

COLUMN: DISCUSSIONS ON FORCED TECHNOLOGY TRANSFER

1. INTERNATIONAL DEVELOPMENTS IN FORCED TECHNOLOGY TRANSFER

International interest in forced technology transfer has grown in recent years. The G7 Taormina Leaders' Communiqué issued on May 2017 states that “[w]e push for the removal of all trade-distorting practices – including dumping, discriminatory non-tariff barriers, forced technology transfers, subsidies and other support by governments and related institutions that distort markets – so as to foster a truly level playing field.”¹ As an example of market-distorting measures, the communiqué cited forced technology transfer, stating that it should be removed.

The Charlevoix G7 Summit Communiqué issued in June 2018 states that “[w]e will work together to enforce existing international rules and develop new rules where needed to foster a truly level playing field, addressing in particular non-market oriented policies and practices, and inadequate protection of intellectual property rights, such as forced technology transfer or cyber-enabled theft.”²

In line with the efforts of the G7, at the Trilateral Trade Ministers' Meeting in May 2018 (Annexed Statement of the Joint Statement³), concerns were expressed about forced technology transfer policies and practices of third countries. Based on these concerns, discussions on forced technology transfer are currently underway in the three regions. The joint statement issued in January 2020 states that “[t]he Ministers discussed possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries, the need to reach out to and build consensus with other WTO Members on the need to address forced technology transfer issues and their commitment to effective means to stop harmful forced technology transfer policies and practices, including through export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules”⁴, introducing the contents of the discussion. In addition, industries in Japan, the United States and the EU also expressed their high expectations in the “Joint Statement toward the Trilateral Trade Ministers' Meeting among Japan, the United States, and European Economic Organizations”⁵, saying that “[t]here is currently a lack of coherent and comprehensive rules to effectively address market distortive practices particularly in the area of industrial subsidies (except export subsidies), the role of state-owned enterprises (SOEs), and forced technology transfer. This gap must be addressed quickly.”

<Excerpt from the Joint Statement of the Trilateral Trade Ministers' Meeting in May 2018>

1. Shared view that no country should require or pressure technology transfers from foreign companies to domestic companies, including, for example, through the use of joint venture requirements, foreign equity limitations, administrative reviews and licensing processes, or other means
2. Discussed the harmful effects of regulatory measures that force foreign companies seeking to license technologies to domestic entities to do so on non-market-based terms that favor domestic entities

¹ Ministry of Foreign Affairs G7 Taormina Leaders' Communiqué, Paragraph 20 (<https://www.mofa.go.jp/mofaj/files/000260045.pdf>).

² Ministry of Foreign Affairs Charlevoix G7 Summit Communiqué (provisional translation), Paragraph 5 (https://www.mofa.go.jp/mofaj/ecm/ec/page4_004125.html).

³ Ministry of Economy, Trade and Industry May 31, 2018 Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (provisional translation) Annexed Statement 2: Joint Statement on Technology Transfer Policies and Practices (<https://www.meti.go.jp/press/2018/05/20180531009/20180531009-1.pdf>).

⁴ Ministry of Economy, Trade and Industry January 14, 2020 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (provisional translation) <https://www.meti.go.jp/press/2019/01/20200114007/20200114007-1.pdf>

⁵ Keidanren <https://www.keidanren.or.jp/policy/2020/001.html>

3. Discussed the need to establish and share best practices, coordinating where useful, on mechanisms to stop the practices by governments that direct and unfairly facilitate the systematic investment in, and acquisition of, foreign companies and assets to obtain technologies and intellectual property and generate the transfer of technology to domestic companies
4. Condemned government actions that support the unauthorized intrusion into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets and use that information for commercial gain

2. TRENDS IN THE UNITED STATES

On August 18, 2017, the United States initiated an ex officio investigation under Section 301 of the Trade Act regarding China's forced technology transfer. On March 22, 2018, the United States found that four of the issues under investigation (such as forced technology transfer, enforcement of certain provisions in licensing agreements, systematic acquisition of U.S. companies, and theft of trade secrets) were unreasonable or discriminatory, and burdened or restricted U.S. commerce. The key points of the Section 301 report are summarized as follows.

(a) Forced technology transfer

The Chinese government makes demands for the transfer of technology and intellectual property to Chinese companies by using opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, government procurements, and a variety of tools to regulate or intervene in U.S. companies' operations in China.

(b) Mandate of particular terms in licensing contracts

The Chinese government's acts, policies and practices deprives U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China, including by mandating particular terms (such as terms for indemnities and ownership of technology improvements) in contracts.

(c) Systematic acquisition of U.S. companies

The Chinese government directs or unfairly facilitates investment in or acquisition of U.S. companies by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important according to the Chinese government's industrial plans.

(d) Theft of trade secrets

The Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information. Subsequently, a list of products containing 818 product lines worth \$34 billion (List 1) was released on June 15 of the same year, and an additional tariff of 25 percent was imposed on the product lines in List 1 on July 6 of the same year (first tranche)⁶. A list of products containing 279 product lines worth \$16 billion (List 2) was released on August 7 of the same year, and an additional tariff of 25 percent was imposed on the product lines in List 2 on August 23 of the same year (second tranche)⁷. A list of products containing 5,745 product lines worth \$200 billion (List 3) was released on September 18 of the same year, and an additional tariff of 10 percent was imposed on the product lines in List 3 on September 24 of the same year (third tranche)⁸. As for the third tranche, the rate of the tariffs was

⁶ USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/ustr-releases-product-exclusion>

⁷ USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche>.

⁸ USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200>.

increased to 25 percent on May 10, 2019.⁹ A list of products containing product lines worth \$300 billion (List 4) was released on August 13, 2019, and an additional tariff of 10 percent was imposed on certain product lines in List 4 (fourth tranche)¹⁰.

Upon accession to the WTO, China made an additional commitment that it would not make the transfer of technology a condition for granting licenses and approvals (Article 7, Paragraph 3 of the Protocol on the Accession of the People's Republic of China). It is also pointed out that China basically had not made any overt demands for technology transfers after it acceded to the WTO, and China denies the existence of forced technology transfers itself¹¹. On the other hand, there are opinions that some companies in developed countries such as the U.S. are in effect being forced to transfer advanced technologies to Chinese companies, and the Article 301 report points out that the Chinese government continues to force technology transfers by making verbal demands for technology transfers, or by making demands for technology transfers from foreign companies through Chinese companies closely related to the government and the Communist Party¹².

China has requested bilateral consultations on the above-mentioned measures taken by the United States. The first and third tranches are under examination by the panel (DS 543), and the second and fourth tranches are at the consultation stage (DS 565 and DS 587, respectively).

Against this background, on January 15, 2020, the United States and China reached an agreement on matters such as the protection of intellectual property, the prohibition of technology transfers, the elimination of trade barriers for agricultural and fishery products, the opening of financial markets, policies and transparency with respect to currencies, and trade expansion.

The United States decided not to impose the additional tariff of 15 percent (part of the fourth additional tariff that has not been imposed) that was scheduled to be imposed on December 15, 2019, and reduced the fourth additional tariff that had already been imposed on September 1, 2019 from 15 percent to 7.5 percent on February 14, 2020. On the other hand, among the various measures that China had announced and implemented in order to impose additional tariffs against the United States as a retaliatory response to the additional tariffs implemented by the United States against China, China decided not to impose the additional tariff of 10% or 5% which was originally scheduled to be imposed on December 15, 2019. On February 14, 2020, China reduced the additional tariff that had been imposed on September 1, 2019 from 10% to 5% or from 5% to 2.5%, respectively.¹³¹⁴

3. POLICY TRENDS IN CHINA

In response to these developments, China has also taken steps to include the prohibition of forced technology transfers in its domestic laws, such as the prohibition of forced technology transfers under the Foreign Investment Law enacted in March 2019 (Article 22), in addition to its commitment to the WTO accession protocol. The Ministry of Justice of China solicited comments on the implementing regulations, which corresponds to the detailed implementing regulations of the Foreign Investment Law, from November 1 to December 1, 2019. On December 31, 2019, the State Council published the "Implementing Regulations for the Foreign Investment Law of the People's Republic of China"¹⁵. In

⁹ USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/statement-us-trade-representative>.

¹⁰ USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-announces-next-steps-proposed>.

¹¹ Kozo Kawai and Masahiro Heike, "Protection of Intellectual Property Rights and Technology Transfer in China and the U.S. Trade Act", *Jurist* October 2019, page 45.

¹² Same as above.

¹³ USTR https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Modification-January_2020.pdf

¹⁴ Ministry of Finance of the People's Republic of China http://gss.mof.gov.cn/gzdt/zhengcejiedu/202002/t20200206_3466538.htm

¹⁵ The Central People's Government of the People's Republic of China <http://www.gov.cn/zhengce/content/2019->

addition, on March 18, 2019, the State Council announced that it would revise some administrative laws and regulations, and announced the deletion of various provisions of the Technology Import and Export Regulations (TIER) (“Decree of the State Council of the People’s Republic of China” (No. 709)). The provisions are effective from the date of promulgation (March 2, 2019). The deleted provisions are as follows.

【Technology Import and Export Regulations (TIER)】

- A foreign company shall bear the liability for infringing third party rights (Article 24)
- Where a Chinese company makes improvements in technology, the improved technology belongs to the Chinese company (Article 27)
- Prohibit foreign companies from restricting the content of technology license contracts (Article 29)

【Implementing Regulations of the Law on Sino-foreign Enterprise Joint Ventures (JV Regulations)】

- The term of a technology transfer agreement of a joint venture partner shall generally be no longer than ten years, and after the expiry of the term, the technology importing party shall have the right to use the technology continuously (Article 43, Paragraphs 3 and 4 of the JV Regulations)

Some concerns still remain. For example, while the Cryptography Law that came into force on January 1, 2020 prohibits requiring the disclosure of source codes, the Data Security Law (Draft) includes provisions requiring companies to provide data. In addition, there is a concern that Article 27 of the Data Security Law (Draft) may widen the scope of discretionary exceptions to the requirement to obtain an individual’s consent when providing the individual’s personal information, such as exceptions for national security and social and public interest, and the safety of the individual’s life.

In addition, the enactment and enforcement of the “Export Control Law” (second draft for public comment) published on December 28, 2019¹⁶ will strengthen export permit control over transfers of technical information outside of China from the standpoint of security trade control. For example, when technology developed at R&D bases of Japanese companies in China is transferred to Japan or other countries outside of China, the disclosure of technical information to the Chinese authorities is required, and there is a concern that de facto collection of technical information may be made at that time.

<Reference: Main text of the Foreign Investment Law of the People’s Republic of China (excerpt)>

Article 22: The State shall protect the intellectual property rights of foreign investors and foreign-invested enterprises, protect the legitimate rights and interests of intellectual property rights holders and related rights holders, and pursue legal liability for intellectual property rights infringements in strict accordance with the law. The State shall encourage technical cooperation based on voluntary principles and business rules in the process of foreign investment. The conditions for technical cooperation are determined by equal negotiation between the parties to the investment in accordance with the principle of fairness. Administrative agencies and their staff shall not use administrative means to force the transfer of technology.

<Reference: Cryptography Law (excerpt)>

Article 31: (omitted) Cryptography management departments and relevant departments, as well as their staff, shall not require commercial cryptography work units and commercial cryptography testing and certification bodies to disclose source code and other proprietary information related to cryptography; and are to strictly preserve the secrecy of commercial secrets and personal private information learned of in the performance of their duties, and must not leak or illegally provide it to

other people. (omitted)

<Reference: Data Security Law (draft for public comment) (excerpt)>

Article 27: Before providing personal information to others, network operators should assess possible security risks and obtain the consent of the personal information subject. The following situations are exempted from this: (1) collection through lawful public channels that does not clearly violate the personal information subject's wishes; (2) when the personal information subject has made it public of their own accord; (3) when the personal information has undergone anonymization processing; (4) when necessary for law enforcement bodies to perform their duties in accordance with the law; and (5) when necessary to safeguard national security, the social public interest, or the safety of the personal information subject's life.

Article 36: When the relevant departments of the State Council, in order to fulfill the requirements of their responsibilities in safeguarding national security, social management, economic control, etc., and in accordance with the provisions of laws and administrative regulations, request network operators to provide them with relevant data (*) in their possession, network operators should provide it.

*No definition of "relevant data"

4. U.S.-CHINA CONSULTATION AGREEMENT

Chapter 2 of the agreement entered into between the United States and China on January 15, 2020¹⁷ sets out rules specific to forced technology transfers. The agreement addresses the issues identified in the joint statement and the Article 301 findings, including (i) a commitment to ensuring that private companies do not engage in technology transfers under government pressure; (ii) a prohibition against foreign investment support or direction aimed at acquiring foreign technology with respect to industries or sectors targeted by the U.S. government or the China government in accordance with their respective industrial plans; (iii) a prohibition against requiring or pressuring companies to make technology transfers through administrative procedures or licensing requirements; and (iv) a prohibition against requiring or pressuring companies to use technology owned by or licensed to domestic companies as a condition for licensing, market access or the granting of benefits.

5. ANALYSIS BY THE OECD REPORTS

In November 2017, the OECD published a report titled "International Technology Transfer Measures in an Interconnected World"¹⁸, which classified policies on technology transfers into six categories: (i) absorptive capacity policies; (ii) measures relating to IPR; (iii) FDI promotion measures; (iv) FDI restrictions and FDI screening; (v) performance requirements; and (vi) investment incentives.

The OECD report for 2017 points out that (i) there are many regulations and performance requirements in emerging countries, including China, and (ii) for example, while R&D requirements are rare, they are conducted in conjunction with market access in China, and while foreign companies may refuse to meet R&D requirements in other countries, in the case of China, market size and attractiveness provide incentives.¹⁹ The report also points out that FTAs and investment agreements have TRIMS-plus rules as rules for forced technology transfers, and that performance requirements are a popular tool for developing countries, but they may not be effective unless there are advantages such as access to markets and resources that force companies to accept technology transfers. Furthermore, the trend with respect

¹⁷ USTR https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf.

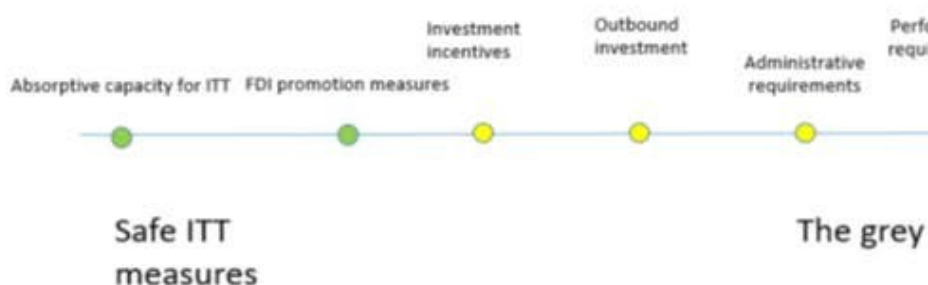
¹⁸ OECD https://www.oecd-ilibrary.org/trade/international-technology-transfer-measures-in-an-interconnected-world_ada51ec0-en.

¹⁹ Osamu Nishiwaki "Contribution concerning efforts toward the Trilateral Trade Ministers' Meeting" JMC Journal, January 2020.

to investment agreements is to expand the list of prohibited measures. The report also points out that even though the implementation requirements of the specific measures mentioned above are prohibited to a certain extent under the WTO TRIMs agreements, bilateral investment agreements, and FTAs, they are not enough and it can be said that there is a need and possibility for global rule-making.²⁰

In addition, in January 2019, the OECD published a report titled “International Technology Transfer Policies”²¹. In this report, technology transfer measures are categorized into those that are more compelling, such as JV regulations and performance requirements (including technology transfer requirements), and those that are less compelling, including those with incentives such as subsidies. Regarding technology transfer policies, measures with a low to high degree of problems are categorized as follows, which will serve as a reference for discussions on rulemaking in the future.

OECD “International Technology Transfer Policies” P8, (Figure 1. The Initial ITT continuum)



6. FUTURE CHALLENGES

One of the challenges in future measures against forced technology transfers is the difficulty of collecting information and evidence. As pointed out in the OECD report, if a company is attracted to the markets and resources of its host country, it is possible that it may not view technology transfers to be a problem even if it is forced to conduct such technology transfers. In addition, if a technology transfer induced by a government was not based on laws or regulations, the company would be deemed to have voluntarily provided its technology to a local company, which allows the government of its host country to argue that such technology transfer was conducted by the company on its own initiative and that the government did not force the company to do so. There is also a possibility that companies will not be able to raise their concerns due to retaliation from the governments of their host countries or because they wish to maintain good relations with them.

The second challenge is the difficulties in making rules to deal with forced technology transfers and implementing such rules. The United States has been conducting individual negotiations to stop technology transfers by using the tariff increase under Section 301 as a bargaining chip. This response by the U.S. is apparently due to its concern that solving problems by making rules has certain limitations (e.g. even if rules were to be made, it may be difficult to implement such rules due to the aforementioned difficulties in collecting evidence, and it may be difficult to make rules for cases where technology is voluntarily transferred in exchange for the attractiveness of the market, etc.). There is also the problem of how to identify and make rules on measures against technology transfers that are not explicitly required by law, and all these problems and challenges will need to be considered in the future.

²⁰ Same as above.

²¹ OECD https://www.oecd-ilibrary.org/trade/international-technology-transfer-policies_7103eabf-en.