

14 February 2018

Attn. Ministry of Commerce, People's Republic of China  
From: The Center for Information on Security Trade Control (CISTEC), Japan and  
The Export Group for Aerospace, Defence and Dual-Use (EGADD), United Kingdom

### **Joint Comments by CISTEC and EGADD on China's Export Control Draft Law**

CISTEC and EGADD warmly welcome China's on-going work to develop an export control system that fulfils its international obligations and commitments on non-proliferation and arms control. We applaud the Government's decision to establish a legal foundation for the administration of export controls. From an industry perspective we look forward to a system that promotes international norms, is applied consistently in accordance with its legal base and encourages continued co-operation, trade and investment in China by foreign companies in high-tech sectors, such as those listed in "China Manufacturing 2025".

We do, however, have a number of concerns with the draft Export Control Law that was released last year and we hope that there will be an opportunity to work with you to address those concerns in a future draft of the law. In particular, we would ask you to consider:-

- A greater alignment with the norms, principles and control lists of the multilateral export control regimes, in particular (but not exclusively) those of the Wassenaar Arrangement;
- A clearer definition of the terms "dual-use" and "conventional arms", that are consistent with those already applied internationally by many states, to ensure that mass-market products and their associated technology are not inadvertently subject to control;
- Consistency with World Trade Organisation (WTO) rules and procedures.

To expand on these concerns, we would like to draw your attention to the following that we consider diverge from generally accepted norms in export control legislation, and which could lead companies to conclude that pursuing trade with and investment in China is no longer so mutually advantageous.

Export licensing decisions are normally focussed on considerations based on national security and the implementation of international obligations and commitments. We understand the need to strike a balance between ensuring national security and continued economic growth. However, adding additional factors such as "impact on competitiveness of trade and industry", "supply in international markets", and "development of technology" (Articles 16, 18, and 22) adds a degree of uncertainty not found in other countries' export control systems. In a similar vein, the inclusion of "equality principles" that establish measures for countries that have implemented discriminatory export restrictions on China (Article 9), while understandable, add a further risk to trade because of the risk of escalation by both sides.

Globally, only a very small fraction of goods and technology are subject to export control because they attract significant security and non-proliferation concerns. Adding rare materials, often used in mass market items, to export controls could cause issues in relation to the WTO.

Another of our major concerns relates to the re-export and deemed export control provisions as set out in the draft law. Such controls do not feature in the laws developed by the majority of states. We recommend that the Chinese law should be developed and implemented in a manner consistent with international best practices and procedures. With regard to re-export, Article 64 sets out to control the re-export of Chinese origin items when located in another country and re-export of foreign-made items that contain Chinese-origin content, where the value of the Chinese content exceeds certain levels. We recommend that if China still wishes to impose such controls, they should be restricted to the most sensitive items and only used in cases where the importing country does not implement effective national export controls. Without such limitations, companies buying items from China would be faced with an increased compliance burden and the risks associated with that. Where there were alternatives to using Chinese origin items, foreign companies would be likely to choose suppliers from states that did not impose re-export controls, rather than incur the additional cost associated with compliance and possible restrictions on the markets they could serve.

On deemed export controls, Article 3 sets out to control by license the supply of controlled commodities, technologies, and services to foreign nationals (persons of non-Chinese nationality) within China. With one notable exception, countries have chosen not to introduce such regulations. Article 3 seems to regulate internal dealings with foreign national employees within a company. If so it would produce a great deal of concern that day-to-day discussions on technical matters with foreign executives and employees and access to data could not be undertaken smoothly. It is also not clear whether the supply to foreign origin companies within China would be subject to "deemed" export controls. The totality of "deemed" export controls, as proposed, would have the potential to seriously constrain the activities of foreign affiliated companies operating in China.

In the draft explanation to the law, executing international obligations and fostering international cooperation was at the heart of the process. In this regard, international industry would favour a control list that incorporated all the items covered by the various control lists developed by the international export control regimes, in a format that was readily recognisable. It should go no further than that. This would ease compliance and give greater confidence that items sent to China from other countries would be subject to continued control if they were re-exported from China to other destinations.

With regard to the re-export of controlled (and certain mass market) items from China to a third country we are concerned that technical assessment for re-export in compliance with Chinese law should not be over intrusive by demanding disclosure of source code or full design and development data. Such practices would make it both difficult and unattractive to export non-Chinese origin cutting-edge industrial products from China. The receipt of an export license from the original exporting state, or receipt of assurance that the items were not subject to export control, should be taken into account when determining whether an item would require an export license from China.


Article 28 of the draft law stipulates on-site verification of an item's end user and uses after it has been exported from China. We understand the need for follow up in certain circumstances, but recommend that this provision should be narrowed in scope to particularly sensitive items when there are concerns of diversion to illicit WMD programmes.

We recommend that sufficient publicity is given to the work of drafting this far-reaching legislation and that adequate opportunity is provided for an exchange of views with both domestic and foreign industrial sectors. If work goes forward on crafting and enacting this legislation without ensuring that interested parties fully understand or are prepared for it, there could well be widespread confusion.

Companies will need to make adequate preparations and this can only happen when they have an understanding of how the law will operate in practice. For foreign companies, this will involve the impact on their supply chains in China. In order to achieve an understanding and smooth introduction of the new law, we would strongly advocate an adequate grace period be guaranteed after the details have been settled, and also request that consideration be given to introducing these regulations step-by-step, rather than all at once.

As the law and processes for implementation are further developed, we also recommend that the export control system seeks to incentivise the development of company internal compliance systems. This can be achieved through the introduction of licensing procedures which can be broadly applied to minimize licensing transactions, especially for high-volume exports to destinations that do not pose any proliferation risk. Such simplified procedures can be granted to companies that have adequate compliance processes in place.

Thank you in advance for your consideration of these comments. If you have any questions about this correspondence please feel free to contact us.

Regards  


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