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Australia Passes Law to Implement U.S. Defense Trade Treaty

Five years after it was signed, the U.S.-Australia Defense Trade Treaty finally may go into effect in the coming months following the Australian parliament's enactment of legislation Oct. 31 to implement the pact. Full implementation of the treaty must still await publication of revisions to the International Traffic in Arms Regulations (ITAR) by State's Directorate of Defense Trade Controls (DDTC). DDTC issued rules for the parallel U.S.-United Kingdom Trade Treaty in March (see **WTTL**, March 26, page 4).

"Eliminating identified gaps in Australia's export control system will align Australia with the accepted best practice of the export control regimes that Australia belongs to, and contribute to international efforts to prevent proliferation," said a statement by Australia's ministers of Defense and Defense Materiel. "The strengthened export controls relate to those Defense and strategic goods that already require a Defense permit if exported from Australia in physical form due to the risk they pose to international security and weapons proliferation," they added.

The legislation was delayed due to concerns raised by Australia's academic and research communities. After consultations, the measure was amended to provide a two-year transition period; appointment of a Steering Group to advise the government on the law's implementation; and a pilot program to monitor the effects of strengthened controls on industry and the academic and research sector during the law's transition period, the ministries explained. The Steering Group "will be able to make recommendations on whether Australia's export control arrangements are not more restrictive than U.S. regulations in relation to University activities," they said. "The Bill will no longer include domestic controls. This means that permits will not be required to supply controlled technology to foreign persons in Australia," the statement noted.

NAFTA Panel Upholds ITA Zeroing in Administrative Reviews

Commerce has successfully explained its decision to stop zeroing in original investigations but keep using the methodology in administrative reviews, a NAFTA binational dispute-settlement panel ruled Oct. 25. The panel had remanded to the International Trade Administration (ITA) its review of carbon and alloy steel wire rod from Canada, ordering ITA to justify the distinction in investigations and reviews based on the Court of Appeals for Federal Circuit (CAFC) rulings in *Dongbu* and *JTEKT*. Since those rulings, ITA has amended its regulations to end zeroing in new reviews but it continues to apply the methodology to old reviews (see **WTTL**, Feb. 20, page 2). In its remand decision, ITA explained why it could continue using zeroing in



old reviews. “By permitting offsets in the aggregation stage, Commerce determines ‘on average’ the aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the comparison results being aggregated were determined,” the panel quoted from the remand. “In contrast, when Commerce uses the average-to-transaction comparison methodology, as it did in this review, Commerce compares the export price or constructed export price for a particular export transaction with an average normal value for the comparable sales of foreign like product,” ITA explained.

In upholding the ITA remand, the NAFTA panel said it considered the CAFC opinion, ITA’s explanation in other cases, the opinions of the Court of International Trade judges, ITA’s briefs to the panel and the submissions by other parties. “We do not see evidence of inconsistent interpretations of 19 U.S.C. Section 1677(35). Rather, Commerce appears to us to be interpreting the statute consistently – as allowing both zeroing and offsetting,” the panel ruled.

“Under Commerce’s consistent interpretation, 19 U.S.C. Section 1677(35) mandates neither practice and forbids neither practice. Instead, it creates a zone of discretion in which an expert agency can select – subject to the reasonableness standard – methodologies that are appropriate to the various contexts that arise,” the panel wrote. “As explained by Commerce, and as the Panel now understands, zeroing and offsetting are not interpretations but *methodologies*,” it continued (original emphasis).

In Last Days of Campaign, Trade Reorganization Put in Spotlight

President Obama’s plans for uniting trade agencies in one new department became a last-minute subject of dispute in the presidential election. Obama mentioned his reorganization plan in an interview on MSNBC’s Morning Joe Oct. 29. “I’ve said I want to consolidate a whole bunch of government agencies. We should have one Secretary of Business, instead of nine different departments that are dealing with things like getting loans to SBA [Small Business Administration] or helping companies with exports. There should be a one-stop shop,” the president said, according to an MSNBC transcript of the program (see **WTTL**, Oct. 1, page 1).

Gov. Romney took issue with the proposal Nov. 1 in Roanoke, Va. “He came up with an idea last week, which is he’s going to create the Department of Business. I don’t think adding a new chair in his cabinet will help add millions of jobs on Main Street,” Romney said. “We don’t need the Secretary of Business to understand business. We need a president who understands business,” he continued. The Romney campaign also released a TV campaign ad on that theme Nov. 1.

ITA Talks Hear Concerns about Expansion of Product Coverage

As more countries join talks on updating the World Trade Organization’s (WTO) Information Technology Agreement (ITA), some developing countries are questioning the “IT-relatedness” of many of the products being proposed for coverage under a new deal. New Zealand, Hong Kong and the Philippines were among new participants in technical discussions that 17 countries held the week of Oct. 29 in Geneva, while India and several Central American countries questioned the inclusion of many of the new products being proposed.

India, Costa Rica, the Dominican Republic, El Salvador and Nicaragua raised concerns about product expansion. Nicaraguan and El Salvadoran officials said ITA proposals are being analyzed in their capitals. A Costa Rican official said one-third of its industrial exports consist of IT products. India’s consultations with stakeholders showed “problems regarding relevance of the proposed products, their multiple uses, and possible difficulties in processing at customs,” one trade official told **WTTL**. The Indians claimed they lost manufacturing after the first ITA was adopted. They said many component manufacturers closed their facilities and moved to Asia and Southeast Asia. In addition, talks on Russia’s ITA schedule continued. The U.S. told

the Russians they need to make technical changes to “ensure full coverage of ITA products,” one official said. One goal of the meetings was an effort to consolidate or reduce the number of “x-outs” of tariff lines that countries have wanted left out of a new agreement because of their sensitivities. About 350 six-digit Harmonized Tariff Schedule codes are now included in a consolidated list of items to include in a new pact.

The list includes such products as medical equipment with communications functions, which the U.S. has proposed, and microwave ovens, refrigerators and other consumer durables, sought by Japan and Korea. In the discussions, Norway said substantial work remains to reduce non-tariff measures (NTMs). An EU official noted that with tariffs at zero, only NTMs remain as obstacles to IT trade.

WTO Accession Will Reopen Silk Road Through Tajikistan

Part of the ancient “Silk Road” that stretched from China to the Middle East will reopen with the expected accession of Tajikistan to the WTO. The way for Tajikistan’s membership was cleared Oct. 26 when a WTO working party approved conditionally its accession report on the country. The WTO General Council is expected to approve the report and accession protocol at its Dec. 11-12 meeting. Dushanbe will have until June 7 to ratify the terms of accession and notify the WTO. It would become a WTO member 30 days later.

Tajikistan will apply all WTO provisions without any transitional period. It also committed to joining the Information Technology Agreement and the Agreement on Trade in Civil Aircraft upon accession and will apply to join the Government Procurement Agreement within one year of its accession.

Tajikistan agreed to bind all its import tariffs. The average “bound” tariff for all products is 8.0%. For agricultural products, it’s 10.4%, while for non-agricultural products the average is 7.6%. The ex-Soviet republic promised that its state-trading enterprises “would make purchases and sales which are not for the government’s own use in accordance with commercial considerations. Companies from other WTO members will be afforded adequate opportunity to compete for participation in purchases or sales of Tajikistan’s state enterprises,” the WTO said.

Trade Restrictions Slow in 2012, but Friction Continues

While trade restrictive measures, such as antidumping investigations and stringent customs procedures, are on the decline in the world’s 20 largest economies (G-20) in 2012, trade frictions, including dispute-settlement cases in the WTO, are increasing, according to an Oct. 31 WTO report. Since mid-May, members have imposed 71 new trade restrictive measures, it said. “The most frequent measures used continue to be trade remedy actions, in particular the initiation of antidumping investigations, followed by more stringent customs procedures. There were fewer new export restrictions introduced over the past five months than in previous periods,” the report said. Nonetheless, WTO Director-General Pascal Lamy warned of the danger of “temporary” measures. “Past experience shows that, once in place, these measures tend to remain permanent as they build domestic political constituencies,” he stated.

Congressman Asks GAO to Review NASA Export Controls

In a letter Oct. 25 to the Government Accountability Office (GAO), Rep. Paul Broun (R-Ga.) requested a review of the National Aeronautics and Space Administration’s (NASA) export control policies, especially related to the transfer of military and dual-use technologies to foreign nationals under the ITAR. “Recent allegations of export control violations at one of the [NASA] centers raises [sic] concerns about NASA’s ability to protect sensitive technology from foreign nationals that may have access to its facilities,” said the letter from Broun, who

chairs the House Science Committee's investigations and oversight subcommittee. In the letter, Broun cited an ongoing investigation at California's Ames Research Center (ARC) and asked that ARC be included in the review of NASA.

In April 2012, Sen. Charles Grassley (R-Iowa) asked NASA Administrator Charles Bolden to respond to allegations that ARC allowed foreign nationals to access sensitive materials contrary to the ITAR. "These foreign nationals have allegedly obtained NASA secrets and cutting edge technology while not possessing the proper clearance in violation of [ITAR]," Grassley noted in a letter to Bolden.

Supreme Court Hears Arguments on Copyright Import Rules

In a case pitting yard-salers, charity thrift shops, museums, bookstores and libraries against Hollywood and publishers of textbooks, music and even small newsletters, the Supreme Court heard oral arguments Oct. 29 in *Kirtsaeng v. John Wiley & Sons, Inc.* At issue in the case are provisions in Copyright Act barring the import of a work "without the authority of the owner" of the copyright, and the "first-sale" doctrine. Supap Kirtsaeng, originally from Thailand, is appealing a Second Circuit ruling that said the "first-sale" rule doesn't apply to used textbooks published in Thailand and imported into the U.S.

As usual, the justices gave a no hint which way they lean in deciding the merits of this case. "If it's manufactured in the United States and sold in the United States, that copy belongs to the person who purchased it, end of case. But if the exhaustion doctrine applies only nationally, then your argument is asking for something that runs against the regime that is accepted in most places," Justice Ruth Bader Ginsburg told Kirtsaeng's lawyers during arguments.

"You can say both, either it was manufactured directly and received an American copyright and satisfied all the conditions, or, if that wasn't the case, it was manufactured in a way that satisfied the conditions of the American statute, even though, for technical reasons, it didn't apply," Justice Stephen Breyer noted. Justice Elena Kagan also commented on Kirtsaeng's arguments. "Just as a matter of copyright theory, I had always understood copyright to -- a copyright holder has a kind of a bundle of rights. It's not one right that applies everywhere in the world. It's you have your U.S. rights and you have your Chinese rights, you have your rights under each jurisdiction's law," she said. [**Editor's Note:** Gilston-Kalin Communications, LLC, publisher of WTTL, is a member of a division of the Software and Information Industry Association, which filed an amicus brief supporting Wiley's claims.]

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CHINA: Ministry of Commerce launched "new exporter" review Oct. 18 to consider request from Nissan North America, Inc. Nissan seeks exemption from antidumping and countervailing duties China has imposed on sedans and cross-country vehicles with over 2.5 L displacement imported from U.S. U.S. has filed WTO complaint against China's imposition of these duties (see **WTTL**, Sept. 24, page 2).

EXPORT ENFORCEMENT: Four men have been sentenced to prison in Miami U.S. District Court for exporting U.S. military aircraft engines and components to Venezuela. They pleaded guilty in July. Kirk Drellich, owner of SkyHigh Accessories, was sentenced Oct. 26 to one year and one day in prison to begin Jan. 4 followed by one year of supervised release, plus \$50,000 fine. Freddy Arguelles, ex-Venezuelan Air Force pilot living in U.S., and Victor Brown, aircraft parts broker, were sentenced Oct. 9 to 23 months in prison plus three years' supervised release. Alberto Pichardo, Venezuelan Air Force officer who headed Venezuelan Military Acquisitions Office in Doral, Fla., was sentenced Sept. 25 to 24 months followed by three years' supervised release.

MORE EXPORT ENFORCEMENT: British citizen Christopher Tappin pleaded guilty in El Paso U.S. District Court Nov. 1 to one count of aiding and abetting illegal export of batteries for Hawk Air Defense Missile to Iran. Sentencing is set for Jan. 9. Tappin was extradited from UK Feb. 24 and ordered detained in jail March 5 (see **WTTL**, March 12, page 4).