post-importation direct infringement: district courts," O'Malley noted.

> While joining O'Malley's dissent, CAFC Judge Timothy Dyk issued a separate dissent to emphasize "how starkly the Commission's theory of induced infringement differs from its own past practice." He noted that in past inducement cases inducing instructions were imported alongside an article that was ultimately used to directly infringe.

Court Hearing Challenges ITC's Ruling on Digital Trade

The International Trade Commission (ITC) may have gotten bad luck of the draw in the panel of Court of Appeals for the Federal Circuit (CAFC) judges who heard a challenge Aug. 11 to its effort to block the transmission of digital models of teeth that it found to be patent-infringing under Section 337 of the Tariff Act. Two members of the three-judge panel, CAFC Chief Judge Sharon Prost and Judge Kathleen O'Malley had joined in a strong dissent just the day before in a CAFC ruling in *Suprema, Inc. v. ITC*, that sustained the expansion of the ITC's authority to find "induced infringement" (see related story page 1). The third judge, Pauline Newman, had sided with the ITC in that case.

> During the oral arguments, all three judges questioned the ITC's authority to issue a cease-and-desist order against the digital transmission from Pakistan of a system for aligning teeth and creating 3D models when there was no physical "good" or "article" crossing the border. Align Technology, Inc., brought the original 337 case against ClearCorrect Operating, LLC and ClearCorrect Pakistan (Private), Ltd.

ClearCorrect's attorney, Michael Myers, of McClanahan Myers Espey in Houston, argued that the transmission of data was not a tangible good and Congress has not granted the ITC authority to regulate such transfers. He said that authority belongs to the Federal Communications Commission. Align still has the opportunity to take its case to a district court, he said. "Align will have its day in court," he said. He also noted O'Malley's dissent in *Suprema*, to which she replied, "A dissent doesn't get you very far."

The CAFC judges got tougher in their questioning of ITC Attorney Advisor Sidney Rosenzweig, who latched on to the court's day-old ruling in *Suprema* as supporting the premise that ITC jurisdiction covers contributory infringement that is not tied to the simultaneous import of an article. He called the claim that the FCC has jurisdiction over these transfers "a complete red herring." Rosenzweig cited the Supreme Court's 2009 ruling in *Eurodif,* an antidumping case involving uranium enrichment services, as supporting the application of trade law to a service.

Align's attorney, Stephen Kinnaird of Paul Hastings, argued that the act gives the ITC broad authority to protect trademarks and patents. He disagreed with some amicus briefs about the impact the ITC ruling would have on the Internet and e-commerce. Internet providers are immune from prosecution for the content they carry, he argued. The case,

ClearCorrect Operating v. ITC, has drawn a half-dozen amicus briefs from organizations taking opposite sides in the debate over the ITC's jurisdiction, some raising concerns about the extension of its reach and others supporting efforts to block infringing digital communications. Among those filing briefs were Nokia, Electronic Frontier Association, Business Software Alliance, Association of American Publishers and the Motion Picture Association of America.

Swiss Jump Gun to Lift Sanctions on Iran

Fear that the international consensus to maintain sanctions on Iran may crumble after adoption of the P5+1 nuclear agreement with Tehran appears to be partially warranted. One of the first signs of the lost consensus came Aug. 12 when the Switzerland's Federal Council agreed to lift some sanctions that had been suspended since January 2014 as part of the original deal at the start of the talks. The Council "decided to lift the ban on precious metals transactions with Iranian state bodies, as well as the requirement to report trade in Iranian petrochemical products," a Swiss announcement said.

> The Swiss move comes as several European countries reportedly are already planning trade missions to Iran in anticipation that trade sanctions would be eased. In contrast, continuing non-nuclear U.S. trade sanctions are keeping American firms from joining the parade.

Switzerland has also ended the requirement to report the transport of Iranian crude oil and petroleum products as well as insurance and reinsurance policies related to those transactions. It raised by tenfold the threshold values for reporting and licensing obligations related to money transfers from and to Iranian nationals.

"Today's decision by the Federal Council underlines its support for the ongoing process to implement the nuclear agreement, and its confidence in the constructive intentions of the negotiating parties. The Federal Council also wishes to signal that Switzerland's positioning with respect to Iran, which was developed and maintained over a number of years, should be used to promote a broad political and economic exchange with Iran," the announcement stated.

"In recent decades, Switzerland has pursued a consistent, neutral and balanced policy with regard to Iran. In part due to its protecting power mandate for the USA, it has always been committed to dialogue and to keeping communication channels open. At the same time, Switzerland has always defended its own values and views. Today Switzerland is perceived in Iran as a reliable and credible discussion partner," it added.

Meanwhile, a World Bank report Aug. 10 said lifting sanctions "will have a significant impact on the world oil market, the Iranian economy and Iran's trading partners." Once Iran returns fully to the global market, its could produce a million barrels of oil a day, which could lower oil prices that already are near six-year lows by $10 a barrel.

"The Bank's report estimates that exports from Iran will eventually increase, too, by about US$17 billion, which is about 3.5% of its GDP. Britain, China, India, Turkey and Saudi Arabia are among the countries most likely to see the largest rise in post-sanctions trade with Iran. Foreign direct investment may increase to about US$3 billion a year, double the current rate but still lower than its peak in 2003," the World Bank said.

USTR Gets Mixed Advice on South Africa's AGOA Treatment

At a public hearing Aug. 7, U.S. Trade Representative (USTR) officials heard arguments both against and for South Africa's eligibility for preferential tariff treatment under the African Growth and Opportunity Act (AGOA). The out-of-cycle review of South Africa's eligibility was required by the Trade Preferences Extension Act of 2015.

> Four industry groups participated in the hearing, including two agricultural organizations, a security association and a consumer advocacy group. In public comments and written testimony, representatives from the pork and poultry industries cited South Africa's import restrictions in advocating against the country's eligibility, while the security group argued against a pending "forced localization" bill.

The National Pork Producers Council's (NPPC) written comments noted South Africa's "harsh and unjustifiable import restrictions on U.S. pork to prevent diseases for which there is a negligible risk of transmission from U.S. product." It said pork "should be the poster child for why South Africa's eligibility has come under this scrutiny."

Withdrawing its eligibility from AGOA "is the only action that will draw the attention of high-level officials to the anti-trade policies being enforced by government agencies. If total withdrawal of eligibility is not under consideration, we urge that South Africa's eligibility be limited substantially by removing significant products from its lengthy list of eligible items," NPPC wrote.

The National Chicken Council referred to South Africa's 1999 antidumping action against U.S. poultry imports. "Under international law standards, the preferred method of determining whether a product is dumped is to compare the price of the product sold at export with the price of comparable product sold in the home market of the exporter. Had South Africa applied that preferred methodology, there would have been no determination of dumping," the group wrote.

The Security Industry Association (SIA), which represents firms offering home and industry security systems and services, cited a pending South African law that it claims will "restrict foreign ownership of security firms operating in South Africa to a minority share." The bill "provides that foreign-owned private security firms, including companies that supply, manufacture, install and distribute equipment to the private security industry, will be forced to sell at least 51 percent of their South African businesses to South Africans, in what is often referred to as a 'forced localization' measure," SIA said in its written testimony.

> Passage of the bill "would be in direct violation of the provisions of AGOA and, absent any correction, could be considered grounds for the exclusion of South Africa from participation," SIA noted.

Only the consumer group Public Citizen argued for the country's eligibility, citing patent reform efforts and the availability of affordable medicines. "It would be unconscionable for the U.S. government to use its influence against another country's lawful efforts to protect its people's health," the group said in its written comments. "Any such pressure, inducement or persuasion undermines longstanding U.S. policy and, if successful, would lead to preventable suffering and death," it added.

China's Currency Moves Add Pressure for Legislation

Under the heading of be careful what you wish for, China's decision to move the renminbi (RMB) closer to market values has led to depreciation of the currency. The U.S. and other major trading countries have pressed Beijing for years to allow the currency to float under the assumption that a market-based rate would lead to its appreciation. To some, it wasn't a surprise that the opposite might happen.

> The economic slowdown in China and in emerging markets where currencies have already depreciated has prompted some economists to say the RMB was overvalued. In May, the International Monetary Fund (IMF) said it was no longer undervalued (see **WTTL**, June 1, page 1). "The new mechanism for determining the central parity of the Renminbi announced by the PBC appears a welcome step as it should allow market forces to have a greater role in determining the exchange rate," an IMF spokesman said Aug. 11.

The slower economy and lower exports were among the reasons cited for the Bank of China's decision to revalue the currency. China has also lost some competitive edge against countries with lower labor costs such as Vietnam. In addition, the RMB's depreciation comes after significant depreciation of currencies in Brazil, Mexico and Malaysia.

Regardless of the economic impact of the change in the Chinese currency, the political fallout could be seen when Congress returns in September from its August recess and deals with the still pending Customs enforcement bill. The Senate version includes provisions that could make the alleged manipulation of the Chinese currency subject to countervailing duty remedies. It also puts pressure on U.S. negotiators to demand stronger anti-currency-manipulation rules in the Trans-Pacific Partnership (TPP).

"Today's news that China has yet again lowered the value of its currency is another harsh reminder that we cannot afford to sit idly by as China refuses to play by the rules; any negotiations on the Trans-Pacific Partnership must prioritize combating currency manipulation by our foreign competitors," said Sen. Rob Portman (R-Ohio) in a statement. "I fought to include bipartisan language in the Trade Promotion Authority to address currency manipulation on behalf of Ohio workers, and the bill includes two principal negotiating objectives that explicitly call on the Administration to address currency manipulation through our ongoing trade negotiations," he said.

"Although some analysts have suggested that today's move is a step in the direction of a truly market-based exchange rate for the Chinese RMB, it is important to note that in many other respects, China is increasingly intervening in its stock market and other markets," said Rep. Sander Levin (D-Mich.), ranking member of the House Ways and Means Committee, in a statement. "There is reason to be skeptical of believing that the largest devaluation of the Chinese currency in over two decades is merely about moving to a market-based exchange rate," he added.

"In view of suggestions that additional countries like China might become party to a TPP agreement, and that we need to use TPP as a key opportunity to write the rules of trade for the 21st Century, this action highlights the need to include a strong and effective obligation on currency manipulation in TPP, and to include a provision to impose countervailing duties to address currency manipulation in the Customs legislation that is expected to be negotiated in a House-Senate conference in September," Levin said.

* * * Briefs * * *

FCPA: Vicente E. Garcia, former executive at U.S. subsidiary of German software provider SAP, agreed Aug. 12 to pay SEC $92,395 to settle charges of violating FCPA. Garcia and others offered to pay bribes to two Panamanian government officials and paid bribes of at least $145,000 to another senior official to secure software license sales of approximately $3.7 million to various government agencies, SEC said. He also pleaded guilty in San Francisco U.S District Court to conspiracy to violate FCPA. Sentencing is set for Dec. 16, 2015.

TRADE PEOPLE: Former Justice attorney Ryan Fayhee has joined Baker & McKenzie's compliance and investigations practice as partner in Washington office. He was at Justice for 11 years, most recently as assistant U.S. attorney in Northern District of Illinois. Fayhee previously served as National Export Control Coordinator, principal Justice attorney overseeing export control and embargo investigations and prosecutions.

STEEL: AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, SSAB Enterprises, LLC, Steel Dynamics, Inc., and United States Steel Corporation filed countervailing duty petitions Aug. 11 at ITA and ITC against hot-rolled steel flat products from Brazil, Korea and Turkey and antidumping petitions against certain hot-rolled steel flat products from Australia, Brazil, Japan, Korea, Netherlands, Turkey and United Kingdom.

DIAMOND SAWBLADES: In 5-0 "sunset" vote Aug. 7, ITC said revoking antidumping duty order on diamond sawblades and parts from China would renew injury to U.S. industry. Commissioner F. Scott Kieff did not participate in this review.

HYDROFLUOROCARBON: In 6-0 preliminary vote Aug. 7, ITC found U.S. industry may be injured by allegedly dumped imports of hydrofluorocarbon blends and components from China.

SANCTIONS: Navigators Insurance Company agreed Aug. 6 to pay $271,815 to settle 48 OFAC charges of violating U.S. sanctions. Between May 2008 and April 2011, Navigators and its London branch "issued global protection and indemnity (P&I) insurance policies that provided coverage to North Korean-flagged vessels and covered incidents that occurred in or involved Iran, Sudan, or Cuba—some of which led to the payment of claims," OFAC said. Company voluntary self-disclosed apparent violations, agency added.

OFAC: Schlumberger Oilfield Holdings, Ltd. (SOHL), wholly owned subsidiary of oilfield services company Schlumberger Ltd., received Finding of Violation from OFAC Aug. 7 for alleged violations of Iran and Sudan sanctions. SOHL faces no additional penalties because it agreed in March to pay more than $232 million in penalties under plea agreement with Justice for facilitating illegal transactions and engaging in trade with Iran and Sudan in 2004 and 2010 (see **WTTL**, March 30, page 5).

EXPORT ENFORCEMENT: Majid Iranpour Mobarekeh was sentenced July 29 in Oklahoma City U.S. District Court to 51 months in prison followed by three years' supervised release for illegally exporting firearm shell casings to Iran in July 2014. He pleaded guilty in February.

MORE EXPORT ENFORCEMENT: Sam Rafic Ghanem, naturalized U.S. citizen born in Lebanon, was sentenced Aug. 12 in Greenbelt, Md., U.S. District Court to 18 months in prison followed by three years' supervised release for attempting to illegally export firearms parts and accessories, to Lebanon in 2013. Federal jury convicted Ghanem, who owned Washington Movers, Inc., freight forwarding business in District Heights, Md., in May after five-day trial (see **WTTL**, May 11, page 9). Articles included 9mm semi-automatic pistols; .40 caliber semi-automatic pistols; AR-15 .223 caliber semi-automatic rifles; and combat optic gun sights.

EDITOR'S NOTE: In keeping with our 50-week publishing schedule, there will be no issue of ***Washington Tariff & Trade Letter*** on Aug. 24. Our next issue will be Aug. 31.