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North Korea Taken Off List of Terrorist Countries

The Bush administration Oct. 11 formally ended North Korea's designation as a state-sponsor of terrorism following the signing of a new agreement to verify its denuclearization efforts. After President Bush in June notified Congress of his intent to end Pyongyang's terrorist status, the Bureau of Industry and Security (BIS) said it would amend the Export Administration Regulations (EAR) to remove North Korea from Country Group E. BIS officials, however, did not return calls asking when the EAR rules would be amended (see **WTTL,** July 7, page 3).

> The rescinding of North Korea's terrorist status is "effective immediately," State Spokesman Sean McCormack announced. "The D.P.R.K. remains subject to numerous sanctions resulting from its 2006 nuclear test, its proliferation activities, its human rights violations, and its status as a communist state," he added. [**Editor's Note**: Copy of State fact sheet on remaining sanctions on North Korea will be sent to subscribers on request.]

Even after the EAR is revised, little change is expected in trade with North Korea. "North Korea will still remain one of the most sanctioned countries in the world in terms of U.S. law," Acting Assistant Secretary of State Patty McNerney told a press briefing where the change in North Korea's status was announced. "In fact, all exports by the United States remain subject to licensing by the Commerce Department, as well as many prohibitions from the missile standpoint, the nonproliferation of nuclear weapons standpoint," she said.

In July, BIS said, "North Korea is currently a member of Country Groups D:1, D:2, D:3, D:4, and E:1. In response to the formal rescission of North Korea's designation as a state sponsor of terrorism, the Department of Commerce would remove North Korea from Country Group E:1, but North Korea would likely retain membership in all four 'D' Country Groups." In the one-year period from August 2007 to July 2008, BIS reviewed 20 license applications for North Korea. It approved 13, denied one, and returned without action six.

Court Vacates ITC Exclusion Order for Qualcomm Chips

The Court of Appeals for the Federal Circuit (CAFC) Oct. 14 vacated and remanded to the International Trade Commission (ITC) its limited exclusion order (LEO) barring the imports of certain cell phones containing Qualcomm communications chips that infringe a patent held by Broadcom. The appellate court ruled that the commission exceeded its legal authority in crafting its remedy under Section 337 of the Trade Act. While ruling in favor of Qualcomm

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and 16 cellphone manufacturers and service providers on the LEO issue, the court upheld the ITC's judgment that Qualcomm had infringed Broadcom's '983 patent on several points. The CAFC said it affirmed the ITC's claim construction and rejected Qualcomm's broader understanding of 'different' in the context of claim 1 of the '983 patent. The court "affirms the ITC's finding that the '983 Patent is not invalid" as well as its determination "of no direct infringement by Qualcomm," it said "However, because the ITC misapplied the standard for induced infringement, this court vacates and remands on infringement," the court ruled.

> When it issued its LEO in the Qualcomm case, the ITC tried to respond to cellphone industry concerns that a broad general exclusion order (GEO) against imports containing the infringing chip would cripple the industry. The three-judge CAFC panel, however, said Section 337 allows the use of an LEO only against importers that were named respondents in a 337 case and who had been found to be infringing the subject patent.

A general exclusion order had to be used if the commission determined other imports needed to be blocked to prevent circumvention of an exclusion order. "If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO by satisfying the heightened burdens of sections 1337(d)(2)(A) and (B)," the court ruled.

"Broadcom appears to have made the strategic decision to not name downstream wireless device manufacturers and to not request the ITC to enter a GEO," the CAFC said. "Broadcom also chose to forego the burden of proving the extra statutory requirements for a GEO. Based on those choices, Broadcom does not stand in the best position to attempt to blur the clear line drawn by the statute between LEOs and GEOs," it added. "On remand, the Commission can reconsider its enforcement options," the court advised.

The court's rejection of the ITC's induced infringement finding is based on its ruling in *DSU Med. Corp. v. JMS Co.,* which was issued after the ITC made its initial determination in the Qualcomm case. In *DSU,* the court "clarified en banc that the specific intent necessary to induce infringement 'requires more than just intent to cause the acts that produce direct infringement. Beyond that threshold knowledge, the inducer must have an affirmative intent to cause direct infringement'," it said, quoting the DSU ruling. "Although thought to be proper at the time, the approach adopted by the ITC is improper under this court's decision in *DSU.*"

In addition to Qualcomm, firms appealing the ITC ruling were Kyocera Wireless Corporation, Motorola, Samsung Electronics Corporation, LG Electronics Mobilecomm U.S.A., Inc., Sanyo Fisher Co., T-Mobile USA, AT&T Mobility (formerly Cingular Wireless), Sprint Nextel, Palm, Pantech Wireless, Pantech Co., Ltd., Pantech & Curitel Communications, Inc., UT Starcom, High Tech Computer Corporation, Shenzhen Huawei Communication Technologies Co., Research in Motion Limited and Research in Motion Corporation, Foxconn International Holdings Ltd., and Casio Hitachi Mobile Communications Company, Ltd.,

BIS Disregarded Explanation in Settlement, Marysol Contends

Marysol Technologies, Inc., of Clearwater, Fla., has agreed to pay a $180,000 civil fine in a settlement with the Bureau of Industry and Security (BIS), but it contends the administrative settlement process is unfair and the agency refused to listen to its explanation of how the violations that BIS charged occurred. The settlement resolved BIS allegations that on nine occasions Marysol exported optical surgery equipment to China, India, Russia and Belarus without approved licenses.

The violations were "not intentional at all," Marysol President Daniel Bar Joseph told WTTL. "I think it was more than an honest mistake, it was a mistake of the Department of Commerce. The regulations are incomplete or misleading," he argued. "Based on their specifications, it was very vague and their specification was misleading," he said. Bar Joseph said it is very technical, and he sent is explanation to the BIS. "They didn't even care about it, they didn't

read anything I sent to them," he complained. The BIS Charging Letter claimed that "on six occasions from on or about December 4, 2003, until on or about April 7, 2006, Marysol engaged in conduct prohibited by the Regulations when it exported items subject to the Regulations and classified under Export Control Classification Number (ECCN) 6A005 (Lasers, components, and optical equipment), including laser resonator modules, module cavities, and components or parts for resonator modules and module cavities, from the United States to the People's Republic of China (PRC) without the export licenses required." Similar charges were made about three exports that went to Belarus, India and Russia.

> "I am selling medical equipment, and I am violating the law," Bar Joseph told WTTL. "They sent a delegation to my customers in China in 2006. They found it was a medical end use, and gave me an export licence. Now we must pay $180,000, for a company that makes less than $100,000 a year," he added. Bar Joseph told WTTL that only through personal financial sacrifice would his company be able to stay in business. BIS agreed to allow Marysol to pay the fine over a one-year period, starting with a $30,000 payment in 30 days and five more payments of $30,000 each every 60 days.

"I don't think they care about industry, they only care to collect money," Bar Joseph said of BIS. "I sent them a letter that I have doubts about the charging letter. The only thing I had back from them is a message on my phone that said 'now because you are wasting our time, you must pay more.' It was a lawyer from the Commerce Department," Bar Joseph said. "That cost me an additional $15,000 in law fees," he claimed. "It was done in two days, and was all to show how much money they have collected," Bar Joseph said.

Supreme Court Denies Petition to Review FCPA Conviction

The Supreme Court Oct. 6 denied without comment an appeal seeking a review of the Foreign Corrupt Practices Act's (FCPA) application to illegal acts in foreign countries that are not directly related to the acquisition of new business. The High Court refused to issue a writ of certiorari sought by David Kay and Douglas Murphy, two former executives of Rice Corporation of Haiti who were convicted under the FCPA for bribing tax and customs agents in Haiti. They had argued that a lower court of appeals had misapplied the necessary "business nexus" between their activities and the FCPA because the law is ambiguous on this point.

> The Solicitor General opposed their petition. "Petitioners are incorrect, because the plain language of the business nexus element, when read in the context of the entire statute, is not ambiguous," it asserted. "The business nexus element requires that a bribe to a foreign official be made 'in order to assist [the company] in obtaining or retaining business for or with * * * any person'," the government argued. "Thus, the statutory language does not restrict the FCPA's coverage to the award or renewal of contracts, but more broadly reaches actions that assist in obtaining or retaining business," it said (see **WTTL**, Aug. 4, page 4).

Deemed Export Panel's Recommendations Draw Comments

Representatives of the exporting and academic communities say they support the recommendation of the BIS Deemed Export Advisory Committee (DEAC) to narrow the list of technologies subject to deemed export licensing requirements, but they oppose its suggestions for adding new criteria to determine which foreign nationals need a deemed export license. Comments filed with BIS on the DEAC's recommendations also suggest that questions about a foreign national's security status should be handled through the visa process, including the Visa Mantis program which screens visa applicants who will work or study in certain sensitive areas (see **WTTL**, Sept. 29, page 3). "While national security should be a central concern of government regulation, the DEAC proposal places the burden of inquiry on the wrong party," wrote David

Hirsh, executive vice president for research at Columbia University. "Universities, including Columbia University, lack the information, expertise, and resources to gather reliable travel and habitation histories in a way that will bolster national security," he said. Intel Global Export Compliance Manager Jeff Rittener told BIS that "the delay and cost of assessing, obtaining, and managing export licenses and access to technologies burdens Intel's ability to hire and deploy skilled foreign nationals to work on critical technology."

> Douge Martin of Mentor Graphics Corp. and Laurence Disenkof of Cadence Design Systems, Inc., on behalf of the Electronic Design Automation Consortium (EDA), echoed those comments. "Replacing 'bright line' objective guidelines with a subjective policy open to contradictory interpretations leaves the prudent export compliance practitioner in a quandary. We would foresee these practitioners applying for countless Deemed Export and Deemed Re-Export licenses in the attempt to shift the burden of proof back to BIS, reversing twenty years of BIS policy intent on lessening licensing requirements and processing," they wrote.

"Qualcomm is in favor of narrowing the scope of technologies on the CCL subject to deemed export licensing requirements, but against the proposed expansion of assessment of probable country of affiliation for foreign nationals. Narrowing the scope of technologies on the CCL subject to deemed export licensing requirements would be beneficial since current deemed export licensing requirements are ineffective at protecting national security when similar technology is not controlled for deemed exports and technology has been on the market for a long period of time or there is high foreign availability," commented Qualcomm Export Compliance Director Kathleen F. Gebeau.

Officials at National Institutes of Health (NIH) urged BIS to rely on the Visa Mantis program to screen foreign nationals. The Visa Mantis security review involves a U.S. government review of visa applications. "The Visa Mantis security review is exhaustive and comprehensive and any additional criteria for review for access to CCL technologies by a foreign national should only by based on credible and specific information," they wrote.

* * * Briefs * * *

ANTIBOYCOTT: BIS has issued Warning Letters to Aries Global Logistics, Inc., Koch Chemical Technology Group and Citibank, N.A., for alleged violations of antiboycott regulations. Agency told firms, "we are closing this investigation with the issuance of this Warning Letter" after considering all facts and circumstances known to BIS about alleged violations.

CREDIT CRISIS: WTO Director General Pascal Lamy, noting concerns about impact of credit crisis on trade, has appointed task force inside WTO secretariate to monitor crisis (see **WTTL**, Oct. 13, page 1).

WASSENAAR ARRANGEMENT: BIS in Oct. 14 Federal Register amended EAR to implement changes export control regime adopted in December 2007. Among the changes are new license requirements for ECCN 9A0 12.b.4 (certain air breathing reciprocating or rotary internal combustion type engines) and certain software and technology controlled under ECCN 3D001 and 3E001 related to the development or production of certain solar cells, cell-interconnect coverglass (CIC) assemblies, solar panels, and solar arrays. Also amended are ECCNs 1A004, 1E201, 2B001, 2B002, 2B006, 2B007, 2B008, 3A001, 3A002, 3A229, 3B001, 3C002, 3C005, 3C006, 3D001, 3E001, 5A001, 5A002, 6A001, 6A005, 6A995, 7A002, 7A003, 7A008, 9AO12, and 9E003. New controls are created for ECCN 1A006 to control equipment specially designed or modified for disposal of improvised explosive devices and ECCN 1A007 for charges for devices containing energetic materials by electrical means.

BEEF HORMONES: WTO Appellate Body, in essence, told U.S. and EU Oct. 16 to stop playing games with dispute over EU ban on imports of certain hormone-treated beef and U.S. retaliation and to direct issue to special WTO dispute-settlement panel. "In the light of the obligations arising under Article 22.8 of the DSU, we recommend that the Dispute Settlement Body request the United States and the European Communities to initiate Article 21.5 proceedings without delay in order to resolve their disagreement as to whether the European Communities has removed the measure found to be inconsistent in *EC – Hormones* and whether the application of the suspension of concessions by the United States remains legally valid," Appellate Body ruled.