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Japan Drafting Tighter Rules for Technology Exports

Japanese trade officials are drafting amendments to Japan's export control law to add new restrictions on the transfer of technology, including provisions that would be similar to U.S. deemed export rules. The proposals, which would have to be adopted by the Diet, Japan's legislature, are still not fully developed but are expected to address the carrying of controlled technology out of the country, the transfer of technology to non-residents inside Japan and physical controls on access to technology at companies, universities and research labs.

> Many of the details of how these new rules would work have not been decided yet, Satoshi Miura, the economics counselor at the Japanese Embassy in D.C., told WTTL. The rules would apply to dual-use technology. Japanese law already bars most exports of defense items and technology.

Rules on the carrying of technology out of the country would apply to data on such media as CDs, DVDs and flash drives, as well as on laptop computers. A license would be needed if the technology on those media were to be given to a non-resident. The Japanese may provide for bulk licenses for such transfers. "We want the implementation to be reasonable," Miura told WTTL. "We don't want to impose too much of a burden on legitimate business," he added.

Another change being considered would require licenses for the transfer of controlled technology to non-residents inside Japan. A person is considered a resident of Japan after six months in the country. The Japanese want to control transfers to foreign nationals after they have gained resident status. Some ideas being examined would base controls on the individual's nationality, employment history, or relationship to companies or entities of concern.

The third proposal under review would impose tighter controls on physical access to very sensitive technology related to weapons of mass destruction. The plan would require companies and universities to limit access to such data through physical measures such as locked containers, restrictions on computer access and creating restricted-access areas. An industry advisory committee reviewed the three proposals for tougher restrictions on technology and issued a report in April supporting the changes, Miura said.

Banking Crisis Puts Pressure on Export Financing

The banking crisis that has caused turmoil on Wall Street and prompted an economic rescue plan from Congress may also be roiling the market for export financing and raising prospects

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for the U.S. Export-Import Bank to become the financier of last resort. Ex-Im officials report "an uptick" in calls, e-mails and letters inquiring about its lending and loan guarantee programs. They say some commercial banks that have provided export financing in the past have sent their clients to Ex-Im for help.

> The bank's role in export financing has shrunk significantly over the years. It now provides about $12-13 billion a year in financial aid, mostly in the form of loan guarantees rather than direct lending. This compares to the $1 trillion in U.S. exports that are financed through the private sector. Under its charter it is authorized to hold up to about $100 billion in obligations and has only about half that amount committed now. Bank officials say that means they have the resources to undertake more financing if needed.

"We have plenty of capacity," Ex-Im spokesman Phil Cogan told WTTL. "We have not had to change our guidelines or rules," he said. "As market liquidity has decreased, what we've seen is that deals are not worse, but banks don't have liquidity," he said; adding, "We expect to see an increase in applications." Ex-Im is monitoring the default rate for its deals for any early signs of trouble among its clients. "We are aware of what is going on in the financial world," Cogan said. The staff has had internal discussions about it for months, he reported.

Ex-Im doesn't expect a rush of new financing applications because the kinds of transactions it backs often take months of marketing and negotiations. "When people need money, we are not going to be the fastest source of funds," Cogan said. At a Sept. 17 Ex-Im Advisory Committee meeting, Bank officials tried to assure members that it has the resources in staff and funds to deal with any sharp increase in applications.

Enforcement of Anti-Counterfeit Pact Raises Questions

A Sept. 22 briefing by the U.S. Trade Representative's (USTR) office and Commerce Department on the state of multilateral negotiations on an Anti-Counterfeiting Trade Agreement (ACTA) drew a mixed reaction from the business community, underscoring the differences between those who create intellectual property and those who transmit it over the Internet. Whether the ACTA being negotiated will be tough enough on intellectual property rights (IPR) violators or will impinge on open dissemination of information and knowledge is an issue that still divides the business community.

> At the briefing, Assistant USTR for Intellectual Property and Innovation Stanley McCoy characterized the ACTA as "a leadership agreement." The agreement, which is being negotiated by a dozen countries plus the European Union (EU), will build on the World Trade Organization's Agreement on Trade-Related Intellectual Property Rights (TRIPs) and U.S. free trade agreements, McCoy said (see **WTTL**, June 30, page 3). "Searching travelers' music players or laptops for infringing content is not the focus of the discussions for border measures, but border officials should have that power," he said.

A Google representative at the briefing questioned McCoy on how ACTA would treat transmission of copyrighted material on the Internet. This has been an issued raised by consumer groups as well. "We have not had any in-depth discussions on Internet related protections," McCoy responded. "Internet provisions are still under discussion internally. Internet is going to show up in best practices," he said. The next ACTA talks will be in October 2008 in Tokyo and will center on criminal enforcement, McCoy said.

Some industry sources say they are concerned about the ACTA's lack of muscle. Industry has "high hopes" that ACTA will be more than just "TRIPS with one carrot," one source told WTTL. IP producers see the idea of a "leadership document" as meaning "arm twisting of our allies to do more on IP," the source said. "This is clearly a carrot document. That's fine; that's the new recipe," the source added. "I honestly don't know how it can be more then just

a document. It is not a 301 solution," the source said. Statements at the briefing by representatives of trade groups and unions emphasized the need for ACTA to have strong enforcement provisions and requirements for sanctions against IPR violators.

> Neil Turkewitz, excutive vice president at the Recording Industry Association of America (RIAA), told WTTL that he believes the ACTA sends an "important political message." Turkewitz said ACTA should not be looked at as a stand alone document. It is part of process that includes the World Trade Organization, the World Customs Organization and the U.S. anti-piracy program known as STOP, he said. ACTA is "okay for dealing with 301, at a political level. There is no single thing that would be sufficient to defeat piracy and counterfeiting. ACTA is a meeting of like minded countries. When that occurs legitimate commerce emerges," Turkewitz said.

Countries that have been the target of Section 301 complaints for their lack of IPR enforcement are participating in the talks, McCoy told WTTL after his briefing. "We think their participation in ACTA will help them move their IP protections forward. Those countries are good faith trading partners. They are trying," McCoy said, referring to Canada, South Korea, and several EU members. "We have not been considering a sanctions-backed dispute resolution" but rather a "more consultative model of dispute resolution," he noted.

Emerging Technology Panel Appears Overwhelmed

At the first meeting of the Bureau of Industry and Security's (BIS) Emerging Technology and Research Advisory Committee (ETRAC) Sept. 23, members appeared overwhelmed by the wide-ranging assignment that agency officials gave them. Questions raised by members during meeting suggested that they were uncertain what they were being asked to do, how their recommendations would actually be implemented and whether they had the expertise to address some of the BIS questions.

> At one point in the session, one member asked the BIS staff to speak slower so he could take notes on all the assignments being given to the committee. Near the end of the two-hour meeting another member asked the BIS staff to clarify what priorities the agency wants the committee to address. Privately, one BIS official told WTTL that the agency "will have to work with them."

The caught-in-the-headlights reaction of committee members wasn't due to their lack of brainpower. At the start of the meeting, BIS Assistant Secretary Christopher Wall said "this is by far the smartest group of people ever assembled at the Commerce Department." The 23 ETRAC members include top members of the academic research community as well leading researchers from industry and federal laboratories. Selected to co-chair the panel were Dr. Richard McCullough, vice president for research at Carnegie Mellon University, and Dr. Thomas Tierney IV, project leader at Los Alamos National Laboratory.

When pressed to clarify the committee's priorities, Kevin Kurland, the director of the BIS office of technology evaluation, named three. One is to clarify whether there is a limited list of specific technologies on the Commerce Control List that should be subject to deemed export requirements and how to deal with who should be subject to deemed export controls. The second is to advise BIS on the competitive impact the deemed export rules are having on the research community, including universities and companies. The third is to recommend a methodology for BIS to identify emerging technologies that are not on the CCL but should be considered for future regulation because of their potential impact on national security.

Committee members also plan to bring their own agenda to their task. One member asked if they could revisit the findings and recommendations of the Deemed Export Advisory Committee (DEAC), and in particularly its recommendations for a new standard for determining the trustworthiness of loyalty of foreign nationals. One member also questioned the legal basis for

deemed export controls under the Export Administration Act. "You have full latitude," Kurland told the ETRAC. Although the DEAC made many recommendations, "you are not restrained by it," he added. Earlier, Wall anticipated the panel's concerns about the loyalty idea in the DEAC's final report. "We're not talking about a McCarthiest approach to loyalty," he said.

Doha Talks Going Back to Bigger Negotiating Groups

After a breakdown in talks among the G-7 group of countries Sept. 20 after WTTL went to press, World Trade Organization (WTO) members are now grasping at straws trying to find a way to keep the Doha Round alive. The latest hope is that expanding talks to a broader group of members in meetings on agriculture and non-agriculture market access (NAMA) may spur new options and increase pressure on two or three major players to bridge their differences.

> While the G-7 talks foundered trying to find a compromise on the Special Safeguard Mechanism (SSM) for agriculture, they also deadlocked on other farm trade issues. Differences of opinion emerged over tariff simplification, tariff-rate quotas, blue box head room, cotton, and sensitive products. Negotiators never got through the full list of issues, one source reported (see **WTTL**, Sept. 22, page 3).

In a Sept. 24 letter to WTO Director General Pascal Lamy, Indian Commerce Minister Kamal Nath tried to portray the breakdown of talks on Sept. 20 as the result of several members not being able to agree on proposed compromises not just India. He said China and the U.S. also objected to provisions being proposed. He noted that Lamy had called for a "new architecture" for addressing the SSM issue. Unless any SSM solution meets the goals established in the 2004 Framework Agreement and at the Hong Kong Ministerial "both in terms of triggers and remedies as well as the ease of use, it would not be possible for India to accept any compromise solution," Nath declared.

One trade official said a couple of things in Nath's letter appear misleading, including his complaint that the U.S. had not shown flexibility during the talks at the end of July. Nath was also misleading in saying the U.S. negotiator wasn't ready to accept the SSM proposal on the table Sept. 20. The group's objective was a G-7 product, and it was very clear from the prior discussion that India wasn't in a position to accept it, the trade official said. They said they had concerns and would need to go back home to consult about them, he added.

Meanwhile, consensus emerged Sept. 26 among two dozen countries for putting agriculture negotiations back into the wider negotiating group. Agriculture group chairman Crawford Falconer will resume talks Oct. 1 with the goal of organizing work for the coming weeks. Swiss WTO Ambassador Luzius Wasescha has emerged as the likely appointee to head NAMA talks and is expected to resume industrial tariff talks on Oct. 2.

Doha Round Talks on Mode 4 Present Another Stumbling Block

An issue long on the back burner in the WTO Doha Round talks – the movement of natural persons between WTO members, also known as Mode 4 – looks likely to become another stumbling block to a final agreement. The division between developing and developed countries over Mode 4 became clear at a Sept. 22-23 WTO forum on the subject in Geneva. Mode 4 is one of the elements of the General Agreement on Trade In Services (GATS) that is being addressed in negotiations on the services leg of the round.

Liberalization of restrictions on foreign service workers has been an especially important goal in the talks for India and several other developing countries. The U.S. has resisted proposals to modify these rules because of congressional opposition to having a Doha deal dictate U.S. immigration policies. Developing countries still believe Mode 4 is their pot of gold, Eoin O'Malley an advisor to the European Services Forum, told WTTL. The economic reality of Mode 4 is that it is much less significant than these countries believe, he said. Mode 4 won't

bring much important development, but it is "blocking all the other modes they should focus on" for development opportunity, O'Malley said. Emerging countries would do better adopting economic reforms that would attract foreign direct investors, he said. "This is where lies the development potential," O'Malley said.

> Developed countries that have made offers on Mode 4 have been frustrated by the lack of reciprocal offers from developing countries in other service areas. The European Union (EU) may be ready to withdraw its Mode 4 offer because other countries haven't matched what it is giving, O'Malley said. "Once again, we're going to give for nothing. We give in agriculture, we give in NAMA, we give in services....and we don't get anything," O'Malley complained. The Australian, Canadian and EU offers are good, he said. "These countries are already putting into place unilaterally, immigration policies which will in any case increase Mode 4 with or without an agreement," O'Malley said.

Hamid Mamdouh, director of the WTO Trade in Services division, told the forum that two plurilateral requests for offers on Mode 4 have been made in the Doha Round. One was sponsored by 15 developing countries and the other by least developed countries, he said. Any changes in Mode 4 rules would apply only to those specific industry sectors that a WTO member agreed to liberalize in its schedule of commitments in the services agreement, Mamdouh said. Other areas that need attention in Mode 4 include greater transparency in the laws and regulations that apply to foreign service workers and regulatory cooperation and collaboration between home and receiving countries, Mamdouh said. Agreements that ensure the return of persons staying in a country temporarily for a certain purpose have gone a long way in facilitating liberalization of the supply of services through natural persons, he said.

Another problem is the lack of delineation between Mode 4 and immigration issues. "That's why undertaking commitments on Mode 4 are extremely difficult. Because you can't liberalize Mode 4 in these cases unless you liberalize everything else with it, as long as there is no distinction," Mamdouh said.

Court Says ITC Has Been "Too Rigid" in Applying Bratsk

The Court of Appeals for the Federal Circuit (CAFC) Sept. 18 ruled that the International Trade Commission (ITC) has been "too rigid" in its interpretation of the court's 2006 ruling in *Bratsk Aluminum* and set out a new standard for dealing with injury determinations in anti-dumping cases involving commodity products. ITC members were probably not upset by the decision, because they complained that the *Bratsk* ruling was confusing and contrary to past trade precedents when it was issued. The ITC tried unsuccessfully to get the CAFC to clarify its opinion at the time and also lobbied the Solicitor General to appeal the case to the Supreme Court. That effort failed also (see **WTTL,** Nov. 13, 2006, page 2).

> "We think the Commission interpreted this court's remand instructions and the decision in *Bratsk* too rigidly, in three respects," the CAFC said in its ruling in *Mittal Steel Point Lisas v. U.S.* (case no. 2007-1553). It cited the ITC treatment of "triggering factors" in applying the Bratsk analysis, the examination of the future impact of eliminating subject imports from the market, and the adoption of a rebuttable presumption "that subject imports would be replaced by non-subject imports and, absent an affirmative showing to the contrary, requiring the Commission to make a negative determination."

"Contrary to the Commission's interpretation, we do not regard the decision in *Bratsk* as requiring the Commission to presume that producers of non-subject goods would have replaced the subject goods if the subject goods had been removed from the market," the appellate court ruled. "Although we stated there, and reaffirm here, that the Commission has the responsibility to consider the causal relation between the subject imports and the injury to the domestic industry, that responsibility does not translate into a presumption of replacement without

benefit to the domestic industry," it added. "What *Bratsk* held is that 'where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market,' the Commission would not fulfill its obligation to consider an important aspect of the problem if it failed to consider whether non-subject or non-LTFV imports would have replaced LTFV subject imports during the period of investigation without a continuing benefit to the domestic industry," the CAFC opinion stated. "Under those circumstances, *Bratsk* requires the Commission to consider whether replacement of the LTFV subject imports might have occurred during the period of investigation, and it requires the Commission to provide an explanation of its conclusion with respect to that factor," it continued.

"The Commission must further explain whether the record provides support for a finding that the domestic industry was materially injured 'by reason of' the LTFV subject imports after it has considered the analysis described in *Gerald Metals* and *Bratsk* along with the statutorily mandated factors and any other relevant economic factors that the Commission elects to consider under section 1677(7)(B)(ii)," the court explained. *"Bratsk* did not read into the antidumping statute a Procrustean formula for determining whether a domestic injury was 'by reason of" subject imports. It simply required the Commission to consider the 'but for' causation analysis in fulfilling its statutory duty to determine whether the subject imports were a substantial factor in the injury to the domestic industry, as opposed to a merely 'incidental, tangential, or trivial' factor." it stated.

* * * Briefs * * *

ITAR FEES: DDTC in Sept. 25 Federal Register issued final rule imposing new licensing fee structure (see **WTTL**, Aug. 4, page 4). No major changes were made from original proposal. "As DDTC continues to reform the export control process, the budgetary requirements will be reviewed on a regular basis, which may result in a revision to the registration fee schedule," it promised.

EXPORT ENFORCEMENT: University of Tennessee Professor Emeritus Reece Roth, who was convicted of giving defense technology to Chinese student without license, has filed motions for acquital and for new trial (see **WTTL**, Sept. 8, page 1). "The evidence showed that Defendant had a fundamental misunderstanding of the Arms Export Control Act (AECA) and its regulatory scheme, the International Trafficking in Arms Regulations (ITAR)," Roth's lawyer pleaded in Sept. 23 motion for new trial. "Defendant's belief (although mistaken) that he understood the law was used by the government to show Defendant disregarded the law," he wrote. "Had the jury been instructed on the ignorance of the law, the jury would have likely returned a verdict of not guilty," he argued. "Ignorance of the law is a defense to the AECA. The Court should have put the issue squarely before the jury," motion asserted.

PACIFIC: Inability to get congressional votes on FTAs with Colombia, Panama and South Korea has not deterred the Bush administration from announcing plans Sept. 22 to open new talks on FTA with four Pacific nations. USTR Susan Schwab said U.S. would enter negotiations early in 2009 with Brunei Darussalam, Chile, New Zealand and Singapore to join Trans-Pacific Strategic Economic Partnership, FTA those countries entered into in 2006. Although he has been blocking action on three trade pacts U.S. has already negotiated, Senate Finance Committee Chairman Max Baucus (D-Mont.) issued positive statement supporting Pacific talks. "If these talks produce a good outcome, a Transpacific deal might be a way for our farmers and manufacturers to sell more of their American-made goods overseas," said Baucus.

CFIUS: Top Treasury officials were pressing staff to get out final CFIUS regulation by end of September, but financial crisis and bailout talks with Congress may have sidetracked that goal.

WAX CANDLES: CIT Judge Leo Gordon Sept. 18 remanded to ITA its circumvention ruling on wax candles from China to either clarify its decision or to explain its proposed evidentiary standard for its application and interpretation of "later-developed merchandise" provisions in antidumping law (Slip Op. 08-101). "In any event Commerce's interpretation is contrary to the clear Congressional intent of § 1677j(e), and correspondingly, is one to which the court cannot defer," Gordon wrote. "The court must therefore remand the matter to Commerce to correct its erroneous interpretation of the statute. On remand Commerce may, of course, continue to limit what constitutes 'later-developed merchandise,' so long as whatever limitation Commerce divines is a reasonable interpretation of the statute," Gordon ruled.

ITAR MEETS FCPA: Shu Quan-Sheng, naturalized U.S. citizen who born in China, was arrested Sept. 24 in Newport News, Va., on dual charges of violating AECA and FCPA. Shu is president AMAC International and is accused of brokering sale of defense products to China and bribing Chinese official.