

Japan: Revising arms export regulation



Recent changes to Japan's 'Three Principles on Arms Exports' relax controls held tightly for decades.

Crystal Pryor reviews the revisions while pointing out an important gap in Japan's munitions regulations

Japan is one of the frontrunners for the sale of submarines to Australia, vying with France and Germany. Japan arguably produces the world's best non-nuclear submarine, its *Soryu* class. The Australian government initially approached Japan about the \$35 billion deal in 2014. It is noteworthy because, if realised, it would be Japan's first major defence export to a third party (i.e., not the United States) in four decades.¹ Prime Minister Abe's strategic vision for Japan has been a key element of the submarine deal, but enabling it are the changes in Japan's 'Three Principles on Arms Exports'. This article addresses the background, significance, and future implications of the Three Principles revision.

Background: 'Three Principles'

In 1967, Prime Minister Eisaku Sato established the 'Three Principles on Arms Exports and Their Related Policy Guidelines', which prohibited arms exports to Communist countries, countries subject to arms embargoes under UN Security Council resolutions, and countries involved in or likely to be involved in international conflicts. Then, in 1976, Prime Minister Takeo Miki strengthened these regulations to say that Japan shall not promote 'arms' exports, regardless of the destination – creating an effective blanket ban on arms exports. These rules held for the next four decades, with the major exception of exports to the United States from the 1980s, most notably in collaboration on ballistic missile defence.

Since at least the end of the Cold War, Japan has recognised the need to engage in arms exports and overseas development projects to maintain its domestic defence industry and national security. In December 2013, Japan released its first National Security Strategy, which promised to review the ban on arms exports based on high-level discussions in years prior. In April 2014, the Abe cabinet revised the

principles to allow exports in cases that will contribute to global peace and serve Japan's security interests. The rules themselves were renamed the 'Three Principles on Defense Equipment Transfers'.

In July 2014, the Japanese government approved delivery of seeker gyros to the United States for use in Patriot Advanced Capability-2 (PAC-2) missile interceptors. (The PAC-2 will ultimately be sold to Qatar.) Japan also agreed to conduct joint research with the UK on using Japanese seeker technology in air-to-

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air missile technology for fighter jets. In early 2015, it became clear that Japan was hoping to sell its P-1 maritime patrol aircraft to the UK, but the UK decided to go with the tried-and-true Boeing P-8 Poseidon. The sale of Japanese submarines to Australia, however, is still on the table. We should know by mid-2016 whether Japan could beat established arms exporters France and Germany to land its first third-party defence export since the rule revision.

Legislation on arms exports

The legal basis for Japan's arms export controls is the Foreign Exchange and Foreign Trade Act (Law No. 228; the 'Trade Law' or *Gaitame-ho*), which was originally enacted on 1 December 1949, and is the equivalent of the U.S. Export Administration Act ('EAA') and Arms Export Control Act ('AECA'). Article 25 of the Trade Law covers technologies,

while article 48 covers goods. Legislation supporting the act includes (1) cabinet orders, (2) ministerial orders, and (3) notifications and guidance. The most important statutes under the act are two cabinet orders: the Export Trade Control Order ('ETCO', or *Yushutsu-rei*) and the Foreign Exchange Order ('FEO' or *Gaitame-rei*). The ETCO refers to controlled *goods* (article 48 of the Trade Law) while FEO specifies controlled *technologies* (article 25 of the Trade Law). Ministerial orders provide details like the specification of listed items. Finally, notifications and guidance/ notices (interpretations) sit below ministerial orders in Japan's legal structure. Japan's ETCO and FEO (and lower) are akin to how the U.S. Export Administration Regulations ('EAR') and International Traffic in Arms Regulations ('ITAR') respectively sit below the EAA and the AECA. Japan's Center for Information on Security Trade Controls ('CISTEC') notes that Japan's multi-layer legal structure, although pervasive in the Japanese legal system, makes any regulatory change in export controls difficult to implement.²

The revision of the Three Principles is a cabinet decision and, as such, does not impact this legal basis. Rather, the new principles serve to clarify in which cases arms exports are banned, especially with regard to countries in conflict, and in what cases the government can make approvals under the principles. Yet the legal basis is important in the actual implementation of these rules.

The new principles repeat the existing definition of 'defence equipment and technology': 'For the purpose of this policy, "defence equipment and technology" refers to "arms and military technologies"; "arms" refers to items listed in section 1, Annexed List 1 of the ETCO (Cabinet Order No. 378 of 1949), and are to be used by military forces and directly employed in combat; and "military technologies" refers to technologies for the design, production or use of arms.'³

Referring to this definition, CISTEC notes that the distinction between what is 'directly employed in combat' versus indirectly employed is not obvious, nor is why the items must be used by

‘military forces’ (as opposed to, say, terrorists). More importantly, neither this definition nor the list of arms in Annexed List 1 considers new forms of warfare and relevant IT technologies, such as in the cyber and outer space fields.⁴ This results in a gap between section 1, Annexed List 1 of the ETCO and the Wassenaar Arrangement munitions list (‘WAML’). In particular, Japan’s list does not cover specially designed IT technology or information communication-related technologies.⁵

CISTEC also notes that some items on the WAML are covered under Annexed List 14 of the ETCO rather than Annexed List 1. Further, among the items in Annexed List 1, items for police, industry, and civil use are included. For these reasons, CISTEC argues that Japan’s list should be brought into line with the WAML. Only then will it be appropriate for the new Three Principles to refer to the ‘Annexed List 1 items’ as subject to controls.

The state of Annexed List 1 contrasts with the dual-use technologies covered in other lists, which all correspond with the

multilateral regimes – the Nuclear Suppliers Group, Australia Group, Missile Technology Control Regime, and Wassenaar Arrangement (‘WA’) dual-use lists. The distinction between Annexed List 1 and the other lists exists because Annexed List 1 has not been updated over the years, while the others have.⁶ This state of affairs is the result of Japan restricting its arms exports over the decades while routinely exporting dual-use technologies.

Meanwhile, with regard to the use of defence *technologies*, Japanese companies now contemplating defence-related exports are concerned that the definition remains vague. Both article 25 of the Trade Law and the FEO (Cabinet Order No. 260 of 11 October 1980) describe ‘technology *pertaining to* the design, manufacture or use’ of listed items, in line with the WA definition.⁷ The scope of ‘use’ according to a Ministry of Economy, Trade and Industry (‘METI’) notification (*ekimu tsutatsu*) effective 26 December 2011, and in line with WA, is ‘Operation, installation (including on site installation),

maintenance, (checking), repair, overhaul and refurbishing.’⁸ Yet only Annexed List 1 employs a different definition than WA of ‘use’: ‘any

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process other than design or manufacture, including operation....’ This definition is both broad and vague. If you follow this definition, no matter what the type of information, if it includes technical content related to weapons, you may not so much as talk about that information to another person without a licence. Therefore, CISTEC sees the scope of ‘use’ as the primary reason for difficulty in making a concrete, quantitative reference in business discussions.

Nor is ‘use’ of arms limited to the six types of technology use defined in WA (‘Operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing’). For Japan’s dual-use technologies, METI revised its notification in 2011 to be in line with WA (through limited enumeration of the ‘use’ definition), *except for* Annexed List 1. Therefore, as to information related to Annexed List 1 arms, it is unclear what is subject to controls, in both qualitative and quantitative terms. CISTEC proposes that in line with WA, defence technologies should be limited to its six types of technology use; and the development, production, and use of these technologies should be subject to export controls.

Moreover, when it comes to defence technology, its scope is not limited to ‘required’ technology for the ‘development’, ‘production’ or ‘use’ of a product.⁹ The ‘required’ technology could instead be defined – as a METI notification (*kaishaku tsutatsu*) interprets – as ‘necessary technology’: as ‘the necessary technology to meet or exceed the regulation performance level, property, or function.’ If the government switched to this approach, it could better consider qualitative and

Arms and arms production related equipment listed as Item 1 of the Annexed list 1 of the Export Trade Control Order

- 1 Firearms and cartridges to be used therefor (including those to be used for emitting light or smoke), and accessories thereof, as well as parts thereof.
- 2 Ammunition (excluding cartridges), and equipment for its dropping or launching, and accessories thereof, as well as parts thereof.
- 3 Explosives (excluding ammunition) and military fuel.
- 4 Explosive stabilisers.
- 5 Directed energy weapons and parts thereof.
- 6 Kinetic energy weapons (excluding firearms) and equipment for their launching, as well as parts thereof.
- 7 Military vehicles, and accessories and bridges specially designed for military use thereof, as well as parts thereof.
- 8 Military vessels, and hulls and accessories thereof, as well as parts thereof.
- 9 Military aircraft and accessories thereof, as well as parts thereof.
- 10 Antisubmarine nets and antitorpedo nets as well as buoyant electric cable for sweeping magnetic mines.
- 11 Armour plates and military helmets, as well as bulletproof jackets and parts thereof.
- 12 Military searchlights and control equipment thereof.
- 13 Bacterial, chemical, and radioactive agents for military use, as well as equipment and parts thereof for dissemination, protection, detection, or identification thereof.
- 13-2 Chemical mixtures specially formulated for the decontamination of objects contaminated with biological agents and radioactive materials adapted for use in war and chemical warfare agents
- 14 Biopolymers for detection and identification of chemical agents for military use and cultures of cells for production thereof, as well as biocatalysts for decontamination and degradation of chemical agents for military use and expression vectors, viruses or cultures of cells containing the genetic information necessary for production thereof.
- 15 Equipment and parts thereof for the production or testing of military explosives.
- 16 Equipment for the production or testing of arms, as well as parts and accessories thereof.

Source: METI

quantitative aspects with regards to a limited number of items and be in line with WA, CISTEC argues.

METI retains final authority to issue all export licences, including those for arms, in contrast to U.S. practices for military items on the USML list, which the State Department regulates.

The Three Principles on Defense Equipment Transfers set out two new and noteworthy requirements. First, the National Security Council (itself only established in 2013) must review major defence-related exports, as with the seeker technologies to the United States and the United Kingdom.¹⁰

METI is then responsible for implementing the Foreign Exchange and Foreign Trade Act appropriately in accordance with the NSC's decision. Second, the government must publish the NSC's decisions as well as information on the arms exports that the NSC does not review. Unlike the United States or the United Kingdom, Japan has not traditionally published information on its licensed arms or dual-use exports. Japan published the first of these reports in October of last year, which includes historical exports made on the basis of exceptions to the Three Principles.¹¹ In these two respects, there are additional deliberative and transparency requirements in place which make it difficult to describe the Three Principles revision as a 'loosening' of Japan's arms export controls.

METI's first licensing report shows that in fiscal 2014, Japan approved 1,841 defence equipment exports under the new principles and guidelines on arms exports. The vast majority (1,731) were articles for use by governmental organisations including the Japan Self-Defense Forces ('SDF') and involved temporary exports to return, exchange, or repair broken items purchased from overseas or for outsourced processing of domestically-produced products – and more than 80% of these were to the United States. Under the defence transfer rules, individual licences are the standard, but special bulk licences are available for returning items. The government approved 45 such bulk licences, primarily for the SDF and the Ministry of Defence ('MOD')'s overseas activities. (There is no bulk licence system for business activities such as sale discussions, inquiries, or financial statements.¹²) The report also elaborates on the Patriot PAC-2 seeker gyro and provision of technical

Japan's (dual-use) export controls

While Japan is new to the contemporary arms export market, it has a long history of exporting sensitive dual-use technologies. The United States censured Japan for practising lax export controls during the Cold War, particularly after the Toshiba machine tools scandal was disclosed in 1987.

In 1989, Japan reformed its export control system including the amendment of Trade Law, and today it is seen as a regional standard-bearer.¹³ Japan is the only major country to have a third-party organisation (the Center for Information on

Security Trade Controls, 'CISTEC') that serves to liaise between the government and industry. CISTEC retains and produces a wealth of resources and knowledge about export controls, and has regularly been publishing articles on the new arms export principles, primarily geared for Japanese exporters.

Given Japan's history in exporting sensitive dual-use technologies, there is a consensus among Japanese experts that Japan must build from the skillset and knowledge it has developed in this field to apply to arms exports.¹⁴

information for joint development related to seeker technology with the United Kingdom.

Establishment of ATLA

On 1 October 2015, the Japanese government established the Acquisition, Technology & Logistics Agency ('ATLA'). ATLA brings together disparate parts of the MOD working on defence R&D, procurement, and exports under one roof. The goal is to improve efficiency, and eliminate organisational bureaucracy and duplication. Compared to similar agencies in Japan's peer countries, like the United Kingdom and France, ATLA is small, at 1,800 people and with a budget of about 2 trillion yen (\$16.3 billion). Yet this is a massive agency by Japanese standards, representing a third of the total MOD budget.

It has only been half a year since the formation of ATLA, so whether it will be an effective institution for assessing the impact of defence equipment transfer on Japan's security remains to be seen. As Morimoto notes, ideally ATLA will have a function like the Defense Technology Security Administration ('DTSA') in the United States, meaning it can implement a framework for assessing the impact of arms exports on Japanese security in a holistic manner.

Future challenges

● Industry engagement

With the revision of the Three Principles and the establishment of ATLA, the administrative and the institutional structure is in place for Japan to engage in international arms sales and co-development. While there are still questions about how the new

rules and ATLA will work in practice, a big piece of the puzzle is Japan's defence industry. Having spent so many years having only needed to sell to one major consumer (the SDF), Japanese industry must now figure out how to appeal to a much broader market. While there is evidence that Japanese industry generally supported the opening of the arms export market, companies have retained a passive stance since the changes. For one, they are concerned about being branded a 'merchant of death' in a still largely pacifistic society. Moreover, defence exports make up a small amount of revenues (less than 10% even of the major defence contractors'). And, unlike Japanese commercial businesses, the defence agents sorely lack experience in sales and negotiations.

Moreover, when it comes to business discussions, in the case of the U.S. ITAR, general explanations are exempt from export controls (basic marketing information on function, objective and system explanations, even if not public, is not subject to controls). Japan lacks such guidance for its companies, and salespeople are currently struggling with how much they are able to reveal at international trade shows.

● Inter-bureaucracy relations

As mentioned above, METI has been the authority for issuing export licences, and this situation remains under the new rules. Major arms deals will have to be approved by the National Security Council, at which MOD and the Ministry of Foreign Affairs ('MOFA') play major roles in addition to METI. As Japan is the only developed country with no extensive history of exporting arms, MOD has to

get up to speed quickly to increase its presence in export licensing, not only for arms but also for sensitive dual-use technologies. MOFA also needs to step up as a player in determining to which destinations Japanese defence items and technologies will safely go. As

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Japan expands its military cooperation with advanced arms exporters like the United Kingdom and France and also with countries in Southeast Asia, MOFA's input will be essential. Of course, the potential is great for turf wars with METI, the established player in exports. As one Japanese export control expert notes, the NSC will take centre-stage in Japan's major arms exports decisions, which requires inter-

agency coordination, and also means other governmental bodies will bear responsibility for licensing decisions.¹⁵

In terms of cooperation with the intelligence community, Japan's capacity to collect and analyse intelligence is underdeveloped relative to some of its peer countries. Such intelligence is critical in determining whether arms should be exported and keeping track of them once they have been exported.

● *Technology controls*

Technology leakage is also a major concern in the export of militarily sensitive technologies, so Japanese producers must consider steps like including anti-tampering and reducing the capabilities of (potential) military assets. Of course, Japanese companies have taken safety measures in the dual-use field, such as incorporating relocation detectors into its machine tool exports. Japanese companies can build on these efforts and use information the government provides to assess what other measures they should take.

● *International standardisation*

Moving forward, Japan can also use

this opportunity to take two steps that will improve international coordination on controlling the export of sensitive technologies. The first is to publish not only its arms export data, but also its dual-use licensing data. Such data can provide an overview as to whether Japan's dual-use licensing practices are in line with those of its peer countries. The other step is harmonisation of Japan's export control numbers with the EU, which now maintains the international standard. Japanese companies have been pushing for this latter change for years. Only recently – and reluctantly – has METI issued a correlation table for exporters between the Japanese and EU export control numbers based on 2012 lists.¹⁶ Asian countries like South Korea, Singapore, Malaysia, Singapore, and Hong Kong have already harmonised their numbers. Harmonisation would not only make things easier for exporters, many of which are multinational companies, but also for the government to reflect future changes at the multilateral level in the domestic rules.

Conclusion

Despite the revision of the Three Principles and the potential landmark submarine deal, Japan has both institutional and cultural hurdles to overcome before it becomes a major participant in the international arms market. Under the revised rules, Japan can only export to other governments and for limited purposes such as international co-production or arming the SDF. Further, it may still be in Japan's best interest to stick to exporting dual-use items and participating in the co-development of arms rather than exporting full arms packages. The latter move risks raising both domestic and regional concerns (while not necessarily bringing more revenue to Japanese companies).

Links and notes

- ¹ Crystal Pryor and Llewelyn Hughes, 'PacNet #11 – Domestic interests and 'strategic benefits' in Australia-Japan submarine deal,' available at <http://csis.org/publication/pacnet-11-domestic-interests-and-strategic-benefits-australia-japan-submarine-deal>.
- ² CISTEC, 'Overview of Japan's Export Controls (Third Edition)' (October 2012), p. 5.
- ³ Ministry of Defense, 'Three Principles on Transfer of Defense Equipment and Technology,' http://www.mod.go.jp/e/pressrele/2014/140401_02.pdf.
- ⁴ CISTEC Request to METI, 「防衛装備移転に係る手続きの環境整備に向けた課題について」 ('Issues Related to the Procedural Environment for Defense Transfers'), available at: http://www.cistec.or.jp/service/boueisoubi_data/youbou_20151211.pdf (11 Dec. 2015; Japanese only).
- ⁵ List in English available at: http://www.meti.go.jp/policy/anpo/securityexportcontrol1_3_1.html.
- ⁶ Masamitsu Morimoto, 「武器輸出管理の課題」 ('Issues with arms export controls'), *PHP Policy Review* (Vol. 9, No. 68) (30 March 2015), available at: http://research.php.co.jp/policyreview/pdf/policy_v9_n68.pdf.
- ⁷ ML22(a) 'Technology', other than specified in ML22.b, which is 'required' for the 'development', 'production', operation, installation, maintenance (checking), repair, overhaul or refurbishing of items specified by the Munitions List.'
- ⁸ This modifies the previous scope, 'Operation, installation (including on-site installation), maintenance (inspection), repair, overhaul, refurbishing, etc., which are stages other than development and manufacturing.' According to trade compliance professional Tatsuya Kanemitsu, this change was instituted because Japan's definition of 'use' tended to be interpreted more broadly and covered more 'use' technology than other Wassenaar Arrangement countries.
- ⁹ WA definition of 'Required' Cat 6, 9: As applied to 'technology', refers to only that portion of 'technology' GTN which is peculiarly responsible for achieving or exceeding the controlled ML 22 performance levels, characteristics or functions. Such 'required' 'technology' may be shared by different products.
- ¹⁰ 'Significant cases that require especially careful consideration from the viewpoint of Japan's security will be examined at the National Security Council (NSC)' (available at http://www.mod.go.jp/e/pressrele/2014/140401_02.pdf).
- ¹¹ Available from <http://www.meti.go.jp/press/2015/10/20151015007/20151015007.html> (Japanese only).
- ¹² CISTEC Request to METI.
- ¹³ Crystal Pryor, 'From Global Straggler to Regional Exemplar: Japan's Export Control System 1990–present,' in Jankowitsch-Prevor, Michel & Paille-Calvo (Eds.), *Modelling Dual-Use Trade Control Systems* (Peter Lang: 2014).
- ¹⁴ See, for example, Heigo Sato, 'Japan's Arms Export and Defense Production Policy,' available at http://csis.org/files/publication/150331_Sato_JapanArmsExport.pdf.
- ¹⁵ Morimoto.
- ¹⁶ Available at http://www.meti.go.jp/policy/anpo/eulist_taihiyo.html (Japanese only).

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