PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

In the Matter of	
CERTAIN WIRELESS DEVICES WITH 3G CAPABILITIES AND COMPONENTS THEREOF	**Investigation No. 337-TA-800**

RECOMMENDED DETERMINATION

Administrative Law Judge David P. Shaw

I. Background and Recommendation

This is the recommended determination ("RD") of the administrative law judge on remedy and bonding in *Certain Wireless Devices with 3G Capabilities and Components Thereof*, United States International Trade Commission Investigation No. 337-TA-800. As indicated in the Final Initial Determination ("ID") on violation, the administrative law judge has found no violation of section 337 of the Tariff Act, as amended (19 U.S.C. § 1337). The administrative law judge, therefore, recommends no remedy. Yet, even in the absence of a finding of violation, the administrative law judge must issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation. *See* 19 C.F.R. § 210.42(a)(1)(ii). That recommendation is contained herein below.

The Commission did not authorize the administrative law judge to take public interest evidence or to provide findings and recommendations concerning the public interest. Thus, in accordance with the usual Commission practice and the applicable Commission Rule, only the Commission can determine the role that public interest factors may play in this investigation.

See 19 C.F.R. § 210.50(b)(1).

II. A Limited Exclusion Order

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. United States Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to respondents' infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d).

InterDigital[1] argues that Respondents[2] do not dispute that they are engaged in the selling for importation, importation, and sale after importation of wireless devices with 3G capabilities and components thereof. Compls. Br. at 568 (citing JX-0025C (ZTE Stip.), JX-0024C (Nokia Stip.), JX-0023C (Huawei Stip.)). Consequently, it is argued, if a violation of section 337 is found, the Commission should issue a limited exclusion order that would "apply to Respondents and, in accordance with the Commission's regular practice, all of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, and should prohibit the unlicensed entry of all wireless devices with 3G capabilities and components thereof

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[1] The complainants are: InterDigital Communications, Inc. of Delaware; InterDigital Technology Corporation of Delaware; and IPR Licensing, Inc. of Delaware (collectively, "InterDigital"). *See* 76 Fed. Reg. 54252 (Aug. 31, 2011); Order No. 91 (Jan. 17, 2013), *aff'd*, Notice of Commission Determination Not to Review an Initial Determination Granting Complainants' Motion for Leave to Amend the Complaint and Notice of Investigation (Feb. 4, 2013).

[2] The respondents are: Huawei Technologies Co., Ltd. of Shenzhen, China; FutureWei Technologies, Inc. d/b/a Huawei Technologies (USA) of Plano, Texas; Huawei Device USA, Inc. of Plano, Texas (together, "Huawei"); Nokia Corporation of Espoo, Finland; Nokia Inc. of White Plains, New York (together, "Nokia"); ZTE Corporation of Shenzhen, China; and ZTE (USA) Inc. of Richardson, Texas (together, "ZTE") (collectively, "Respondents"). *See* 76 Fed. Reg. 54252 (Aug. 31, 2011); Order No. 19 (Apr. 11, 2012), *aff'd*, Notice of Commission Determination Not to Review an Initial Determination Granting Complainants' Motion for Leave to Amend the Complaint and Notice of Investigation (May 1, 2012).

that infringe the claims of the asserted patents for which a Section 337 violation is found." *Id.* at 568-69.

Further, InterDigital argues that although Respondents have taken the position that any remedy should be denied or delayed in view of InterDigital's FRAND commitments,[3] such arguments are based on public policy considerations, which have not been delegated to the administrative law judge for consideration. Compls. Br. at 569. In any event, InterDigital argues, there is no basis in law for FRAND commitments to deny or delay a remedy in a section 337 investigation. *Id.* In addition, in its reply brief, InterDigital takes the position that although Respondents base their remedy arguments on the assertions that: (1) each of the patents asserted by InterDigital in this investigations is subject to FRAND commitments, and (2) each of the Respondents is a willing licensee, Respondents have failed to prove either of these assertions. Compls. Reply at 293-95.

Indeed, Respondents' primary argument concerning remedy is that each asserted patent is subject to FRAND commitments made by InterDigital, and that no remedy should issue in view of such commitments. Resps. Br. at 22-24 (citing RX-3479 (*In Re Motorola Mobility LLC*) at 8-9 (Jan. 3, 2013)). It is also argued that "it is within the Commission's discretion to deny relief, irrespective of the public interest, when the facts so dictate." *Id.* (citing *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Recommended Determination (Dec. 1996)). Respondents argue that even if it is determined that remedy such as a limited exclusion order or cease and desist order should issue, remedy should be delayed. In particular, Respondents rely on FRAND considerations, the

[3] FRAND is an acronym for "fair, reasonable and non-discriminatory," and refers generally to issues related to the licensing of standards-essential patents (also known by the acronym SEPs). The SEPs and related FRAND issues relevant to this investigation are addressed in the ID.

opportunity for Respondents "to preserve their competitiveness," and the alleged potential for a remedy to harm a new Microsoft Windows phone ecosystem. *Id.* at 25-26 (citing *Certain Personal Data & Mobile Communications Devices & Related Software*, Inv. No. 337-TA-710 ("*Personal Data*"), Comm'n. Op. at 79-83 (Dec. 29, 2011)); Resps. Reply at 279-82.

Finally, Respondents argue that any remedy, such as a limited exclusion order or cease and desist order, should account for any products that were found not to infringe or that were not accused, and should allow for replacement, service and repair. Resps. Br. at 27-31; Resps. Reply at 282-86.

The Commission Investigative Staff ("Staff") of the Office of Unfair Import Investigations argues, "Should a violation of Section 337 be found against one or more of the Respondents, the Staff recommends that a limited exclusion order issue against the relevant Respondent(s)." Staff Br. at 133; *see* Staff Reply at 38. In connection with remedy, the Staff reiterates the position it took in connection with Respondents' specific FRAND-based affirmative defenses to the effect that "FRAND commitments in and of themselves are not a bar to the issuance of any remedial order by the Commission." *Id.* at 133-34.

The Staff does not support Respondents' request that any remedy be delayed so that Respondents have time to implement design-arounds in order to maintain Respondents' competitiveness. Staff Br. at 134; Staff Reply at 38. The Staff argues that a four-month transition period allowed in the *Personal Data* investigation is not analogous to the delay sought by Respondents in this investigation. It is argued that the delay in implementing the *Personal Data* remedy was provided so that a nonparty could transition to other suppliers; and further, there were other factors at play, such as the blocking by the Department of Justice of a merger involving the nonparty due to competitive conditions. The Staff argues that it has not been

shown that there is a parallel between the conditions surrounding the *Personal Data* investigation and this investigation. *See* Staff Br. at 134.

The Staff also argues that the evidence is insufficient to support Nokia's argument that remedial orders [ ] Staff Br. at 134. The Staff takes no position with respect to Respondents' request that any remedial order permit the replacement, repair and service of covered products, although there is precedent for such an exception. *Id.* at 135; Staff Reply at 38.

Having considered the arguments of the parties and the evidence of record, the administrative law judge recommends that, if the Commission finds a violation of section 337, the Commission issue a limited exclusion order directed to the infringing products of any respondent found to have committed a violation, and in accordance with the Commission's regular practice, should include in the order a provision covering the infringing products of a respondent's affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. To facilitate the administration and enforcement of the order, and to minimize any burden on non-parties, a certification process should be included in the exclusion order.[4]

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[4] An exclusion order may contain a provision that permits entities whose products are potentially excludable under the order to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that they are familiar with the terms of the order, that they have made appropriate inquiry, and that, to the best of their knowledge and belief, the products being imported are not excluded from entry under the order. *See, e.g., Certain Semiconductor Chips with Minimized Chip Package Size or Products Containing Same*, Inv. No. 337-TA-605, Comm'n Op. at Section II.D.2 (July 29, 2009).

Such a certification provision should address Respondents' concerns regarding products that were not accused in this investigation. A motion to terminate a non-accused product from the investigation was already denied as unwarranted. *See* Order No. 90.

As indicated above, Respondents argue that no remedy should issue in view of InterDigital's FRAND commitments and the alleged breaches thereof. Respondents' FRAND-related defenses were addressed in the ID, and it is assumed for the purposes of this RD that no such defense would have prevailed. While FRAND or other issues may be deemed to be related to public interest considerations, it is noted that this RD does not address such considerations for the reason stated above.

In addition, Respondents request a delay in the implementation of any limited exclusion order. Respondents have not, however, demonstrated a basis for a delay. They seek the delay to retain their own competitive advantage as potential infringers (in the event that a violation of section 337 is found). They have not demonstrated any other benefit, such as that shown in the *Personal Data* investigation, discussed above, in which a delay was necessary for the benefit of nonparties and for the furtherance of competitive conditions in the United States. Evidence and argument related to the [ ] is even more scant. Finally, it has not been shown why a replacement, service and repair exclusion should be added to any limited exclusion order.

III. Cease and Desist Orders

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). The Commission may issue a cease and desist order when it has personal jurisdiction over the party against whom the order is directed. *Gamut Trading Co. v. U.S. Int'l Trade Comm'n*, 200 F.3d 775, 784 (Fed. Cir. 1999).

The Commission "generally issues a cease and desist order only when a respondent maintains a commercially significant inventory of infringing products in the United States."

Certain Ground Fault Circuit Interrupters and Products Containing Same, Inv. No. 337-TA-615, Comm'n Op. at 24 (Mar. 26, 2009); *Certain Video Game Systems, Accessories, and Components Thereof*, Inv. No. 337-TA-473, Comm'n Op. at 2 (Dec. 24, 2002). Indeed, cease and desist orders are usually issued when a commercially significant amount of infringing imported product could be sold so as to undercut the remedy provided by an exclusion order. *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. (Pub. Version) at 22 (June 14, 2007)).

InterDigital argues that the Commission should issue cease and desist orders directed against respondents "based on their respective commercially significant inventories of infringing products." Compls. Br. at 567-68; *see id.* at 570-71 (concerning evidence relating to specific respondents); Compls. Reply at 297. Further, InterDigital argues, "The Commission's cease and desist order should also extend to the foreign-based Respondents, because absent a cease and desist order directed to those entities, InterDigital may be left with limited remedies against those adjudicated infringers who control their U.S.-based subsidiaries and their domestic inventories." *Id.* at 572 (citing *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655 ("*Railway Wheels*"), Recommended Determination at 10 (Oct. 29, 2009)); Compls. Reply at 298.

Many of Respondents' arguments concerning InterDigital's proposed cease and desist orders are based on the FRAND-related defenses, discussed above. Resps. Br. at 24-31. Respondents also argue that cease and desist orders should not issue because InterDigital has failed to prove that they maintain commercially significant inventories of accused products. *See id.* at 32-36; Resps. Reply at 286-90.

The Staff takes the position that "a cease and desist order is appropriate against Nokia Corporation; Nokia Inc.; and Huawei Device USA. Based on the inventory data in the record, the Staff submits that cease and desist orders should not issue against Huawei Technologies Co., Ltd.; Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA); ZTE Corporation; and ZTE (USA) Inc." Staff Reply at 39; *see* Staff Br. at 135-36.

With respect to Nokia Inc. and Huawei Device USA, the evidence shows that both of these companies maintain large inventories of accused products in the United States. *See* CX-1064C, July 25, 2012 Nokia Second Supplemental Response to InterDigital's First Set of Interrogatories, Second Supp. Response to Interrog. 29 and Exhibit A [

] CX-1081C, June 22, 2012 Huawei 16th Supplemental Response to InterDigital's First Set of Interrogatories, Response to Interrog. 29 [ ] Thus, both of these domestic companies should be subject to a cease and desist order if violations of section 337 are ultimately found. The relationship of Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA) to the Huawei inventory is not, however, as clear.

With respect to ZTE (USA) Inc., it is unclear whether the evidence shows commercially significant inventory or whether it also includes devices that have been imported but not held in inventory. *See* CX-1116 (ZTE 4th Supp. Response to First Set of Interrogatories), Attachment. Thus, it is not recommended that this company be subject to a cease and desist order, even if a violation of section 337 is found.

Finally, there is the question of whether any foreign respondent should be subject to a cease and desist order. As indicated above, InterDigital, relying on the remedies issued in the *Railway Wheels* investigation, argues that absent a cease and desist order directed to those

entities, InterDigital may be left with limited remedies against infringers that control their U.S.-based subsidiaries' domestic inventories. As discussed in the ID, the Commission has personal jurisdiction over all Respondents. Yet, it has not been shown that the foreign companies exercise the sort of control over their domestic subsidiaries that existed in the *Railway Wheels* investigation. Thus, under current Commission policy, it is not recommended that the foreign respondents be subject to cease and desist orders, even if violations of section 337 are found.

IV. Bond

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent, during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury.[5] 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

InterDigital and Respondents have stipulated for the purposes of this investigation that "[i]n the event the Commission finds that there has been a violation of Section 337, no bond need be imposed during the Presidential review period with respect to imports of infringing articles or

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[5] When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

sales after importation of any infringing articles." Joint Outline of the Issues to be Decided in the Final Initial Determination at 14. Further, they have stipulated: "Neither InterDigital nor any Respondent will argue to the Administrative Law Judge or the Commission at any stage in this investigation that a bond should be imposed during the Presidential review period." *Id.*

Thus, InterDigital and Respondents have not presented arguments on the question of a bond. *See* Compls. Br. at 572 (citing December 18, 2012 Stipulation, EDIS Document ID No. 499553); Resps. Br. at 36 (citing JX-0027C (Stipulation Regarding Bond)). The Staff argues that in view of the parties' stipulation concerning bond during the Presidential review period, "the appropriate bond rate is zero." Staff Br. at 137 (citing JX-0027C). Consequently, the administrative law judge has concluded that no bond has been sought, and the need for a bond has not been established.

Accordingly, it is the recommendation of the administrative law judge, in the event that the Commission issues a remedy in this investigation, that Respondents should not be required to post a bond during the Presidential review period.

V. Conclusion and Order

It is recommended that if a violation of section 337 is found in this investigation, the Commission should issue a limited exclusion order, and certain cease and desist orders, unless the public interest requires that remedies be set aside or modified. No bond during any Presidential review period is recommended.

It is ordered that by no later than July 15, 2013, each party shall file with the Commission Secretary a statement as to whether or not it seeks to have any portion of this document redacted from the public version. Any party seeking to have a portion of this document redacted from the

public version must submit to this office a copy of this document with red brackets indicating the portion, or portions, asserted to contain confidential business information.[6]

David P. Shaw
Administrative Law Judge

Issued: July 8, 2013

[6] Confidential business information ("CBI") is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

CERTAIN WIRELESS DEVICES WITH 3G CAPABILITIES AND COMPONENTS THEREOF

Inv. No. 337-TA-800

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **RECOMMENDED DETERMINATION** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated on JUL 31 2013.

Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANTS INTERDIGITAL COMMUNICATIONS, INC., INTERDIGITAL TECHNOLOGY CORPORATION, AND IPR LICENSING, INC.:	
Maximilian A. Grant, Esq. **LATHAM & WATKINS LLP** 555 11th Street, NW, Suite 1000 Washington, DC 20004	( ) Via Hand Delivery (✓) Express Delivery ( ) Via First Class Mail ( ) Other: _____
FOR RESPONDENTS HUAWEI TECHNOLOGIES CO., FUTUREWEI TECHNOLOGIES, INC., AND HUAWEI DEVICE USA, INC.:	
Sturgis M. Sobin, Esq. **COVINGTON & BURLING LLP** 1201 Pennsylvania Avenue, NW Washington, DC 20004	( ) Via Hand Delivery (✓) Express Delivery ( ) Via First Class Mail ( ) Other: _____

FOR RESPONDENTS NOKIA COPORATION AND NOKIA INC.:	
Jamie D. Underwood, Esq. **ALSTON & BIRD LLP** 950 F Street, NW Washington, DC 20004	( ) Via Hand Delivery (✓) Express Delivery ( ) Via First Class Mail ( ) Other: _____
FOR RESPONDENTS ZTE CORPORATION AND ZTE (USA) INC.:	
Jay H. Reiziss, Esq. **BRINKS HOFER GILSON & LIONE** 1775 Pennsylvania Avenue, NW, Suite 900 Washington, DC 20006	( ) Via Hand Delivery (✓) Express Delivery ( ) Via First Class Mail ( ) Other: _____

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Kenneth Clair **Thomson West** 1100 13th Street, NW, Suite 200 Washington, DC 20005	( ) Via Hand Delivery ( ) Express Delivery (✓) Via First Class Mail ( ) Other: _____